

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

E-Hearing
REGIONAL BENCH - COURT NO.I

Excise Appeal No.70653 of 2019

(Arising out of Order-in-Original No.03/PR. COMMR./MRT/2019 dated 18.06.2019 passed by Principal Commissioner of Central Goods & Services Tax, Meerut)

M/s Rana Sugar Ltd.,

.....Appellant

(Belwara, Post Office- Manpur,
Tehsil and District Moradabad-244925)

VERSUS

**Principal Commissioner of Central Goods &
Services Tax, Meerut**

....Respondent

(Opposite Shaheed Park, (Near Ashok Ki Lat)
Delhi Road, Meerut)

APPEARANCE:

Shri Vikrant Kackria, Advocate for the Appellant

Shri Santosh Kumar, Authorized Representative for the Respondent

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

INTERIM ORDER NO.-25/2024 Date : 17.12.2024

FINAL ORDER NO.- 70001/2026

DATE OF HEARING : 10.10.2024
DATE OF DECISION : 06.01.2026

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Original No.03/PR. COMMR./MRT/2019 dated 18.06.2019 passed by the Principal Commissioner of Central Goods & Services Tax, Meerut.

2. The issue involved in the present appeal relates to disallowance of credit on various accounts and the demand of Central Excise Duty on sugar found short during inspection by the Departmental Officers. The Departmental Officers had visited the factory of the Appellant on 24.10.2008 and physically verified the stock, which resulted in shortage of 50500 quintals of sugar as compared to Book Balance as detected by the visiting Officers. Statement of various persons of the Appellant's

Sugar Mills were recorded, wherein they only stated that there is shortage of goods, but none of the persons had stated that there was any clandestine removal of the goods by the Appellant. The Cenvat Credit was proposed to be disallowed amounting to Rs.1,50,45,349/- on various grounds. Further, Service Tax of Rs.4,74,760/- was proposed to be demanded under the category of Transportation of Goods by Road Service on the ground that since the freight was borne by the Appellant, thus they were liable to pay the Service Tax on the freight amount under reverse charge mechanism. This is the second round of litigation before the Tribunal. In the first round, the matter was remanded back to the Adjudicating Authority vide Final Order No.71214/2018 dated 21/06/2018, wherein it was mentioned that as regards the clandestine removal of goods, the Authority should look into the corroborating and other evidence to prove that the goods have been removed in a clandestine manner in view of the Hon'ble Allahabad High Court's judgement in the case of Commissioner of Central Excise, Kanpur Vs. Minakshi Castings reported as 2011 (274) E.L.T. 180 (All.). Further as regards, the Cenvat Credit on various items, it was categorically mentioned that the matter be decided in view of the Hon'ble Gujarat High Court's decision in the Case of Mundra Ports & Special Economic Zone Ltd. Vs. Commissioner of Central Excise reported as 2015 (39) S.T.R. 726 (Guj). The Adjudicating Authority has again confirmed the demand of Central Excise Duty on the ground that since there was shortage of goods, thus it proves that the same have been removed in a clandestine manner and the Credit has also been denied to the Appellant. The demand of Service Tax has also been confirmed on the ground that the Appellant was liable for payment of Service Tax. In addition to the confirmation of demand of Central Excise Duty, a penalty of Rs.49,41,425/- has been imposed under Section 11AC of the Central Excise Act. The Cenvat Credit has been disallowed by placing/reliance upon the decision of the larger bench of the Tribunal in the case of Vandana Global Ltd. Vs. CCE reported as 2010 (253) E.L.T. 440 (Tri.-L.B.). Further, a penalty

of Rs.1,50,45,345/- has been imposed under Rule 15 (2) of the Cenvat Credit Rules, 2004, read with Section 11AC of the Act. In addition, penalty of Rs.4,74,760/- has also been imposed under Section 76 and equal amount of penalty has been imposed under Section 78 of the Finance Act, 1994.

3. The learned Advocate appearing on behalf of the Appellant has filed Written Submissions, wherein, he has discussed the issue on each point as under:-

S. No.	Issue Involved	Decision/Submissions
i	Whether demand of Excise duty on the stock of sugar found short consequent to physical verification is sustainable;	(i) The issue as to whether mere shortage can lead to a conclusion of clandestine removal had been decided in earlier round by the Tribunal and specific finding was given to decide the matter in view of decision of Hon'ble Allahabad High court in case of Commissioner of Central Excise, Kanpur Versus Minakshi Castings reported as 2011 (274) E.L.T. 180 (All.). No further evidence has been given for clandestine removal except for the fact that there was a shortage. The issue decided by following decisions reported as :- (a) Commissioner of Central Excise, Kanpur Versus Minakshi Castings reported as 2011 (274) E.L.T. 180 (All). (b) Star Alloys & Chemicals Pvt. Ltd. Versus Commissioner of Central Excise & Service Tax , Raipur reported as 2019 (21) G.T.L. 174 (Tri.-Del.) (c) Commissioner of Central Excise, Raipur Versus M.S.P. Steel & Power Ltd reported as 2017 (357) E.L.T. 275 (Tri. -Del.). (d) Mahavir Polyplast (P) Ltd. Versus Commissioner of Cus., C. Ex., Kanpur 2013 (287) E.L.T. 139 (Tri.-Del.) .

		(e) Commissioner of C.Ex. & S.T., Chandigarh Versus Kewal Garg reported as 2019 (369) E.L.T. 315 (P&H) . (f) Commissioner of C.EX. & S.T., Ludhiana Versus Anand Founders & Engineers reported as 2016 (331) E.L.T. 340 (P & H). Thus, in the absence of any other evidence except shortage, it cannot be alleged that the goods have been removed in a clandestine manner and neither tax can be demanded nor penalty can be imposed. Amount involved: 49,41,225/-
ii	Whether Cenvat Credit taken on HR Coils, Sheet, Shape, Section, Angle, Rod, Plate, etc. which was used for making base structure, shades and civil work in the factory would be admissible;	(ii)The credit was disallowed on the ground that the item did not qualify as Capital Goods in view of decision of Larger Bench of the Tribunal in the case Vandana Global Ltd. Vs. Commissioner of Central Excise Raipur reported at 2010 (253) E.L.T. 0440 (Tri.-LB). The issue is now decided by the following decisions reported as :- (a) Vandana Global Ltd. Versus Commissioner of C.EX. & CUS., Raipur reported as 2018 (16) G.S.T.L. 462 (Chhattisgarh) . (b) Mundra Ports & Special Economic Zone Ltd. Versus C.C.E. & Cus reported as 2015 (39) S.T.R. 726 (Guj.) . (c) Principal Commissioner of Central Goods & Services Tax, Commissionerate, Ludhiana Versus IOL Chemicals And Pharmaceuticals Ltd. Reported as 2023 (385) E.L.T. 705 (P & H) as affirmed by Hon'ble Supreme Court in case of Principal Commissioner, CGST V/S IOL Chemicals & Pharmaceuticals Ltd. reported as 2023 (386) E.L.T. 163 (SC). The entire period involved in the present case is prior to 07.07.2009.

		Amount involved: Rs.73,52,066/- + Rs.23,60,469/- TOTAL- Rs. 97,12,535/-
ii(a)	Whether the credit can be allowed after the factory has become operational.	The only allegation is that the capital goods were received after factory became operational. There is no allegation that the capital goods were not received in factory. It is irrelevant that the factory became operational or not. The capital goods can be received even after the factory has become operational and the capital goods are regularly received in the factory and hence credit cannot be disallowed. Amount-Rs.36,94,012/-
iii	Whether Cenvat Credit taken on paints used for coating of base structure & shades and welding electrodes used for repairing purposes in the factory would be admissible;	(iii)The Credit on Paints and Welding Electrodes has been allowed in the following cases: i) Paint : 82,099/- Decided in favour by the following cases:- (a) Vij Engineers & Consultants Pvt. Ltd. V/S CCE & ST, Rohtak, reported as 2022 (380) Ext 188 (Tri) (b) U.G. Sugar & Industries Ltd. V/SCCE&ST, Meerut-II reported as 2011 (272) E.L.T. 383 (Tri-Del.) ii) Welding electrodes: 2,69,696/- (a) Ramala Sahkari Chini Mills Ltd. V/S CCE, Meerut-II reported as 2016 (334) E.L.T. 3 (SC) (b) Kisan Sahkari Chini Mills Ltd. V/S CCE, Meerut-II reported as 2017 (352) E.L.T. 215 (Tri.-All) (c) Principal Commissioner of CGST, Ludhiana V/S IOL Chemicals & Pharmaceuticals Ltd. as reported 2023 (383) E.L.T. 705 (P &H).

iv	Whether Cenvat credit taken on HR Coils, Sheet, Shape, Section, Angle Road, Plate etc. which were cleared from the factory as such would be allowable;	(iv) The Cenvat Credit has been disallowed on the ground that inputs/capital goods received in the factory were cleared from the factory were liable for reversal of Credit under Rule 3(5) of the Cenvat Credit Rules 2004. The matter is not being contested on merits, but is being contested on limitation. Amount involved: 69,277/-
v	Whether Cenvat credit taken on Weighbridge s installed outside the factory premises would be valid;	(v) The Credit is disallowed on Weigh Bridge installed outside the Factory. The Weigh Bridge was used for weighment of Sugarcane during the crushing season. The issue covered by following decisions: (a) Triveni Engg. & Inds. Ltd. Vs Commissioner of C.Ex., Meerut-II reported as 2014 (303) E.L.T. 129 (Tri. -Del.) . Amount involved: 11,99,744/-
vi	Whether Cenvat Credit taken on	(vi) The issue was with respect to Computers installed in the office. The issue is no more res integra and is covered by the following decisions:-

	computers installed in offices of the party would be legally correct;	(a)Maruti Suzuki India Ltd. V/S CCE&ST, Gurugram, reported as (2023) 4 Centax 108 (Tri.Chd) Amount involved: 17,986/-
		TOTAL AMOUNT ON INPUTS/ CAPITAL GOODS- Rs.1,50,45,349/-
vii	Whether the party are liable to pay service tax under reverse charge mechanism on the freight amount paid for transportation of Sugar-canes from cane collection centres to the factory;	(vii) The issue is with respect to payment of Service Tax and reverse charge based on freight paid to farmers from Cane Centre to the Factory. The issue already stands decided by the following decisions: (a)SHRI PRABHULINGESHWAR SUGARS & CHEMICALS LTD. V/S COMMISSIONER OF CUS., C. EX. & S.T., BELGAUM, reported as 2022 (64) G.S.T.L. 350 (Tri. Bang.) (b) Wave Industries Pvt. Ltd. V/s CCE&ST, Noida reported as 2017 (47) S.T.R. 105 (Tri-All) (c) Nandganj Sihori Sugar Co. Ltd V/s CCE, Lucknow reported as 2016 (42) S.T.R. 545 (Tri-All) Amount involved: 4,74,760/-
viii	Whether extended period is invocable for recovery of evaded duty	(viii) The extended period of limitation is not invocable as the major amount involved was earlier decided against the appellant by the larger bench of the Tribunal, which has now even been reversed by the Hon'ble High Courts. In such cases longer period of limitation is not invocable:

	and wrongly availed Cenvat Credit; and	(a) Commr. Of C.Ex., Lucknow Versus Mankapur Chini Mills as reported as 2019 (367) E.L.T. 889 (All.) (b) K.M. Sugar Mills Ltd. Versus Commissioner of C.Ex. & S.T., Allahabad as reported as 2017 (350) E.L.T. 273 (Tri.-Del.). (c) Pr. Commr. Of Cus & C Ex., Raipur Versus Steel Authority of India Ltd. as reported 2020 (38) G.S.T.L. 171 (Chhattisgarh) (d) Adhikrut Jabti Evam Vasuli Versus C.E.E., Indore as reported as 2017 (6) G.S.T.L. 529 (Tri.- Del.)
ix	Whether mandatory penalty is imposable upon the party.	(ix) When the demand is not sustainable, then there is no question of imposition of penalty. (a) LML Ltd Vs. CCE, New Delhi reported as 2001 (130) E.L.T. 480 (Tri). (b) Pre-Stressed Udyog (Assam) Pvt. Ltd. V/s Commissioner of Central Excise Shillong reported as 1999 (111) E.L.T. 88 (Tri). (c) Sulara Chemicals Pvt. Ltd. V/s Commissioner of C.E. Bolpur reported as 2002 (145) E.L.T. 230 (Tri).

4. The learned Advocate vehemently pleaded that since there is no evidence to prove that the goods have been removed in a clandestine manner, there was no reason for confirming the demand of Central Excise Duty as well as imposition of penalty. Further he has relied upon the judgements to support that the Cenvat Credit cannot be denied. He also submitted that Service Tax was not payable as the Appellant had not borne the freight

amount and the liability to bear the freight was that of the farmers, who were to transport the Sugarcane.

5. The learned Departmental Representative reiterated and justified the findings of the Adjudicating Authority.

6. Heard both the sides and perused the appeal records.

7. We have gone through the submissions of the Appellant as well as learned Departmental Representative on various issues in dispute. As regards, the first issue regarding the shortage of the goods, it is to be mentioned that the matter was earlier remanded by the Tribunal to the Adjudicating Authority to consider any other evidence except shortage of goods to prove that the goods have been removed in a clandestine manner. No findings have been recorded in the impugned order in this respect. We have gone through the grounds of Appeal and the case laws cited by the learned Advocate. As per the below mentioned decisions, it has constantly been held that mere shortage of goods does not lead to the conclusion that the goods have been removed in a clandestine manner. The Hon'ble High Court held that the onus was on the Department to prove the clandestine removal of the goods by way of positive evidence like statements of Drivers, Transporters, the persons to whom the goods have been sold and how the payment of the goods have been received. In the instant case, we do not find any such evidence produced by the Department either at the time of investigation or subsequent thereto in the Show Cause Notice, Order-In-Original and even after the remand by the Tribunal. More so, the item on which shortage has been detected is sugar, which is a controlled commodity by the Government. Sugar cannot be sold in the open market as such and quotas are issued by the Government for clearance of the said commodity. There is no other evidence except for shortage, which can lead to the conclusion that the goods have been removed/cleared in a clandestine manner by the Appellant. The following decisions of the Tribunal as well as Hon'ble High Courts support the said findings :-

(a) Commissioner of C.Ex. & S.T., Chandigarh Vs. Kewal Garg reported as 2019 (369) E.L.T. 315 (P&H).

(b) Commissioner of C.EX. & S.T., Ludhiana Va. Anand Founders & Engineers reported as 2016 (331) E.L.T. 340 (P & H).

(c) Commissioner of Central Excise, Kanpur Va. Minakshi Castings reported as 2011 (274) E.L.T. 180 (All).

(d) Star Alloys & Chemicals Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax, Raipur reported as 2019 (21) G.T.L. 174 (Tri.-Del.).

(e) Commissioner of Central Excise, Raipur Vs. M.S.P. Steel & Power Ltd reported as 2017 (357) E.L.T. 275 (Tri.-Del.).

(f) Mahavir Polyplast (P) Ltd. Vs. Commissioner of Cus., C. Ex., Kanpur 2013 (287) E.L.T. 139 (Tri.-Del.).

8. Thus, in absence of any other evidence except shortage, it cannot be alleged that the goods have been removed in a clandestine manner and hence neither the demand of the Central Excise Duty can sustain nor penalty can be imposed.

9. As regards, the denial of Credit of Rs.97,12,535/- on Iron and Steel Structure used for making Base Structure and other Foundations and Civil Work, the sole ground of the Adjudicating Authority for denial of Credit is that the issue is decided against the Appellant in the case of Vandana Global Ltd. Vs. Commissioner of Central Excise & Customs reported as 2010 (253) E.L.T. 0440 (Tri.-LB). We find that the period involved in the instant case is prior to 07.07.2009. The decision of the Tribunal has been held to be not a good law by the Hon'ble High Courts in the following cases:-

(a) Vandana Global Ltd. Vs Commissioner of C.EX. & CUS., Raipur reported as 2018 (16) G.S.T.L. 462 (Chhattisgarh).

(b) Mundra Ports & Special Economic Zone Ltd. Vs C.C.E. & Cus reported as 2015 (39) S.T.R. 726 (Guj.).

(c) Principal Commissioner of Central Goods & Services Tax, Commissionerate, Ludhiana Vs. IOL Chemicals And Pharmaceuticals Ltd. Reported as 2023 (385) E.L.T. 705 (P

& H) as affirmed by Hon'ble Supreme Court in case of Principal Commissioner, CGST Vs. IOL Chemicals & Pharmaceuticals Ltd. reported as 2023 (386) E.L.T. 163 (SC).

Following the above decisions, we hold that Credit cannot be denied to the Appellant. The ground for denial of Credit of Rs.36,94,012/- is that the Capital Goods were received in the Factory of the Appellant after the machines were installed and factory came into production and hence those cannot be used for the purpose of supporting the structure or other machineries, but were used for fabrication of shed.

10. We find that there is no evidence either in the Show Cause Notice or in the impugned Order to arrive at such conclusion. The receipt of the Capital Goods is an ongoing process in the various factories and Mills. Because the Mill has become operational, cannot be a ground to hold that the said items were used only for making of shed in the Factory and not for machineries. Thus, the denial of Credit does not merit to sustain on this account. The Credit of Rs.82,099/- cannot be denied on paints as the issue is no more *res integra* and covered by the following decisions:-

(a) Vij Engineers & Consultants Pvt. Ltd. Vs. CCE & ST, Rohtak, reported as 2022 (380) Ext 188 (Tri).

(b) U.G. Sugar & Industries Ltd. Vs. CCE&ST, Meerut-II reported as 2011 (272) E.L.T. 383 (Tri-Del.).

Similarly, in case of denial of Credit of Rs.2,69,696/- on Welding Electrodes the issue is decided by the Hon'ble Supreme Court and followed by various decisions of the High Court and Tribunal:-

(a) Ramala Sahkari Chini Mills Ltd. Vs. CCE, Meerut-II reported as 2016 (334) E.L.T. 3 (SC).

(b) Kisan Sahkari Chini Mills Ltd. Vs. CCE, Meerut-II reported as 2017 (352) E.L.T. 215 (Tri).

(c) Principal Commissioner of CGST, Ludhiana Vs. IOL Chemicals & Pharmaceuticals Ltd. as reported 2023 (383) E.L.T. 705 (P & H).

11. Respectfully following the above decisions, we hold that the Credit cannot be denied. As regards, the denial of Credit on the ground that certain Weigh Bridges/Weigh Scales were removed outside factory and hence they were liable to pay the amount of Credit availed under Rule 3(5) of the Cenvat Credit Rules. It is to be mentioned that as per detail in the Annexure enclosed with the SCN, the items are not Weigh Bridge, but Weigh-Scales. It is clear from the Annexure G of the SCN that 9 Weigh-Scales, which were of higher capacity were installed in the factory itself and balance 41 Weigh Scales of lower capacity were installed at the Agriculture Fields to Weigh the sugarcane from the farmers during the crushing season. The said Weigh Scales of smaller capacity are not permanently removed from the Appellant's factory and the issue regarding the eligibility of Credit on Weigh-Scale has been decided in the case of Sugar Mills itself and is cited as Triveni Engg. & Inds. Ltd. Vs. Commissioner of C.Ex., Meerut-II reported as 2014 (303) E.L.T. 129 (Tri. -Del.) hence, we hold that credit cannot be denied.

12. As regards, the Credit of Rs.17,986/- on Computers installed in the Office, it is to be mentioned that the same is covered by the decision of the Tribunal in case of Maruti Suzuki India Ltd. Vs. CCE & ST, Gurugram, reported as (2023) 4 Centax 108 (Tri.-Chd). Following the said decision, we hold that Credit cannot be disallowed.

13. As regards, the demand of Service Tax on Freight paid to the farmers under reverse charge basis, it is to be mentioned that the Appellant is not bearing the freight amount, but the freight is borne by the farmers, as the Appellant deducts the amount of freight from the bills of the farmers and hence the Appellant is not liable to bear the freight amount. Similar issue has been covered by the following decisions of the Tribunal :-

(a) SHRI PRABHULINGESHWAR SUGARS & CHEMICALS LTD. Vs. COMMISSIONER OF CUS., C. EX. & S.T.,

BELGAUM, reported as 2022 (64) G.S.T.L. 350 (Tri. Bang.).

(b) Wave Industries Pvt. Ltd. Vs. CCE & ST, Noida reported as 2017 (47) S.T.R. 105 (Tri-All).

(c) Nandganj Sihori Sugar Co. Ltd. Vs. CCE, Lucknow reported as 2016 (42) S.T.R. 545 (Tri-All).

14. Thus the demand of Service Tax does not sustain. Even, otherwise, the demand does not sustain on limitation, as the issue of major amount was decided by the Larger Bench of the Tribunal, which has already been reversed by the Hon'ble High Court. In such a scenario, the extended period of limitation cannot sustain. Since the demand of Tax/denial of Credit is not sustainable, thus there is no question of demand of interest or for imposition of any penalty.

15. In view of the above discussion, the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the Appellant is allowed with consequential relief, as per law.

(Order pronounced in open court on.....)

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

Separate Order
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS

SANJIV SRIVASTAVA:

I have gone through the order prepared by Learned Member (Judicial). However, after long persuasion, I am not in position to concur with the findings recorded in the entire order.

2.0 The facts as narrated in the show cause notice are reproduced as follows:-

"2. On the basis of intelligence, a team of the officers of Central Excise Division, Moradabad visited the premises of M/s Rana Sugars Ltd, Belwara (Moradabad) on 24.10.2008 and physically verified the stocks of finished goods i.e. V.P Sugar & Molasses in presence of two independent witnesses and authorized signatory of M/s RSL. On physical verification of the stocks of sugar, a shortage of 50500 Qtls as compared to the book balance was detected by the visiting officers. A panchnama to this effect was drawn on the spot on 24/25-10.2008 (RUD-01). A CPU installed in the said M/s RSL was also resumed as per list dated 24/25-10- 2008 (RUD-02) together with certain other records. Statement of Shri P.K Malhotra, Vice President of M/s RSL was also recorded on the spot on 25.10.2008 under the provision of Section 14 of the Central Excise Act, 1944 (RUD-03). The said Shri Malhotra, in his statement dated 25.10.2008, though admitted the shortage of sugar detected by the visiting officers but he could not explain the reasons thereof. He simply stated that Shri Jasvinder Singh (Sales manager) and Shri Yogendra Singh (Godown & Sale in-charge) looked after the sale of sugar but none of them was available in the unit on 24/25-10-2008. He also stated that Shri Jasvinder Singh used to sit in their head office at Chandigarh and Shri Yogendra Singh was on leave. The value of 50500 Qtls of sugar which was found short in stock was reported to be Rs. 8,45,87,500.00 involving duty amounting to Rs. 49,41,425/- (Rs. 35,85,500/- BED Rs. 12,12,000/- Sugar Cess Rs. 95950/- Ed Cess + Rs. 47975/- SHE Cess). The

value was calculated on the basis of sale invoice No. 252 dated 23.10.2008. On 25.10.2008, the amount of duty of Rs. 49,41,425/- (Rs. 35,85,500/- BED + Rs. 12,12,000/- Sugar Cess + Rs. 95950/- Ed Cess + Rs. 47975/-SHE Cess) involved on the said shortage of sugar was debited by M/s RSL vide PLA Entry No. 03 dated 25.10.2008 and intimated the debit particulars vide letter dated 25.10.2008 addressed to the Assistant Commissioner, Central Excise Division Moradabad (RUD-04).

3. The said Shri Malhotra was asked to produce the invoices whereby M/s RSL was effecting clearances and other related documents. He, however, expressed his inability to produce such documents stating that they have got ERP (Electronic Requisition Process) system and their every document is generated and is stored in the "server" installed in their Head office situated at M/s Rana Sugars Ltd, SCO 49- 50, Sector BC, Madhya Marg, Chandigarh. Therefore, a team of the officers of this Commissionerate along with the officers of Chandigarh Commissionerate visited the office premises of the Head office of M/s RSL at Chandigarh on 31.10.2008. There, the officers resumed the said server and recorded the proceedings conducted by the visiting officers vide Panchnama dated 31.10.2008. Statement of Shri Naresh Saini, Manager (I.T) of M/s Rana Sugars Ltd. Chandigarh, who operates the said server, was also recorded on 31.10.2008 under the provisions of Section 14 of the Central Excise Act, 1944.

4. It was further gathered that M/s RSL had also availed wrong Cenvat credit on the items of iron & steel namely HR Coil, Sheet, Shape, Section, Angle, Rod Bar, Plate etc (hereinafter referred to as the said material of iron & steel) shown to have been used in fabrication of various alleged capital goods in the unit Therefore, the officers of Central Excise Division Moradabad in association with the officers of Commissionerate Hdqrs Meerut-II again visited the premises of M/s RSL on 31.10.2008 in order to

verify the capital goods fabricated by them using inputs on which credit of duty was availed. Statement of Shri P.K Malhotra, V.P of M/S RSL was recorded on 31.10.2008 under the provisions of Section 14 of the Central Excise Act, 1944 in this behalf (RUD-07). During scrutiny of records, it was observed that M/s RSL had shown to have purchased Approx. 9000 M.T of the said materials of iron& steel during the period from 01.01.06 to 31.10.08. Out of the said 9000 M.T, approx. 6500 M.T of said materials was shown to have been purchased on payment of duty and accordingly availed Cenvat credit amounting to Rs. 2.47 crores during the period from 01.01.06 to 31.10.08 on the basis of Cenvatable invoices (RUD-08). On further scrutiny of records, it was observed that Ms RSL had shown to have purchased all capital goods, except few items, from outside sources and availed Cenvat credit amounting to Rs 4.30 crores Approx during the period from 01.01.06 to 31.03.08 on the basis of Cenvatable invoices (RUD-9). The visiting officers apprehended that the quantum of inputs reportedly used in fabrication of capital goods was not justified with reference to the quantity used in fabrication / erection thereof in the factory. It was observed that quantity of inputs was much higher than the one required for fabrication of items found installed in the unit. Whereas prima facie, from the perusal of the documents the visiting officers who laid their hands on them and also going by the averments made by some of the responsible officers of M/s RSL in their respective statements indicated herein below, it transpired that the capital goods found installed in the unit were purchased from outside sources. In the sequence, summons under Section 14 of the Central Excise Act 1944 were, inter-alia, issued to Shri S.P Tomer, Chief Engineer and Shri Anurag Mehrotra, Manager Accounts and their statements recorded, which are discussed herein below:-

5. *Shri S.P Tomer, Chief Engineer in his statement dated 09.02.09 (RUD-10),inter-alia, stated-*

(i) That he is working as a Chief Engineer of the plant since 12th Nov'07 in the scope of troubleshooting operation and maintenance of the plant and machinery; that prior to Nov07, he was working with another unit of M/s RSL Group situated at Chandigarh but used to visit and supervise the project work at Belwara unit as and when required; that all the work relating to fabrication & installation of various items of plant and machinery at Belwara unit was undertaken under his supervision;

(ii) That capacity of Belwara plant is 5000 TCD (Tons per Cane per Day);

(iii) That the details of the items fabricated in Belwara unit have been mentioned at S. No. 01 to 15 of the chart attached to his statement and no other item, except the items mentioned in the said chart, have been fabricated in the unit. (He also specified the total weight of fabricated goods together with the scrap generated there from);

(iv) That the number of boilers in the unit is one and its capacity is 120 Ton per hour with working pressure 87 Kg per centimeter square;

(v) That no part of the boiler fabricated in the unit except ducting & prefab as mentioned in the above chart was manufactured

(vi) That number of horizontal crystallizers installed in the unit is 08 and their capacity is 85 Ton. Vertical type of mono crystallizer is 01. Vertical type twin crystallizer is 01; that all the crystallizers were purchased from outside and no crystallizer was fabricated in the unit;

(vii) That all the movable parts like cane unloader, grap, trolley, cabin & electrical parts were purchased from outside and only base of the cane unloading system was fabricated in the unit;

(viii) That exhaust/ vapour pipe line was fabricated in the unit. Exhaust vapour travels through the said pipe line:

- (ix) That numbers of vaccum pan are 06 in the plant. 02 number of 120 Ton capacity, 02 numbers of 80Ton capacity, 01 number of 35 Ton capacity and 01 number of 25Ton capacity. All the said vaccum pans were purchased from outside manufacturer and no vaccum pans were fabricated at site;
- (x) That molasses tank in the plant is one and capacity of said tank is 1,00,000 Qtls; that the said molasses tank was fabricated in the unit;
- (xi) That all the movable parts like EOT crane, bridge with end carriage and electrical parts of power house crane loading & unloading system were purchased from outside. Only base of the said system and prefab for power house was fabricated in the unit;
- (xii) That numbers of turbine in the plant are 02; That one turbine of 6MW (make Kessels) was purchased from outside and one turbine of 2.5MW (make Triveni) is old which was transferred from other unit at Amritsar; that no part of said turbine was fabricated in the unit;
- (xiii) That juice sulphitor system and syrup sulphotor system were fabricated in the unit and these items are used for clarification of juice after heating and syrup after evaporation house;
- (xiv) That complete clarifier was purchased from outside side and no part of clarifier was fabricated in the unit;
- (xv) That complete unit of ESP were purchased from M/s Alstom, Calcutta and no part of said unit was fabricated in the unit;
- (xvi) That all movable parts like chains, link and electrical parts of Bagasse Feeding System were purchased from outside and only base of the Bagasse Feeding System was fabricated in the unit;
- (xvii) That the base of Mill house crane loading and unloading system was fabricated in the unit and all movable parts like chain, link & electrical parts of the said system were purchased from outside:

(xviii) That chimney of boiler was not fabricated. It is RCC construction.

6. *From the depositions as made by the said Shri S.P Tomer, it appears that only following 15 items were manufactured / fabricated within the factory using Cenvatable and Non Cenvatable inputs. It was also found that in respect of items mentioned at S. No. 11 to 15 of the table below, M/s RSL have also discharged the duty leviable thereon though items were captively consumed by them. He further stated that certain amount of inputs was also used in erecting the Exhaust/vapour pipe line. However, the fabrication of said exhaust / vapour pipe neither reported by M/s RSL in their ER-1 returns, nor mentioned by Shri S.P Tomer in the list provided by him*

S. No.	Equipment	Qty	Weight (M.T)	Rate (Rs)	Value arrived (Rs.)	Duty paid under invoice (Rs.)	Waste generated	Total material used
1	Juice Sulphitor System	01	226.630	32404.20	7343700	-	28.000	254.630
2	Syrup Sulphitor System	01	216.690	32404.20	7021600	-	26.770	243.460
3	Tanks for intermediate storage	40	671.570	32404.20	21761600	-	82.980	754.550
4	Ducting boiler parts	03	559.090	32404.20	18116810		69.080	628.170
5	Pipe for boiler	01	2.160	32404.20	70000		0.270	2.430
6	Molasses storage tank	01	496.230	32404.20	16080000		61.310	557.540
7	Cane Unloading system	01	176.160	32404.20	5708400		21.770	197.930
8	Mill house crane loading/unloading system	01	392.040	32404.20	12703700		48.440	440.480
9	Bagasse Feeding System	01	529.310	32404.20	17152000		65.400	594.710

10	Power House Crane Loading/unloading System	01	397.810	32404.20	12890800		49.150	446.960
11	Structure for cane unloading	01	160.880	32404.20	5213179	737579	19.880	180.760
12	Pre Fab. For power house	01	125.240	32404.20	4958163	574163	15.470	140.710
13	Pre Feb. for mill house	01	337.170	32404.20	10925824	1545824	41.660	378.830
14	Pre Fab. For Boiling house	01	385.340	32404.20	12486656	1766656	47.610	432.950
15	Pre Fab For boiler house	01	147.390	32404.20	4776146	675746	18.210	165.600
	TOTAL	56	4823.71		157208578 6308578	5299968	596	5419.71

7. Shri Anurag Mehrotra (Manager Accounts) of M/s RSL, in his statement dated 09.02.2009, (RUD-11), inter-alia, stated that he was. working as Manager Account in the unit from Nov'07 and looking after work relating to accounts; that prior to Jan'09, he was working in the guidance / direction of Shri K.L Benerjee (Chief Manager Account) but after transfer of Shri Benerjee in the month of Jan'09 he independently worked and reported to Shri D.B.S Gill, G.M (Accounts), who sits in Head office at Chandigarh; that when the goods reached at the site, the said goods were entered in the store. As a measure of procedure adopted by M/s RSL in this behalf after receiving the goods in store, SRV (Store Receipt Voucher) IS being maintained (RUD-12); that prior to 12" Feb'07, the SRVs were maintained manually and thereafter the said SRVs are being maintained in Computer; that an issue slip, containing the details of required quantity & item and the details of the items for which the said item is required, is received from Engineering department; that at present the said issue slips are not available and the same shall be submitted within 05 days.

8. At this juncture, Shri Anurag Mehrotra requested to leave the office as his mother was seriously ailing. He, however, promised to appear on 16.02.09. He accordingly appeared on 16.02.08. The said Shri Mehrotra further stated in his statement dated 16.02.09 (RUD-13) that they are not retaining the issue slips as the same were only on a plain piece of paper and not a required document; that he has seen the ledger of materials obtained from the computer of M/s RSL and also signed the same in token of having seen the same that ledger of receipt & issue of each item is being maintained separately; that the quantity shown against the column of issue, covers the quantity used in the fabrication of goods or parts thereof, base structure of said machine, shade of the machine and other civil work surrounding the said machine; that Shri S.P Tomer, Chief Engineer is looking after the work of fabrication; that he has seen the list of items submitted by Shri S.P Tomer on 09.02.02; that during his period, no item was fabricated in the unit; that the quantity of the materials of iron & steel which was used in the fabrication of items within the unit was given by said Shri S.P Tomer on 09.02.2009 that rest quantity shown used in various items was used for other work like shade of the machine and other civil work required for the said machine.

9. From the above, it may be seen that the said Shri Anurag Mehrotra endorsed the averments made by Shri S.P Tomer in his statement dated 09.02.09. SO far as they related to the items manufactured and the quantity of inputs used in fabrication of such items together with the quantity of scrap generated as a result of their fabrication. He, however, added that certain amount of inputs were used in fabrication of goods or parts thereof, base structure of machines, shades of machines and other civil work undertaken. Further, Shri Mehrotra also stated that he was working with M/s RSL since Nov'07 which averment did not appear to be correct in view of the documentary

evidence, i.e. the invoices were issued for fabricated items for captive use prior to Nov'07 (RUD-14). The said invoices bear the dated signatures of the said Shri Mehrotra. Therefore, he was again summoned on 31.03.09 for appearance before the investigating officer on 08.04.2009.

10. The said Shri Mehrotra appeared on 06.04.2009 instead of 08.04.2009 and his statement was recorded. In his statement dated 06.04.09 (RUD-15), the said Shri Mehrotra on being specifically asked as to who signed the aforesaid invoices he stated that the said invoices were issued under his signature and that he was working with M/s RSL since Oct'06. Shri Mehrotra further stated that Syrup Sulphitor system, Tanks for intermediate storage and syrup sulphitor system are the parts of boiling house and that the quantity of inputs were issued under the goods belonging to boiler house. However, on perusal of drawing submitted by M/s RSL, it appears that Syrup Sulphitor System is part of clarification.

11. Summons were also issued to Shri D.B.S Gill, G.M (Finance) of M/s RSL Vide their letter dated 04.04.2009 (RUD-16) M/s RSL informed that said Shri D.B.S Gill was very upset and under treatment of Doctor due to sudden and untimely death of his son. However, Shri Pramod Sharma, President (Commercial) of M/s RSL Group appeared before the investigating officer on 06.04.09 and offered himself to state in the matter in place of Shri D.B.S. Gill. Accordingly, statement of Shri Pramod Sharma was recorded on 06.04.2009 (RUD-17). Shri Pramod Sharma endorsed the averments made by Shri S.P Tomer in his statement dated 09.02.2009 and Shri Anurag Mehrotra in his statement dated 09.02.2009 16.02.2009 & 06.04.2009, so far as they related to the items manufactured and the quantity of inputs used in fabrication of such items. However, Shri Pramod Sharma

added that base of various machines installed in the unit were also fabricated in the unit which was not-stated by Shri S.P Tomer in his statement dated 09.02.2009. He further stated that Shri Anurag Mehrotra was in their organization since 2006 and not since Nov'07 09.02.2009 as stated by Shri Anurag Mehrotra in his statement dated

12. In view of the aforesaid statements of Shri S.P Tomer, Shri Anurag Mehrotra and Shri Pramod Sharma of M/s RSL, it is apparent that no capital goods or parts of any capital goods was manufactured/ fabricated by M/s RSL except the items mentioned hereunder which were stated by Shri S P Tomar in his statement dated 11.02.09:-

- (1) Juice Sulphitor System.*
- (2) Syrup Sulphitor system*
- (3) Tanks for intermediate storage*
- (4) Ducting of boiler*
- (5) Pipe for boiler*
- (6) Molasses storage tank*
- (7) Base of Cane unloading system*
- (8) Base of Mill house crane loading & unloading system*
- (9) Base of Bagassee feeding system*
- (10) Base of Power house crane loading & unloading system*
- (11) Structure for cane unloading*
- (12) Pre fab for power house*
- (13) Pre fab for mill house*
- (14) Pre fab for boiling house*
- (15) Pre fab for boiler house*
- (16) Exhaust / Vapour pipe line only*

From the statement of the aforesaid Shri Anurag Mehrotra and Shri Pramod Sharma, it is clear that some quantity of materials of iron & steel was used in fabrication of items discussed at S. No. (1) to (16) above, as stated by Shri S.P Tomar and rest quantity of the said material was used

in the fabrication of base of machines, shades and other civil work. Further, from ER-1 return for the month of March'07 (RUD-18), wherein the afore-stated items were shown to have been manufactured by M/s RSL within their factory, it is apparent that fabrication/ manufacture took place up to March'07. Thus, it appears that no material of iron & steel was used in fabrication of aforesaid items at S. No. (1) to (16) on or after 01.04.07.

13. The said materials of iron & steel namely H.R/S.S Coil, Plates, Shape & Section, Bar & Rod, H.R/S.S Sheet/plate, Joist, Channel, and Angle etc are not covered under the definition of capital goods' as defined under Rule 2(a) of the Cenvat Credit Rules 2004. However, M/s RSL has claimed. Cenvat credit on the said items treating them as input of capital goods, in terms of Explanation-2 of Rule 2(k) of Cenvat Credit Rules 2004. Explanation 2 of said Rules provides that "input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer". The said material of iron & steel was used in fabrication of base structure, shades and other civil work which are not covered under the definition of "capital goods". As . M/s RSL maintains computerized records, a print out of stock ledger of the material of iron & steel was taken from the CPU resumed from the Belwara unit on 24/25-10-2008. The said print out was taken on 19.01.2009 in presence of Shri Gagandeep Singh authorized person of M/s RSL (RUD-19). The proceeding of unsealing of CPU on 19.01.2009 also recorded in the Panchnama dated 19.01.2009 (RUD-20) and a statement of said Shri Gagandeep Singh was also recorded on 21.01.2009 (RUD- 21).

14. On perusal of the aforesaid ledger, it is revealed that M/s RSL maintains item wise ledger indicating the SRV (Store Receipt Voucher) number & date of receipt of materials, date of issue, quantity issued and name of item

for which the said materials was issued. M/s RSL is receiving the materials of iron & steel duty paid as well as non duty paid and no separate record is maintained for duty paid and non duty paid materials. Further, as stated by Shri Anurag Mehrotra, the quantity shown against column of issue covers the quantity used in fabrication of goods or parts thereof, base structure of said machine, shade of the machine and other civil work surrounding the said machine. Therefore, in order to ascertain the admissibility of `cenvat credit on the said materials of iron & steel, the actual quantity used in fabrication of items as stated by Shri S.P Tomer in his statement dated 09.02.2009 was quantified as per FIFO method (First in first out) from the said ledger of materials of iron & steel. Quantification charts are enclosed as Annexure-A-1 to A-14 and Annexure-D to this Show Cause Notice

15. The quantity showing receipt & issue of materials was duly reflected in their ledger for the period 01.01.2006 to 31.03.2007, and when compared with the depositions made by Shri S P Tomar in his statement dated 09.02.2009, position as emerged, is analyzed herein below:-

- (i) M/s RSL shown to have used 2062.394 M.T of the said materials in Boiler (details as per Annexure-A-1). Out of said quantity of 2062.394 M.T, 1297.185 M.T was used from cenvatable material on which they had availed Cenvat credit amounting to Rs. 46,46,063/-. Whereas Shri S.P Tomer stated that they have one boiler in the unit and complete boiler was purchased from outside manufacturer. He also stated that except boiler ducting, pipe for boiler and pre fab of boiler house, no part of boiler was fabricated in the unit. He also stated that only 628.170 M.T (559.09 M.T weight of ducting 69.080 M.T waste) in the ducting + 165.600 M.T (147.390 M.T weight of pre fab + 18.210 M.T waste) in the pre fab of boiler*

house and 2.430 M.T (2.160 M.T weight of Pipe + 0.270 M.T waste) in the pipe of boiler was used

- (ii) *M/s RSL shown to have used 1389.325 M.T of the said materials in boiling house (details as per Annexure-A-2). Out of said quantity of 1389.325 M.T, 1046.858 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 37,06,662/-. Whereas Shri S.P Tomer & Shri Anurag Mehrotra stated that the said quantity was used in the fabrication of Syrup sulphitor system & Intermediate storage tanks which are parts of boiling house and pre fab of boiling house*
- (iii) *M/s RSL shown to have used 413.378 M.T of the said materials in Clarification station (details as per Annexure-A-3). Out of said quantity of 413.378 M.T, 405.637 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 15,00,415/-. Whereas Shri S.P Tomar stated that 254.630 M.T (226.630 M.T Juice Sulphitor system + 28.000 M.T waste) was used in the ' fabrication of Juice Sulphitor System which is the part of Clarification station.*
- (iv) *M/s RSL shown to have used 1161.285 M.T ot the said materials in Cane Carrier, Cane Unloader, foundation, belt conveyor, Mill No 1, 2 & 3 and mill station (details as per Annexure-A-4). Out of said quantity of 1161.285 M.T, 503.293 M.T was used from cenvatable material on which they had avaliled c-edit amounting to Rs. 18,87,451/-. Whereas Shri S.P Tomer stated that all the movable parts i.e.cane unloader, grap trolley, cabin, electrical parts, chain, link etc were purchased from outside manufacturer. He also stated that only base of the cane unloading system, base of the M ill house crane loading & unloading system, structure of cane unloading system and pre fab of mill house was fabricated using the said materials.*
- (v) *M/s RSL shown to have used 310.953 M.T of the said materials in power house (details as per Annexure-A-5). Out of said quantity of 310.953 M.T. 40.210 M.T was used*

from cenvatable material on which they had availed credit amounting to Rs. 1,63,801/-. Whereas Shri S.P Tomar stated that pre fab of power house was fabricated in the unit in which 140.710 M.T (125.240 M.T weight of pre fab + 15.470 M. T waste) of said materials was used.

(vi) M/S RSL shown to have used 718.409 M.T of the said materials in Molasses Tank (details as per Annexure-A-6). Out of said quantity of 718.409 M.T, 660.714 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 27,25,184/- Whereas Shri S.P Tomer stated that one molasses tank was fabricated in the unit in which 557.540 M.T (496.230 M.T weight of tank + 61.310 M.T waste) of said materials was used

(vii) M/s RSL shown to have used 317.115 M.T of the said materials in Exhaust / Vapour pipe Line (details as per Annexure-A-7). Out of said quantity of 317.115 M.T, 251.040 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 1029274/-. Shri S.P Tomer stated that Exhaust / Vapour pipe line was erected in the plant in which the said quantity was used.

(viii) M/s RSL shown to have used 128.697 M.T of the said materials in Bagasse carrier (details as per Annexure-A-8). Out of said quantity of 128.697 M.T, 95.427 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 325379.00. Whereas Shri S.P Tomer stated that all movable part like chain, link and electrical parts were purchased from outside and only base of bagasse feeding system was fabricated in the unit in which 594.710 M.T (529.310. M.T weight of base + 65.400 M.T waste) of said material was used but in the ledger only 128.697 M.T shown to issued in the name of Bagasse carrier.

(ix) M/s RSL shown to have used 0.476 M.T of said materials in turbine (details as per Annexure-A-9). Whereas Shri S.P Tomer stated that number of turbines in the plant are 02. 01 Turbine is 06 MW make Kessel which was purchased

from outside and other one is 2.5MW make Triveni which was transferred from their other unit at Amritsar. He further stated that no turbine or any part of said turbine was manufactured in the unit.

- (x) *M/s RSL shown to have used 30.260 M.T of the said materials in the fabrication of ESP & ESP System (details as per Annexure-A-10) on which they had availed credit amounting to Rs. 1,20,737/-. Shri S.P Tomer stated that Complete ESP was purchased from M/s Alstom Calcutta and no part of said unit was fabricated in the unit.*
- (xi) *M/s RSL shown to have used 265.395 M.T of the said materials in the fabrication of continuous pan (35 Ton) (details as per Annexure-A-11). Out of said quantity of 265.395 M.T, 230.499 M.T was used from cenvatable.material on which they had availed credit amounting to Rs 8,18,141.00. Whereas Shri S.P Tomer stated that al the continuous pans were purchased from outside and no continuous pan was fabricated in the unit.*
- (xii) *M/s RSL shown to have used 548. 108 M.T of the said materials in the fabrication of Vaccum Pan and Pan Station (details as per Annexure-A- 12). Out of said quantity of 548. .108 M.T, 516. .828 M.T was used from cenvatable material on which they had availed credit amounting to Rs. 18, 85,119/- Whereas Shri S.P Tomer stated that number of Vaccum Pans are 06 in the unit and their capacity are 02 of 120 Ton capacity 02 of 80 Ton capacity 01 is 35 Ton capacity and 01 iS 25 Ton capacity and all the said pans were purchased from outside. He further stated that no Vaccum pan was fabricated in the unit.*
- (xiii) *M/S RSL shown to have used 36.280 M.T of the said materials in the fabrication of Crystallizer (dotails as per Annexure-A-13) on which they had availed Cenvat credit amounting to Rs. 1,40,539. 00/- Whereas Shri S.P Tomer stated that number of horizontal crystalizers in the unit are 08 and their capacity IS 85 Ton. Vertical type of mono*

Crystallizer & Vertical type twin crystallizer is 01 each. He further stated that no crystallizer was fabricated in the unit and all the said crystallizers were purchased from outside.

- (xiv) *M/s RSL shown to have used 100.732 M.T of said materials of iron & steel in the fabrication of various items like civil, Guest house, structure & platform, sugar godown, workshop, furnace, fibrizoe, drier house etc (details as per Annexure-A-14). Out of said quantity of 100.732 M.T, 95.592 M.T was used from cenvatable materials on which they had availed credit amounting to Rs. 3,48,676/-. Whereas Shri S.P Tomer stated that no item except the item mentioned at S. No. 01 to 15 of the list attached with his statement was fabricated in the unit. In the said list neither the aforementioned items nor their parts have been shown to be fabricated in the unit.*

16. Annexure-B pertaining to the quantity of said materials of iron & steel used in fabrication of items within the factory reveals that a total quantity of 7483.807 M.T was shown to have been issued as per their ledger and as against this a quantity of 4823.852 M.T, was stated to have been used in fabrication of items namely; Juice Sulphitor System, Syrup Sulphitor system, Tanks for intermediate storage, Ducting of boiler, Pipe for boiler, Molasses storage tank, Base of Cane unloading system, Base of Mill house crane loading & unloading system, Base of Bagasse feeding system, Base of Power house-crane loading & unloading system, Structure for cane unloading, Pre fab for power house, Pre fab for mill house, Pre fab for boiling house, Pre fab for boiler house and Exhaust / Vapour pipe line by Shri S.P Tomar and the balance quantity of 2737.305 M.T was stated to have been used in fabrication of items namely, base of machines, shades of machines and other civil work surrounding the machines as stated by Shri Anurag Mehrotra and Shri Pramod Sharma. Out of said quantity of 2737.305 M.T, a quantity

of 2009.583 M.T was used from Cenvatable materials on which they availed credit amounting to Rs 73,52,066/-.

17. Further, M/s RSL also shown to have used the said materials of iron & steel in the aforesaid items mentioned at S. No. 01 to 14 during 01.04.2007 to 31.10.2008, [sub para (i) to (xiv) of para 15] whereas as per records i.e. ER-1 returns (RUD-18) and invoices issued for captive use (RUD-14), the complete plant was operational in the month of April 07 and came into production during the month of May'2007 itself. Thus it appears that no amount of the said materials of iron & fabrication of any of the aforesaid items. Further, it appears that the said materials were also not used in base of machines as stated by Shri Anurag Mehrotra and Shri Pramod Sharma because the machines were fabricated and installed up to the month of March'07. The details of the said materials of iron & steel which were shown to have used during the period 01.04.2007 to 31.10.2008 have been worked out in a chart enclosed as Annexure-C to the Show Cause Notice. Thus, it is apparent that 1476.157 M.T of said materials of iron & steel were used in the fabrication of shades and other miscellaneous civil work during 01.04.07 to 31.10.08. Out of said quantity of 1476.157 M.T. a quantity of 1009.832 M.T was used from Cenvatable materials on which they availed credit amounting to Rs. 36,94,012/-.

18 Further, whereas M/s RSL took Cenvat credit on the said items claiming them to be input of capital goods in terms of explanation 2 of Rule 2(k) of Cenvat Credit Rules, 2004. Explanation 2 of said Rules stipulates that-

"input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer"

As per said rule, it appears that M/s RSL was not eligible for Cenvat credit on the Cenvatable material which was used in fabrication of base structure, shades and other

miscellaneous civil work as the same do not appear to fall within the meaning of "capital goods" nor they can be considered as "components, spare parts and accessories" of capital goods. Further, before introduction of Cenvat Credit Rules, 2002/2004, the definition of capital goods contained in erstwhile Rule 57Q of the Central Excise Rules, 1944 and it included the words "plant" and expression "components, spare parts and accessories of plants" which are kept out of the purview of the present Rule 2(a) of the Cenvat Credit Rules, 2004. Now, therefore, once the word "plant and the expression "components, spare parts and accessories of plants" which were used in the erstwhile Rule 57Q are kept out of the purview of Cenvat Credit Rules, 2004 then there would be no scope for considering the materials of iron & steel used in fabrication of base structure of machines, shade of the machine and other miscellaneous civil work as eligible to credit of duty. In view of the above, it appears that M/s RSL was not eligible for credit on the materials which was used in fabrication of base structure of machines, shades and other miscellaneous civil work. Thus, it appears that M/s RSL wrongly availed credit amounting to Rs. 1,10,46,078/- (Rs. 73,52,066/- availed on 2009.583 M.T of said materials used in the base, shades & other civil work during 01.01.2006 to 31.03.2007 + Rs. 36,94,012/- availed on 1009.832 M.T used in the fabrication of shades & other civil work during 01.04.07 to 31.10.08) and the same is liable to be disallowed and recovered from them.

19 Shri S. P Tomar also stated to have used a quantity of 1084.222 M.T of said material in the fabrication of base structure of Cane Unloading System, base structure of Mill House Crane Loading & Unloading System base of Bagssee feeding system and Exhaust/ Vapour Pipe Line. Out of said quantity of 1084.222M.T, 622.912 M.T was used from Cenvatable materials on which M/s RSL availed

Cenvat credit amounting to RS. 23,60,469/- The details are as below-

S. No.	Materials issued in the fabrication of the base of issued structure of the goods	Total qty issued	Non-Cen qty issued	Cen'ble qty issued	Cenvat on Cen'ble Qty
1	Base of Cane Unloading System	197.930	112.222	85.708	3,11,839
2	Base Mill House Crane Loading & Unloading System	440.480	249.743	190.737	6,93,977
5	Bagasse Feeding System	128.697	33.270	95.427	3,25,379
6	Exhaust Vapour Pipe Line	317.115	66.075	251.040	10,29,274
	TOTAL	1084.222	461.310	622.912	23,60,469

20 Shri S.P Tomer stated hat all the movable parts like cane unloader, grap, trolley, cabin & electrical parts for Cane unloading system, Chain link & electrical parts for Mill house crane loading & unloading system and Chain, Link & other electrical parts for bagasse feeding system were purchased from outside. He also stated that only base of the Cane unloading system, Mill house crane loading & unloading system and Bagasse Feeding System were fabricated in the unit space. He further stated that they also fabricated Exhaust /Vapur pipe line in the unit. M/S RSL has used the aforesaid quantity in the fabrication of base structure of said systems and in the fabrication of exhaustvapour pipe line. The base of the said systems & Exhaust / Vapour pipe line erected by M/s RSL are embedded permanently to earth and not movable without being dismantled and thus ceases to be the "goods". This view finds support from the below mentioned judgments of the Hon'ble Apex Court:

- (i) Ms Quality Steel Tubes (P) Ltd V/s CCE, 1995(75)ELT 17(S.C)*
- (ii) M/s Mittal Works V/s CCE, '1996 (88) ELT 622(S.C)*
- (iii) M/S Thermax Ltd V/s CCE, 1998(99)ELT 481(S.C)*
- (iv) M/S Triveni Engineering V/s CCE, 2000(120)ELT 273 (S. C)*

(v) CCE V/s M/s Damodar Ropeways, 2003(151)ELT 3 (S.C)

(vi) M/s TTG Industries Ltd V/s CCE Raipur, 2004(167)ELT 501(S.C)

Thus, it appears that the base of aforesaid systems and exhaust / vapour pipe line erected by M/s RSL in the unit are not "goods" and, as such, neither the same can be treated as capital good nor components, spares & accessories of capital goods, in terms of Rule 2(a) of the Cenvat Credit Rules 2004.

21 In view of the above, it appears that M/s RSL was not eligible for credit of Rs. 23,60,469/- availed on materials of iron & steel used in the fabrication of said systems and pipe line in terms of Rule 2(a) of the Cenvat Credit Rules, 2004. Thus it appears that M/s RSL wrongly availed said credit amounting to Rs. 23,60,469/- and the same is liable to be disallowed and recovered from them

22 M/s RSL also shown to have used the said materials namely H.R/S.S Coil, Plates, Shape & Section, Bar & Rod, H.R/S.S Sheet/plate, Joist, Channel, and Angle etc in fabrication of Structure of Cane Unloader, Pre Fab for Power House Pre Fab for Mill House, Pre Fab for Boiling House and Pre Fab for Boiler House. The said items also do not appear to be the "goods" in view of the position discussed in para 20 above and, as such, M/s RSL were also not eligible for credit to the extent of inputs used in the fabrication of said structure. However, since M/s RSL have paid duty on the said pre fab & structure of said item as per details given in Col. (7) against SI. No. 11 to 15 of table to para 6 above, no demand of Cenvat credit availed on the materials of iron & steel used in fabrication of said structure and pre fab may be required to be raised

23 M/s RSL also shown to have issued 94.569 M.T of said materials of iron & steel to their other unit at Shabad in Rampur (details as per Annexure-D). Out of said 94.569

M.T. 17.010 M.T of said material was issued on which they had availed credit amounting to Rs 69277/- but neither M/s RSL paid duty on the said materials nor reversed the proportionate Cenvat credit availed by them on the said materials. As per Rule 3(5) of the Cenvat Credit Rules, 2004, when inputs or capital goods. on which cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such input". In view of above, it appears that M/s RSL were required to pay the amount equal to the credit availed in respect of said items, which they failed to do SO. Thus it appears that M/s RSL wrongly availed the credit amounting to Rs 69,277/- and the same is liable to be disallowed and recovered from them.

24 M/s RSL also availed credit amounting to Rs 82,099/- on the paints & varnish (details as per Annexure-E) and Rs 2,69,696/ on welding electrodes (details as per Annexure-F) treating them as inputs. The inputs defined under Rule 2(k) of Cenvat Credit Rules 2004 and the items covered under the definition of input within the expression inputs includes' must be used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final products or for any other purpose, within the factory of production. M/s RSL are engaged in the manufacture of V.P Sugar & Molasses and the said items have not been used in or in relation to manufacture of Sugar & Molasses directly or indirectly. The paints & varnish are used for coating of variquis machine and pipe lines to protect them from rust etc and welding electrodes are used for repair & maintenance of plant and machinery. However, as per Explanation-2 of Rule 2(k) of the Cenvat Credit Rule 2004, inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacture. In this case Ms RSL has not disclosed the

names of capital goods which were manufactured/ fabricated by them in which the said items were used as input. The definition of input only includes the goods which were used in the manufacture of capital goods and not to goods which are used for repair & maintenance of plant & machines. In view of above, it appears that M/s RSL wrongly availed credit amounting to Rs 82,099/- on paints & varnish and Rs 2,69,696/- on welding electrodes and the same is liable to be disallowed and recovered from them.

25 Further, during the course of physical verification of capital goods on 31.10.2008, it was found that M/s RSL purchased 50 weighbridges and availed cenvat credit on the said weighbridges. Out of said 50 weighbridges, 41 weighbridges involving credit amounting to Rs. 11,99,744/- (details as per Annexure-G) were installed at their cane collection centers outside the factory premises. M/s RSL have removed the said weighbridges from the factory without reversal of amount equal to credit availed on the said weighbridges. As per Rule 3(5) of the Cenvat Credit Rules 2004, M/s RSL were required to reverse an amount equal to the credit availed in respect of said 41 weighbridges but they did not reverse the same. Ms RSL also purchased 21 computers and availed cenvat credit on the said computers. Out of said 21 computers, 07 computers involving credit amounting to Rs. 17986/- were installed in heir office. As per Rule 2(a) of the Cenvat Credit Rules, 2004, the definition of capital goods does not include any equipment or appliances used in an office. Thus, in view of said definition of capital goods, M/s RSL were not eligible for credit on the said 07 computers as the said computers were used in their office premises. In view of above, it appears that M/s RSL wrongly availed the said credit amounting to Rs. 12,17,730/- (Rs. 11,99,744/- on 41 weighbridges +Rs. 17986/- on 7 computers) and the same is liable to be disallowed and recovered from them.

26 Further, it was also found at the time of officers visit on 31.10.08 that M/s RSL had availed credit amounting to Rs. 1,21,612/- on the basis of invoice No. 685 dated 10.10.06 of M/s Garg Traders Mohali, whereas the said invoice was issued in the name of their other unit at Shahbad (Rampur). On perusal of records it was observed that M/s RSL did not avail credit on the said invoice no. 685 dated 10.10.06. However, they availed credit amounting to Rs. 121612/- on the basis of another invoice no. 683 dated 10.10.06 of M/s Garg Traders and later on the same was found to have been reversed by them.

27- In view of above, it appears that M/s RSL have wrongly availed the Cenvat credit of Rs.1,50,45,349/- as described below:-

S. No.	Description / nature of item	Reasons for denial of credit	Credit involved (Rs)	Reversed by M/S RSL during investigation
01	Materials of iron & steel namely Shape, Section, Angle, Rod, Plates, HR Coil, Channel, Joist etc	Credit taken on the materials which were used in the fabrication of base structure, shades and other miscellaneous civil work etc	1,10,46,078/-	Rs.25,00,000/-, vide RG-23A Part-II entry No. 02 dated 20.04.2009
02	-do-	Credit taken on the materials which were used in the fabrication of base of Cane unloading system, bagasse feeding system, Mill house crane loading & unloading system and exhaust vapor pipe line which are not goods.	23,60,469/-	-
03	-do-	Material transferred to other unit at Shabad in Rampur without reversal of credit availed on the said materials	69,277/-	-
04	Paints & varnish	Paint & varnish is not eligible capital goods or input of capital goods	82,099/-	-
05	Welding electrodes	Welding electrode is not eligible capital goods or input of capital goods	2,69,696/-	-

06	Weighbridges	Weighbridges removed from factory for installation at collection center outside the factory premises without reversal of credit availed thereon	11,99,744/-	Rs.11,99,744/- vide RG-23A Part-II entry No. 119 to 131 all dated 12.11.08
07	Computers	Cenvat credit availed on the computers installed in their office	17,986/-	
		Total	1,50,45,349/-	36,99,744/-

28- M/s RSL though took the credit of duty paid on the said materials of iron & steel otherwise than as prescribed under the Cenvat Credit Rules, 2004 and never informed the department about the use of such items in fabrication of base structures, shades and other miscellaneous civil work in any manner. Similarly, M/sRSL also concealed the fact of using weighbridges outside. the factory premises and also the use of computers in their office from being brought to the notice of the department. Further, they also did not inform the department of having removed the materials of iron & steel to their other unit. Thus, it appears that M/s RSL have wrongly taken and utilized the Cenvat credit in respect of inputs in contravention of the provision of Rule 3 of the Cenvat Credit Rules, 2004 read with Rule 2 of the Rules *ibid*, by suppression of facts and as such for recovery of the said amount extended period of limitation under the provisions of Section 11A of the Central Excise Act, 1944 is invokable. In view of above, it appears that aforesaid Cenvat Credit amounting to Rs. 1,50,45,349/- is liable to be disallowed and recovered from M/s RSL under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 along with interest under Rule 14 of the said Rules read with Section 11AB of the said Act. The said goods are also liable to confiscation under Rule 15 of the Cenvat Credit Rules, 2004 but the said goods are not physically available. As such the said M/s RSL are also liable to penal action under Rule 15 of Cenvat Credit

Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. It also appears that Ms RSL, vide their letter dated Nil (received through fax on 18.05.2009) (RUD-25), have paid back' an amount of Rs 36,99,744/- (Rs. 11,99,744/- on a/c of 41 weighbridges installed outside factory premises and Rs. 25,00,000/- towards disputed materials of iron & steel). The said amount is liable to be appropriated towards the demand, as discussed above.

29. As regard the shortage of 50500 Qtls of sugar detected on 24.10.08, Shri P.K Malhotra, Vice President of M/s RSL could not explain the reasons of shortage detected in the stock of sugar on 24/25-10-2008 and, as such, summons were issued to him and to Shri K.L Benerjee, Chief Manager Accounts, Shri Jasvinder Singh, Sales Manager, Anil Sharma, Sr Sales Officer and Shri Yogendra Singh. Sales officer of M/s RSL. Shri K.L Benerjee, Shri Jasvinder Singh and Shri Yogendra Singh appeared on 11.12.2008 before the Superintendent, Central Excise Commissionerate Meerut-II. Shri K.L Benerjee, in his statement dated 11.12.2008 (RUD-22), stated that he looked after the work relating to accounts only. Shri Jasvinder Singh, in his statement dated 11.02.09 (RUD-23), stated that the management would give the answer about the shortage as he sits in the Chandigarh office and he was responsible for booking the orders of sugar. Shri Yogendra Singh, in his statement dated 11.02.09 (RUD-24), stated that he prepared the invoices only on the direction of Shri Anil Sharma, Sr. Sales officer. He further, stated that neither the management asked to him for the reasons of shortage nor physical stock of sugar verified in his presence on or after his joining on 28.10.08.

30- Again, summons were issued to the aforesaid Shri P.K Malhotra, who was head of the unit, Shri D.B.S Gill and Shri Anil Sharma. Shri Pramod Sharma, President (Commercial) of M/s RSL Group appeared before the

Superintendent, Central Excise Commissionerate Meerut-II on 06.04.2009 and he submitted a letter dated 04.04.2009 (RUD-16). In the said letter, M/s RSL mentioned that Shri P.K Malhotra and Shri Anil Sharma have already left the company and their whereabouts are not known to them. They also informed that Shri D.B.S Gill is very upset due to sudden and untimely death of his son. Shri Pramod Sharma also offered himself for queries in the matter in place of Shri D.B.S Gill. Shri Promod Sharma in his statement dated 06.04.2009 (RUD-17) stated that physical stock verification was done in presence of Shri P.K Malhotra who has since left the company and accordingly, they have debited the duty involved in the shortage of sugar. In view of above, M/s RSL failed to give any explanation about the shortage of 50500 Qtls of sugar detected by the officers on 24/25-102008. They, however, admittedly paid the duty amounting to Rs. 49,41,425/- (Rs. 35,85,500/- BED + Rs. 12,12,000/- Sugar Cess + Rs. 95950/-Ed Cess + Rs. 47975/-SHE Cess) involved or the said shortage of sugar through PLA vide entry No. 03 dated 25.10.2008.

31- In view of above, it appears that M/s RSL cleared the said 50500 Qtis of sugar clandestinely from the unit with intent to evade payment of excise duty amounting to Rs. 49,41,425/-. Therefore, it appears that M/s RSL violated the provisions of Rules 4, 6, 8, 10, 11 & 12 of the Central Excise Rules 2002. Thus, the said duty amounting to Rs. 49,41,425/- (Rs. 35,85,500/- BED + Rs. 12,12,000/- Sugar Cess + Rs. 95950/- Ed Cess+ Rs. 47975/- SHE Cess) is liable to be demanded and recovered from them under Section 11A of the Central Excise Act 1944. However, since M/s RSL have paid an amount of Rs. 49,41,425/- (Rs. 35,85,500/- BED + Rs. 12,12,000/- Sugar Cess+ Rs. 95950/- Ed Cess + Rs. 47975/- SHE Cess) through PLA vide entry No. 03 dated 25.10.2008, the same is liable to be adjusted / appropriated against the

said demand of duty. M/s RSL also appears to have rendered themselves liable for penal action for contravention of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944, for contravention of aforesaid provision of law."

32 Further, on scrutiny of the records maintained by M/s RSL, it appears that M/s RSL utilized the services of sugarcane transport contractors for procuring sugarcane from various cane collection centers during the period from April'07 to Oct08 but no service tax was paid on the amount of freight paid by them to various contractors. As per provisions of Section 65(50)(b) of the Finance Act, 1994, as amended, the "Goods Transport Agency" (GTA)" means any commercial concern which provides service in relation to transport of goods by road and issues consignment notes, by whatever name is called. In the instant case, according to this definition, the said contractors were covered within the ambit of taxable service in the nature of a 'Goods Transport Agency (GTA)". Since, the said contractors were not registered as service tax assessee M/s RSL was liable to pay service tax on the amount of freight paid by them to said contractors in terms of Rule 2(1)(d)(v) of the Service Tax Rules, 2004. Shri Anurag Mehrotra in his statement dated 06.04.2009 (RUD-16) stated that they are not liable to pay any service tax against these petty contractors, as they are not issuing any consignment note. However, he admitted payment of Rs. 1.53 crores approx towards freight to said contractors. He further stated that he will discuss the issue with top management of the company and they will pay the service tax, if they are liable to pay the same on the said amount of freight paid by them.

33 A print out of ledger of said contractors were taken on 20.01.2009 (RUD-26) from the CPU resumed from the Belwara unit on 24/25-10-2008 in presence of Shri Gagandeep Singh, authorized person of M/s RSL. The proceedings of unsealing of CPU on 20.01.2009 was also recorded in the Panchnama dated 20.01.2009 (RUD- 27) and a statement of Shri

Gagandeep Singh under Section 14 of the Central Excise Act 1944 was also recorded on 21.01.2009 (RUD-21). On scrutiny of said ledger of contractors, it appeared that M/s RSL have made payments to the tune of Rs. 1,53, 64, 400/- during the period from 01.04.07 to 31.10.2008 to the sugar-cane transporters who transported the sugar-cane from sugar-cane collection centers to the said unit. The contractor wise details of payment made & their liability to service tax towards said amount have been furnished in a chart, enclosed as Annexure-H. Thus, it appears that M/s RSL were liable to pay service tax amounting to Rs 4,74,760/- (Rs. 460932/- S. Tax + Rs. 9219/- Ed Cess + Rs. 4609/- SHE Cess) on this account. Further, M/s RSL never informed the department about the said payment and they suppressed the fact from being brought to the notice of the department with intent to evade payment of service tax on the said amount. Therefore, it appears that M/s RSL have contravened the provisions of Sections 65 66, 67, 68 of Chapter V of the Finance Act 1994, as amended, read with Rules 2 & 6 of the Service Tax Rules 1994, with an intent to evade payment of service tax and thus extended period of five years prescribed under proviso to Section 73 of the Finance Act 1994 is invokable. Thus, the said service tax amounting to Rs 4,74,760/- (Rs. 460932/- S. Tax + Rs. 9219/- Ed Cess + Rs. 4609/- SHE Cess) is liable to be demanded and recovered from them under Section 73 of the Finance Act 1994 together with interest due thereon under Section 75 of the said Finance Act. M/S RSL also rendered themselves liable for penal action under Section 76 Q 78 of the Finance Act, 1994. It appears that I M/s RSL, vide letter dated Nil (received through fax on 18. 05. 2009) (RUD-25) have reversed an amount of RS. 4,75,000/- through Service Tax Entry No. 01 dated 20.04.2009 on account of their liability to service tax on the freight paid by them towards sugarcane transportation. However, it appears that M/s RSL is liable to pay the said service tax in cash as they are not output service provider.

Now Therefore, the said M/s RSL are hereby required to show cause to the Commissioner, Customs & Central Excise, Commissionerate Meerut-II, Opposite Shaheed Smarak, Delhi Road, Meerut as to why-

- A. (i) The Cenvat Credit amounting to Rs. 1,50,45,349/- (Rupees one crore fifty lakhs forty five thousand three hundred and forty nine only) as per details given in para 27 above should not disallowed and recovered from them under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944. 'Also the amount of Rs. 36,99,744.00 already reversed by them on this account should not be appropriated in the Govt. account;*
- (ii) Interest on the amount as at S. No. A (i), above, should not be recovered till the date of payment of the said amount under Rule 14 of the Cenvat Credit Rules 2004 read with Section 11AB of Central Excise Act 1944;*
- (iii) Penalty should not be imposed upon them under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.*
- B. (i) The Central Excise duty amounting to Rs. 49,41,425/- (Rupees forty nine lakhs forty one thousand four hundred and twenty five only) (Rs 35,85,500/- BED + Rs. 12,12,000/- Sugar Cess + Rs. 95950/- Ed Cess + Rs. 47975/-SHE Cess) involved on 50500 Qtls of sugar found short in stock on 24-10-2008 should not be demanded and recovered from them under proviso to Section 11A of the Central Excise Act 1944. Since the said mount has already been paid by them vide PLA, entry no. 03 dated 25.10.08, the same is to be appropriated in the Govt. account.*
- (ii) Penalty should not be imposed upon them under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act 1944*
- C. (i) The service tax amounting to Rs 4,74,760/- (Rupees four lakhs seventy four thousand seven hundred and sixty only) (Rs. 460932/- S. Tax + Rs 9219/-Ed Cess + Rs.*

4609/- SHE Cess) should not be recovered from them under proviso to Section 73 of the Finance Act 1994;

(ii) Interest on the amount as at S. No. C (i), above, should not be recovered till the date of payment of the said amount under Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under Section 76 & 78 of the Finance Act 1994.

3.0 From the show cause notice it is evident that the issues for consideration need to be rephrased as:

- (i) Whether CENVAT duty can be demanded in respect of the shortages of the finished goods (sugar) admitted by the appellant. Appellant have admitting the shortages and being not in position to explain the same paid the duty in respect of these shortages. (Rs. 49,41,425/-)
- (ii) Whether CENVAT Credit is admissible to the appellant on Weighbridges not installed and used by them in factory of production. Appellant admitting that 41 Weighbridges were not used and installed in their manufactory have debited the CENVAT Credit involved (Rs 11,99,744/-)
- (iii) Whether CENVAT Credit admissible on material transferred by the appellant to another unit at Shabad. (Rs 69,277)
- (iv) Whether CENVAT Credit is admissible on Paints and Varnishes used by the Appellant. (Rs 82,099/-)
- (v) Whether CENVAT Credit is admissible on Welding Electrodes used by the Appellant. (Rs 2,69,696/-)
- (vi) Whether CENVAT Credit is admissible on Computers installed in the office of Appellant. (Rs 17,986/-)
- (vii) Whether Cenvat Credit is available on the materials which were used in the fabrication of base of Cane unloading system, bagasse feeding system, Mill house crane loading & unloading system and exhaust vapor pipe line which are not goods. (Rs. 23,60,469/-)

- (viii) Whether Cenvat Credit is available on the materials which were used in the fabrication of base structure, shades and other miscellaneous civil work. (Rs. 23,60,469/-)
- (ix) Whether extended period of limitation is invokable.
- (x) Whether appellant is liable to penalty.

3.0 The issue involved in the present case vis-à-vis the clandestine clearance of the goods with regards to payment of duty in respect of goods duly produced and recorded in the books of account/statutory documents by the appellants, the factum to production and the shortages found has not been disputed by the appellant at any point of time, either during the investigation or during any stage subsequently. On the contrary difference has been admitted and the duty due of alleged shortages has been paid by the appellant without offering any explanation in respect of such shortages thereby admitting the shortage and the short payment of duty thereof.

4.0 As factum of production is not in dispute the observations made in the order prepared by learned Brother with regard to receipt of raw material etc. are totally irrelevant, those need not have been investigated and the same is the admitted fact and the admitted facts do not need to establish by way of evidence proving production by way of showing the receipt of raw material, consumption of power etc. Hon'ble Supreme Court in the case of M/s System and Components Pvt. Ltd. 2004 (165) ELT 136 (SC) has held as follows:-

"4.The Collector (Appeals) relied upon a Circular issued by the Board of Central Excise dated 25th September, 1986 and held that Receivers, Surge Drums and Flash Vessels were classifiable under Tariff Item No. 73.11 and the Drain Pot under 73.10. It was held that the oil separator would be classifiable under 84.79 and the Base Frame under 7308.90."

5.0 The decisions relied upon by the appellant during the course of adjudication or during the course of argument in this regard do not support the case of the appellant. In case of M/s

Minakshi Castings which has been referred earlier, Hon'ble Allahabad High Court remanding the matter back to the Original Authority. The issue was with regards to imposition of penalty vis-à-vis the clandestine clearance, Hon'ble High Court has held that in absence of evidence of clandestine clearance penalty should not have been imposed, the relevant paragraphs from the said order are reproduced bellow:-

"7. In the present case the department has preferred the appeal against the order dated 13-3-06 on the following grounds :-

"a. Whether the order of the Tribunal can be held as legal & proper where penalties imposed under Section [(sic) Rule] 25 of Central Excise Rule, 2002 & U/R 13 of the Cenvat Credit Rule, 2002 have been vacated without any justifiable & legal reason whereas penalties were imposed in accordance with law?

b. Whether the Tribunal's could pass the order without examining the issue involved in the case following the ratio of a case involving dissimilar facts?"

8. *The Tribunal found that there was no evidence of any kind to support the findings of clandestine removal, not tallying with the physical stock.*

9. *The Tribunal relied upon the case of C.C.E. Delhi III v. Machino Montell (I) Ltd. - [2004 \(168\) E.L.T. 466](#) (Tri.-LB) in support of its view that in such event no penalty is imposable.*

10. *Sri S.P. Kesarwani has relied upon Union of India v. Rajasthan Spinning & Weaving Mills - [2009 \(238\) E.L.T. 3](#) (S.C.), and submits that the view taken in Union of India v. Dharamendra Textile Processors - [2008 \(231\) E.L.T. 3](#) (S.C.) has not been approved by the Supreme Court. The payment of the differential duty, whether before or after*

the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Central Excise Act.

11. *Section 11AC of the Act authorizing levy of penalty, pre-supposes an intention to evade the duty, where any duty has not been levied, or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or rules made thereunder with intent to evade payment of duty, the person is liable to pay the duty as determined under sub-section (2) of Section 11A and shall also be required to pay penalty equal to the duty so determined.*

12. *The Supreme Court in Union of India v. Rajasthan Spinning & Weaving Mills - [2009 \(238\) E.L.T. 3](#) (S.C.) (Para 19), held that it is clear that penalty under Section 11AC, as the word suggests, is punishment, for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

13. *In the present case, the Tribunal has found that there is no material or evidence of any kind to support the findings, that there was clandestine removal, which did not tally with the physical stock. In substance it was found that there was shortage of finished goods. The shortage of finished goods, by itself could not unless it is related to clandestine removal of finished goods for which there was no material evidence, infer evasion of excise duty, and thus no penalty can be imposed."*

6.0 From the above, it is observed that it is nowhere stated that demand in respect of such shortages is being set aside. The order only says in absence of evidence to clandestine clearance no penalty should have been imposed.

7.0 In case of M/s Anand Founder and Engineers 2016 (133) ELT 340 (P & H) also Hon'ble High Court has held that just for the reason of shortages, charge of clandestine clearance cannot be established, in that case also there is no admission of shortages by the assessee whereas in the present case the shortages deducted has been admitted by the appellant and duty discharged on this ground. The decision of Hon'ble Punjab & Haryana High Court has been distinguished by Hon'ble Chhattisgarh High Court in the case of M/s G.P. Ispat Pvt. Ltd. 2019 (368) ELT 76 (Chhattisgarh) by observing as follows:-

"12. The stand of the Revenue, therefore, is that it is not a case where the Revenue alleged clandestine removal and therefore were obliged to establish the allegation of clandestine removal by the assessee. It was a case of huge shortage of finished products as well as raw materials and lack of any fair explanation by the assessee. The responsible authorities or persons of the assessee-Company accepted the shortage and volunteered to make good the demand of Excise duty of which a significant amount thereof came to be paid and for payment of the balance amount a plea was taken that since the Company was in financial distress, therefore, further time and indulgence ought to be extended to them. However, instead of sticking to their words and despite time having been granted by the Excise authorities, to the Company, they approached the appellate Tribunal and the Tribunal without taking into consideration the statements and acceptance made by the responsible officers of the assessee, got taken in by the line of arguments made before it that it was a case of clandestine removal, therefore, onus has to shift upon the Revenue to establish the same on the basis of the principles extracted from the case of Anand Founders & Engineers as well as Continental Cement Company (supra).

13. *On behalf of the respondents a plea is taken that there were reasons for the shortage and they tried to explain it to the authorities that the shortfall also happened because of the burning factor and therefore benefit of doubt ought to have been given and the duty so demanded coupled with interest and the further liability imposed by way of penalty etc. ought not to have been imposed. However, we do not get any clarity from the order of the Tribunal with regard to the acceptance and the statements made under Section 14 of the Central Excise Act, 1944 duly recorded by the Excise authorities coupled with the acceptance of the fact and position and the undertaking to pay the demand so raised upon them, against which compliance also was done over a period of time.*

14. *The Court therefore fails to appreciate as to why the statements duly recorded under statutory provisions of Section 14 of the Central Excise Act, 1944 was ignored or not taken into consideration by the appellate Tribunal. Nowhere did the private respondents plead that the allegation of clandestine removal was made against them. The department all along sought clarity from them for such huge difference in the physical stock vis-à-vis their book of accounts and only explanation offered by the respondents-Company was that the goods have been "dislodged".*

15. *Since it is a case of acceptance and failure to explain the huge variation in the stock and the variations were not having been disputed, the demand so made and calculated by the assessing authority was in conformity with the law. The ratio relied upon by the Tribunal that it will be governed by the principle of clandestine removal seems to be misplaced in the facts and circumstances of the case. The ratio of Anand Founders & Engineers and Continental Cement Company (supra) have no applicability to the present case."*

This decision of Hon'ble Chhattisgarh High Court has been affirmed by Hon'ble Supreme Court as referred at 2019 (368) ELT A38 (SC).

8.0 In the case of M/s Kewal Garg also the shortages has been not admitted by anyone relating to the assessee as the method of stock taking was not found appropriate, the case of clandestine removal was set aside. This judgment also do not support the case of the appellant. Similarly, the other decisions relied upon are in case where shortages were not admitted and charge of clandestine clearance was made.

9.0 I find that in case of M/s Tulip Lamkraft Pvt. Ltd. 2015 (316) ELT 417 (Guj.) Hon'ble Gujarat High Court has held as follows:-

"4.It can thus be seen that the Dispatch Supervisor as well as one of the Directors of the company who was responsible for the day-to-day functioning of the company had in unequivocal terms admitted the clandestine removal of the goods without payment of Excise Duty. Matching entires were found in their diaries which did not form part of the final records. Raw material was purchased in cash. Clearances were made without raising bills or invoices. Significantly and admittedly these statements were never retracted. The authorities were, therefore, entitled to rely on such statements. When the adjudicating authority and two appellate authorities found that there was enough evidence of clandestine removal of goods, in our opinion, the appeal does not give rise to any question of law. We are prepared to accept the appellant's contention that the question of additional consumption of electricity and procurement of raw material was raised before the lower authorities or that it could have been raised for the first time before the Tribunal. However, such question was not germane at all. When there was overwhelming evidence of unretracted unequivocal confessional statements, mere failure on the part of the Excise authorities to produce

additional evidence of extra consumption of electricity or source of procurement of raw material would pale into insignificance. The Tribunal's remarks were merely in the nature of passing thoughts. Vulnerability of such observations would not vitiate the order itself."

10.0 In the case of M/s R.S. Industries 2014 (301) ELT 382 (Tri.-Kolkata) Kolkata Bench of this Tribunal has held as follows:-

"6.It is clear from the said statement that shortage had been admitted and the applicable duty was paid. No question was raised in ascertaining the reason of such shortage. Accordingly, no explanation was also furnished by the said employee. In these circumstances, it is difficult to accept the contention of the Id. AR for the Revenue that the shortage quantity was removed from the factory clandestinely without payment of duty, when no further investigation had been carried out by the Department. I find force in the contention of the Id. Advocate that such shortages could be on account of various factors, including the practice of determining the weight on applying average weight of each bundle. In absence of cogent evidences or admission of removal of goods clandestinely from the factory without payment of duty, in my opinion, the ingredients of Section 11AC of the Central Excise Act, 1944, are not attracted. I find from the impugned notice that penalty has not been proposed under other provisions of Central Excise Act or the Rules made thereunder, except under Section 11AC of the CEA, 1944. In view of the above discussions, as penalty is not imposable under Section 11AC of CEA, 1944 and in absence of proposal of penalty under any other penal provisions, therefore, no penalty could be imposed on the Appellant for the said shortage. In the result, the impugned Order of the Id. Commissioner (Appeals) is set aside to the extent of confirmation of

penalty imposed on the Appellant. The Appeal is thus partly allowed to the above extent."

11.0 In the case of M/s Chicago Pneumatic India Pvt. Ltd. 2008 (221) ELT 373 (Tri.-Mum) Mumbai Bench of this Tribunal has held as follows:-

"16. We have considered the submissions from both sides. We are satisfied after going through the records namely 'C' challans, purchase invoice, Material Inward Receipts, sales invoice and the stock code numbers mentioned therein that there was a practice with the appellants to enter bought out items also as production in RG-1 register and that this practice was discontinued in June 1988 when the bought out items were not being entered in RG-1 register and in respect of trading activity duty was being paid only in respect of manufactured items and not bought out items. However the moot point is whether the appellants in spite of having discontinued the practice in June 1988, still carried on the balance of bought out items lying with them in June 1988 in the RG-1 register and made no debit entries thereafter till the date of seizure, in spite of the fact that the items were issued either for manufacture or for sale. The appellants have placed a heavy reliance on the computerised statement which according to them reflected such categorywise break up of the spare part. Here we find that firstly as observed by the Commissioner even computerised record were not maintained correctly as 12954 Nos. of spares were not fed in the computer. The appellants' plea that these spares were old and non moving does not mean that the items are not to be reflected in the computerised record and in the inventory prepared by the appellants as the balance sheet neither show them as a obsolete items or as a written off spares. We also note that cardex which were prepared separately for manufactured items and bought out items have been destroyed and are not available. We

therefore called for the computerised record from June 1988 onwards till date along with the RG-1 figures to verify that no debit entries were made in RG-1 register in respect of bought out items which were in balance in June 1988 in RG-1 register. But the appellants could not produce either the computerised records or the RG-1 figures. We thereafter made an attempt to tally figures in balance sheet based on inventory prepared by the appellant and to compare the same with the RG-1 register to verify whether the difference between the RG-1 figures and the balance sheet figures was on account of bought out items which remain to be debited from the RG-1 register from June 1988 onwards or not but the appellants again showed their inability to show us the RG-1 register or the figures as they were not available with them. In view of this we hold that the appellants have not been able to produce a single documentary evidence to establish that the stock of bought out items existing in June 1988 continued to be reflected in the RG-1 register & that no debit entry in respect of such spares was made even after issue of such spares either for manufacture or for sale. It is surprising that though the appellant's claim that the Superintendent of Central Excise, one Shri Gum, advised them not to show the bought out items in the RG-1 register which was meant only for manufactured items, they did not inform department that they have committed a mistake and discontinued the practice by giving the break up of the figures of the manufactured and bought out items in the RG-1 register. We further notice that the so called advice of Shri Gum was only oral and not in writing. Since he was not a relied upon witness, his cross examination could not have been asked for and if the appellants so wanted, they could have produced him in their defence. In view of this it has to be held that whatever shortage was there in the RG-1 register, was in respect of manufactured items as after June 1988

appellants were entering only manufactured items in RG-1 register and not the bought out items. In the absence of any acceptable explanation it has to be considered to have been removed clandestinely. The case laws cited by the appellant holding that mere shortage cannot result in assumption of clandestine removed are not relevant as in these cases the plea raised by the appellant explaining the shortages were not adequately dealt with. We have dealt with the plea taken by them regarding shortage and through various means tried to verify the veracity of their contention but on account of non-production/availability of records we could not verify its correctness. Assessment of RT-12 returns are of no consequence as duty is assessed on the goods which are reflected in the RT-12 returns. On the other hand RT-12 returns are based on RG-1 register and if the stock was reflected in the RG-1 register, the RT-12 returns must have also reflected the same figure and the appellants have also not been able to produce the RT-12 to show that the opening balance and closing balance of manufactured goods in the RT-12 returns was different than one shown in the RG-1 register."

12.0 In the case of Shri Rama Machinery Corporation Ltd. 2017 (348) ELT 540 (Tri.-Chennai) Chennai Bench of the Tribunal has held as follows:-

"18. The appellant when failed to maintain proper accounts it is not entitled to plea of set off of 180 MTs clandestinely removed against unaccounted clearance of 269.712 MTs found by investigation in para 28 of the show cause notice. It is therefore required that without any hesitation the adjudicating authority has to re-compute the duty liability of the appellant in respect of 449.712 MTs which is aggregate of 180 MTs of goods as well as 269.712 MTs of goods clandestinely removed as established from evidence gathered and recovered in the course of search and show cause notice provided basis. There was

misplaced sympathy on the evaders. This can be said following the principle laid down by Hon'ble High Court of Himachal Pradesh in the case of Commissioner of Central Excise v. International Cylinders Pvt. Ltd. - 2010 (255) E.L.T. 68 (H.P.). The Hon'ble Court held that no law can be interpreted in a manner so as to give premium to illegal and criminal activities. It is basic commonsense that no person will maintain authentic records of the illegal activities or unaccounted manufacturing done by it. Therefore in absence of authentic record to show above clearances, preponderance of probability comes to rescue of Revenue and the plea of set off of offence fails. The echoing evidence on record established that investigation discharged its burden of proof bringing out proof of ill design of the appellant aided and abetted by the brokers and bill traders. Therefore there shall be no concession at all be granted to 180 MTs setting off the same against 269.712 MTs of goods clandestinely removed.

19. *Hon'ble High Court of Madras in the case of Alagappa Cements Pvt. Ltd. v. CEGAT - 2010 (260) E.L.T. 511 (Mad.) laid down the law that plea of absence of positive proof of commitment of offence is not a defence for the author thereof. It is settled principle of law that law does not insist upon an impossible threshold of proof to establish allegations, but if on probabilities the statutory authorities can establish evasion, the legal standards are adequately met with. The appellants were implicated for their complicity not on the basis of solitary evidence only, but cumulative evidence like actual manufacture not brought to accounts, clandestine removals were patent, conduct of parties questionable, false bank accounts opened to route sale proceeds of clandestine removals, destruction of evidence, false invoices issued in the name of non-existing concerns which are determinative factors and sufficient to justify the levy under the charge of*

clandestine removal for the settled principle of law that no one should be enriched at the cost of the State as well as no Court should allow anybody any benefit not due to it following the ratio laid down in Chengalvaraya Naidu - (1994) 1 SCC 1 = AIR 1994 SC 853. Accordingly the appellant-company is not only liable to duty on 180 MTs but also on 269.712 MTs clandestinely removed. Thus duty on 449.712 MT (180 MT + 269.712 MT) is accordingly imposable by adjudicating authority. It is also settled principle of law that negative equality cannot be pleaded as a defence to any action which is not in accord with law and justified - 'Rajiv Kumar Sharma v. Commissioner of Central Excise (Del.) - 2012 (276) E.L.T. 321 (Del.). When investigation has discovered the truth and the bill traders as well as the purchasers of clandestinely removed goods demonstrated the questionable modus operandi of the appellant proving that goods of the appellant were dealt with by them resulting in evasion of duty and their evidence remained uncontroverted, the appellant is answerable to law for the evasion of duty it has caused."

13.0 Adjudicating Authority in the impugned order has referred the decision of Hon'ble Allahabad High Court while distinguishing the decision of M/s Minakshi Casting referred above, the adjudicating authority has referred the decision of Hon'ble Allahabad High Court in case of M/s Bajrang Petro Chemicals TIOL-2254-HC-All wherein following has been held:-

"9. We heard both the parties at length and gone through the materials available on record. From the record, it appears that there was a huge shortage of finished goods for which no explanation was offered by the appellant at the time of stock checking. It means that the appellant had admitted the shortage and paid the duty accordingly. Thus, the appellant was unable to give any suitable explanation for the shortage of the finished goods. This is an admission by the appellant that the goods found short had been

removed without payment of the duty. The method for clandestinely removal of the goods is not required to be explained. Since, it is a case of the shortage of the finished goods for which the appellant has no explanation, so the provision of Section -11AC for levy of the penalty and Section 26 for levy of the penalty on the authorized signatory would be attracted."

And in case of C. Namperumal Gounder 1978 (2) ELT J56 (Mad.) Hon'ble Madras High Court has held as follows:-

"2. There is no dispute that the respondent was a warehouse licensee in tobacco. On inspection, it was found that there was a discrepancy between the quantity of tobacco shown in the stock register and the actual stock stored by the respondent. By a comparison of the stock entries in the stock book and the stock actually stored, it was found that there was a difference of 18,45 kilograms of chewing tobacco. The stock book showed 11,280 kilograms, while the actual stock was 22,934 kilograms. When the respondent was asked to explain he stated that shortage was due to shrinkage in storage. It is in evidence that tobacco was stocked for a long time. It is conceded by the prosecution that there will be a shrinkage and that shrinkage in some cases, may even go to an extent of 42 per cent."

14.0 In view of the above decisions, I do not find any merits in the submissions made by the appellant in respect of the shortages deducted during the course of visit of the officers and admitted by the appellant, they have also made a payment of duty in respect of such shortages without giving any explanation setting aside of the demand in respect of these shortages, cannot be justified. In view of the above discussions, as I hold the duty is demandable in respect of such shortages, the penalty imposed under Rule 25 of Central Excise Rules, 2002 read with Section 11AC is also justified. Thus I am not in position to agree with the findings recorded by the learned Member (Judicial)

15. On the issue mentioned at (ii) I find the Appellant is claiming the credit on the weighbridges as Capital Goods. It is settled position in law if the capital goods against which the CENVAT Credit is availed are not used within the manufactory or are cleared as such then the CENVAT Credit availed in respect of these goods needs to be reversed, as provided by the Rule 3 (5) of the CENVAT Credit Rules, 2004.

16. Capital Goods have been defined under CENVAT Credit Rules, 2004 by Rule 2 (a) as follows:

(a) —capital goods means :-

(A) the following goods, namely :-

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, [heading 6805, grinding wheels and the like, and parts thereof falling under [heading 6804 and wagons of sub-heading 860692]] of the First Schedule to the Excise Tariff Act;

.....

used –

(1) **in the factory of the manufacturer of the final products, [* * *];** or

(1A) outside the factory of the manufacturer of the final products for generation of electricity [or for pumping of water for captive use within the factory; or

(2) for providing output service;

(B) motor vehicle designed for transportation of goods including their chassis registered in the name of the service provider, when used for –

(i) providing an output service of renting of such motor vehicle; or

(ii) transportation of inputs and capital goods used for providing an output service; or (iii) providing an output service of courier agency;

(C) motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of –

(i) transportation of passengers; or

- (ii) *renting of such motor vehicle; or*
- (iii) *imparting motor driving skills;*

(D) components, spares and accessories of motor vehicles which are capital goods for the assessee;

From the perusal of the above definition it is evident that capital goods have been defined by referring to their use within the factory of manufacture and not qua their usage in or in relation to the manufacture of finished goods, in the manner by which inputs have been defined. Further Rule 3 (5) of the CENVAT Credit Rules very specifically states that:

"(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 :

Provided that such payment shall not be required to be made where any inputs or capital goods are removed outside the premises of the provider of output service for providing the output service.

This rule specifically provides that credit if any taken against the capital goods or inputs needs to be reversed if the inputs or capital goods on which CENVAT Credit is taken are removed as such from the factory. In the present case 41 of the weigh bridges were removed from the factory of production and were installed elsewhere. Interpreting the said rules, Hon'ble Gujarat High Court has in the case of Inductotherm (India) Pvt. Ltd. [2012 (283) E.L.T. 359 (Guj.)] held as follows:

12. In the Rules, 2002, sub-rule (4) of Rule 3 provided as under :

"(4) When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods

at the rate applicable to such goods on the date of such removal and on the value determined for such goods under section 4 or section 4A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7."

This rule was amended with effect from 1-3-2003. In the amended form, Rule 3(4) of 2002 reads as under :

"(4) When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, the manufacturer of final products shall pay an amount' equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in Rule 7."

From the above statutory provisions, it can be seen that prior to 1-3-2003 when the new Rule 3(4) came into operation, when inputs or capital goods on which Cenvat credit has been taken are removed as such from the factory, manufacturer of the final product had to pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to the same on the date of removal and on the value determined for such goods under Section 4 or 4A of the Central Excise Act. In short, prior to 1-3-2003, the computation of central excise on the goods removed on as such basis was on transaction value. On 1-3-2003, significant change was made inasmuch as on removal of goods as such from the factory, the manufacturer of final product had to pay amount equal to the credit availed in respect of such inputs or capital goods and such removal had to be made under the cover of an invoice referred to in Rule 7. We may at this stage record that such provision is found in later Rule 2004 in Rule 3(5) thereof.

13. *With this brief recording of Legislative change, we advert to the Rules, 2004 applicable to the present case. Rule 3 of Rules, 2004 pertains to Cenvat credit. Sub-rule (2) thereof provides that a manufacturer or producer of final*

products or a provider of a taxable service shall be allowed to take credit to be referred as Cenvat credit of several duties mentioned in clauses (i) to (xi) of sub-rule (1) paid on any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service and any input service received by the manufacturer of final produce or by the provider of output services. Sub-rule (4) of Rule 3 provides the purposes for which the Cenvat credit may be utilized and the relevant portion of which reads as under :

"(4) The Cenvat credit may be utilized for payment of-

- (a) any duty of excise on any final product; or*
- (b) an amount equal to Cenvat credit taken on inputs if such inputs are removed as such or after being partially processed; or*
- (c) an amount equal to the Cenvat credit taken on capital goods if such capital goods are removed as such; or*
- (d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or*
- (e) service tax on any output service.*

....."

Relevant portion of sub-rule (5) of Rule 3 of the Rules, 2004 which is similar to the amended Rule 3(4) of Rules, 2002 reads as under :

"(5) When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in Rule 9.

....."

Sub-rule (6) of Rule 3 provides that the amount paid under sub-rule (5) and sub-rule (5A) shall be eligible as Cenvat credit as if it was a duty paid by the person who removed such goods under such sub-rules.

13.1 *Rule 4 of the Rules, 2004 pertains to conditions for allowing Cenvat credit. Rule 5 pertains to refund of Cenvat credit and provides, inter alia, that where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified by the Central Government by notification.*

In case of Technico Engineers Pvt Ltd [2014 (313) ELT 707 (T)] following has been held:

2. *We have heard both sides. We find that under Rule 57U credit is not admissible on capital goods removed as such and an assessee is required to reverse the credit in such a situation. Admittedly, the goods were removed as such and, therefore, the appellants are liable to duty which they have already paid. The levy of interest is challenged on the ground that removal was not by the assessee but by the finance company to which dues owed. However, the relevant rule does not speak of reversal of credit only if the capital goods are removed by the assessee in whose factory such goods are installed. Removal of capital goods as such by any one would require the assessee to reverse the credit*

taken thereof. Further, interest will be payable in view of the delay in the reversal of credit. We also find that the same issue had been agitated by M/s. Chelpark Company Pvt. Ltd. v. CCE, Bangalore when similar direction regarding consideration of interest was given by the Hon'ble Karnataka High Court vide Final Order No. 1193/2009, dated 14-10-2008 [2009 (239) E.L.T. 460 (Tri.-Bang.)]. The Tribunal held that interest is payable for delayed payment of duty.

17. The decision of CESTAT relied upon by the appellant in case of Triveni Engg & Inds Ltd [2014 (303) ELT 129 (T-Del)] which do not take into account the specific provisions of the CENVAT Credit Rules, 2004 is per-incuriam and cannot be a binding precedent.

18. Appellant has during the course of investigation itself reversed the credit taken by them against these 41 weigh bridges which were removed by them as such.

19. On the basis of the same logic the credit availed by the appellant in respect of the goods claiming them to fall within the category of 'input', which have been removed by them as such for use in another unit at Shabad in Rampur will have to be reversed as these inputs have been removed as such without being utilized in or in relation of manufacture of finished goods. Appellant have not stated separately in respect of this credit sought to be denied in the submissions made by them. Thus this credit also needs to be recovered from them.

20. In respect of the admissibility of CENVAT credit on paints and welding electrodes I find that the law is very clear crystallized on this aspect and the credit in respect of these is admissible.

21. With regards to the issue of CENVAT Credit in respect of the seven computers installed and used in the office of appellant, impugned order records the finding as follows:

"33. The party purchased 21 computers and availed Cenvat credit of duty paid thereon. Out of said 21 computers, 7 computers were installed in their offices. As per rule 2(a)(A)(i) of the Cenvat Credit Rules, 2004, Cenvat credit on any equipment or appliance used in an office would not be admissible. The party in their reply have submitted that computer is not equipment or appliance but is a machine. So the said exclusion clause would not be applicable in this case. In this regard I find that term 'machine' has been defined under Section Note 5 of Section XVI of the Central Excise Tariff as below:-

"5. For the purposes of these Notes, the expression "machine" means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85." From the above, it is clear that equipment or apparatus is a machine. There is no difference between term 'machine' and equipment or apparatus. Hence I do not find any force in the argument of the party. In view of the provisions of rule 2(a)(A)(i) of the Cenvat Credit Rules, 2004, I disallow the Cenvat credit of Rs.17,986/ taken on 7 computers which were used in their office."

From the above it is evident that the CENVAT Credit has been sought in respect only those computer which were installed and utilized by the appellant in their office and not within the factory of manufacture, by referring to the exclusion clause in definition of as per Rule 2 (a) (A) (i). Appellant has on the other hand relied upon the decision of the tribunal in case of Maruti Suzuki India Ltd. [(2023) 4 CENTAX 108 (T-Chd)] holding as follows:

"2. Briefly stated the facts of the case are that the appellant was engaged in the manufacture of Engine, Transmission and their spares and components falling under Chapter Headings 84073310, 87089900 and 84099941 of the First Schedule of the Central Excise Tariff Act, 1985 and was availing cenvat credit on inputs, capital goods and input services in accordance with the provisions of Cenvat Credit

Rules, 2004. The appellant utilizes the services of M/s Apee Eskay Enterprises Pvt. Ltd for the purpose of computer networking and cabling services for establishment of computer network/electricity network also referred to as Business Auxiliary Services. During the course of audit of the records of the appellant, it was observed by the department that the appellant had wrongly availed cenvat credit of service tax paid on several services. Accordingly, two show cause notices dated 5-2-2016 and 7-1-2019 were issued to the appellant alleging that the appellant has wrongly availed cenvat credit on 'Business Auxiliary Services' and 'Housekeeping services' in contravention of the provision of sub-rule (1) of Rule 3 of the Cenvat Credit Rules, 2004.

8. *After considering the submissions of both the parties and perused the case records, I find that the Ld. Commissioner (Appeals) has dismissed the appeal of the appellant solely on the ground that the demand on a similar issue in the appellant's own case was confirmed against the appellant by the Principal Bench of this Tribunal vide Final Order No. 54822 of 2014 dated 22-12-2014. Further, I find that the Ld. Commissioner (Appeals) has failed to consider the subsequent rectification order dated 18-3-2016 passed by this Tribunal, allowing the rectification of mistake by recalling the order dated 22-12-2014. Further, I find that vide order dated 9-8-2017, the appeal filed by the Department has been dismissed. I also find that for the previous period before the amendment sought in the definition of 'input service', the Ld. Commissioner (Appeals) has himself allowed the cenvat credit on 'Business Auxiliary Service' and various orders are on record. Further, I note that once the order of the Ld. Commissioner (Appeals) has attained finality and department has not filed any appeal then now the department is not permitted to take a contrary stand as held in the case of Rosmerta Technologies (supra).*

9. Further, I find on the analysis of the definition of 'input service' as provided in Rule 2(I) of Cenvat Credit Rules, 2004 that the computer networking is specifically included in the 'includes clause' of the definition of input services."

From the facts of the case as reproduced from the decision of Chandigarh Bench, referred by the Appellant reproduced above it is evident that issue for consideration by the bench in that case was in respect of networking services availed by Maruti Suzuki, as input services. The issue was not at all in respect of admissibility of CENVAT Credit in respect of Computers not used in factory of production but in the office of Appellant. This decision is clearly distinguishable. Once something has been excluded by way of exclusion clause in the definition then the same cannot be said to be covered within the ambit of the definition. In case of Solar Industries India Ltd. [2018-TIOL-2245-CESTAT-MUM] Bombay Bench observed as follows:

6.1 With effect from 01.04.2011, Cenvat Credit Rules, 2004, have been amended to provide for specific exclusion in respect of rent-a-cab service from the definition of input service. The exclusion clause has got three limbs categorized as (A), (B) and (C). The phrase specifically "for personal consumption" appearing in (C) is not linked to clause (A) and (B). In the present case the services sought to be denied are part of limb (B).

6.2 With reference to other part of arguments that these are part of business expansion of the appellant. Hence exclusion clause is provided in the statute is with reference to the specific definition clause only. Something which may be covered has got to be excluded by way of exclusion. In view of the exclusion clause the arguments with regard to the coverage, the services under the definition clause first part would not be correct.

6.3 Also tribunal has in cases relied upon by the Authorised Representative that CENVAT Credit in respect of rent a cab service is not admissible.

7. Learned Counsel placed reliance on the decision of this Tribunal in the case of Reliance Industries Ltd. (supra). Specifically he relied upon the paragraph 6.3 which is reproduced below:-

"6.3 Now the question that arises is regarding services which were excluded by the amendment after 2-4-2011 to the definition of Rule 2(I) of the Cenvat Credit Rules, 2004. The said services are - outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees such as Leave or Home Travel Concession. The amendment indicates when such services are used purely for personal use for consumption of any employee, the Cenvat credit cannot be allowed. On perusal of the records, we find that the appellants have been taking a consistent stand that in their case Outdoor Catering services, Club or Association service, Health and Fitness Services are three services on which Cenvat credit from 1-4-2011 is sought to be denied relying upon the said amendment to Rule 2(I) of the Cenvat Credit Rules, 2004, which is incorrect as these services are utilized for the business meetings held at various places including AGM."

8. The close analysis of Para 6.3 shows that the bench has been moved by the fact that on the amendments indicates 'when such services are used primarily for consumption of its employees, CENVAT credit cannot be allowed.' The above reference could be held good only with reference to the services mentioned in clause (C) and not those mentioned Clause (A) & (B). While deciding the matter the bench did not make any distinction between the services covered under clauses (B) and (C). Such interpretation which has

been done ignoring the specific provisions in law cannot be but per incurium and hence cannot be binding precedence. Accordingly, the submissions made vis-à-vis relying on this judgments cannot be a reason for allowing the credit in respect of rent-a-cab service in the present case.

Affirming the said decision Hon'ble Bombay High Court as reported at [2022 (60) ELT GSTL 216 (Bom)] observed as follows:

5.*We have heard the Learned Counsel for the parties at length and we have perused the order passed by the Tribunal disallowing the claim for Cenvat credit. It was found by the Tribunal that by virtue of the amendment dated 1-4-2011 rent-a-cab service had been excluded from the definition of the term "input service". The same was in three limbs and the material basis for denying such Cenvat credit was in view of Clause (B) to Rule 2(1) of the said Rules. We find that the Tribunal was justified in disallowing Cenvat credit for the reasons mentioned in the impugned order. This is also clear from a reading of Section 65(105) of the Finance Act which excludes rent-a-cab scheme. The transportation of employees from distance of about 40 kms. for reaching factory is not an activity which could be said to be a part of manufacturing activity. It is merely for personal convenience of the employees to enable them to reach the premises of the factory so as to thereafter participate in the manufacturing activity.*

In this regard, the Learned Counsel for the respondent is justified in placing reliance on the judgment of the Karnataka High Court in Toyota Kirloskar Motor Private Limited (supra) wherein food and beverages were provided by the appellant therein to its employees by engaging the services of an outdoor caterer. This was sought to be treated as "input service" since there was a statutory duty on the appellant to establish a canteen for its employees. Considering the effect of definition of "input service" after 1-

4-2011 it was found that establishment of such canteen was primarily for personal use or consumption of the employees and after such amendment no Cenvat credit could be availed. This view has been upheld by the Hon'ble Supreme Court while dismissing the Special Leave Petition on 18-11-2021 preferred by the said appellant. The facts of the present case also indicate that the facility of transportation provided by the appellant to its employees was merely in the nature of service for personal use or consumption of its employees.

6.*The decisions relied upon by the Learned Counsel for the appellant are clearly distinguishable. In M/s. Essar Oil Limited (supra) there was no dispute by the Department in that case that the services consumed by an assessee were related to various stages of its manufacturing and business activities. The same is not the case herein. The other decision in Mangalore Refinery & Petrochemicals Ltd. (supra) pertains to availing of service tax credit prior to 1-4-2011.*

7.*Thus considering the material on record, we find that the Tribunal did not commit any error whatsoever in disallowing Cenvat credit to the appellant after 1-4-2011 in view of the amended provisions. The service provided was mere in the nature of personal service to its employees which is not permitted to be treated as "input service".*

This decision of Bombay High Court has been affirmed by the Bombay High Court as reported at [2022 (64) GSTL 257 (SC)]

Thus I do not find any merits in the submissions made by the appellant

22. In respect of the admissibility of the CENVAT Credit in respect of Materials of iron & steel namely Shape, Section, Angle, Rod, Plates, HR Coil, Channel, Joist etc used for fabricating which were used in the fabrication of base structure,

shades and other miscellaneous civil work appellant has relied upon the decisions as follows:

- Vandana Global Ltd. [2018 (16) GSTL 462 (Chattisgarh)]
- Mundra Ports & Special Economic Zone Ltd [2015 (39) STR 726 (Guj)]
- IOL Chemicals and Pharmaceuticals Ltd. [2023 (385) ELT 705 (P&H)] as affirmed at [2023 (386) ELT 163 (SC)]

Taking note of the above decisions learned Member (Judicial) has held that this credit would be admissible.

23. To discuss the issues involved I reproduce the relevant text from these decisions:

- Mundra Ports & Special Economic Zone Ltd [2015 (39) STR 726 (Guj)]

6. Before deciding the question, we deem it appropriate to extract Rule 2(k) and 2(l) of the Cenvat Credit Rules, 2004.

"Rule 2(k) "input" means -

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service.

Explanation 1. - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. - Input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

(l) "input service" means any service, -

(i) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal, and includes service used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal."

7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned Counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions of Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is

not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 up to March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central Government from the date of the notification. According to learned Counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, 2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.) wherein in Paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for Cenvat credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

8. *Mr. Y.N. Ravani, learned counsel for the Revenue has placed reliance on the decision of the Larger Bench of the Tribunal in Vandana Global Limited v. Commissioner of Central Excise, Raipur, 2010 (253) E.L.T. 440. We have carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in Sangam Spinners Limited v. Union of India and Others, reported in (2011) 11 SCC 408 = 2011 (266) E.L.T. 145 (S.C.) would not be applicable to the facts of the instant case.*

- *Vandana Global Ltd. [2018 (16) GSTL 462 (Chattisgarh)]*

"2. By the order dated 17-6-2008 the Principal Bench of the Tribunal referred the following issues for consideration to the Larger Bench :

(a) Whether the term "capital goods" can include plant, structures, embedded to earth?

(b) *Whether the goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures can be treated as 'inputs' in relation to their final products as inputs for capital goods, or none of the above?*

(c) *Whether the credit can be allowed in respect of goods like angles, joists, beam, channels, bars, flats which go into fabrication of such structures and plant?*

3. *Through the impugned order dated 4-5-2010 [2010 (253) E.L.T. 440 (Tri. - LB)], the Principal Bench of the Tribunal presided by the President and the two Members answered the reference by holding as follows :*

(a) *The terms 'capital goods' has been defined in the CENVAT Credit Rules, which in turn have been framed under the rule making powers conferred under Section 37(2) of the Act. The said section refers to credit of duty paid on goods used in, or in relation to the manufacture of excisable goods. Hence, 'capital goods' defined in the CENVAT Credit Rules in the context of providing credit of duty paid, have to be excisable goods. Whether a particular plant or structure embedded to earth can be considered as excisable goods or not has to be determined in the light of the decisions of the Hon'ble Supreme Court on the issue, which is no longer res integra.*

(b) *Goods like cement and steel items used for laying 'foundation' and for building 'supporting structures' cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore, no credit of duty paid on the same can be allowed under the CENVAT Credit Rules for the impugned period."*

The text of this decision wherein the High Court has recorded its findings have been reproduced by Hon'ble Punjab and Haryana High Court in the decision reproduced below, hence I am not reproducing the same here.

- IOL Chemical and Pharmaceuticals [2023 (385) ELT 705 (P & H)]

7. *Since the judgment of the Chhattisgarh High Court covers the case on merits, the show cause notice dated 3-6-2011 (Annexure A-1) was held to be not sustainable. It was held to be barred by limitation and eventually, the appeal was allowed.*

8. *Learned Counsel for the appellant has argued that the appeal has only been allowed on the ground of limitation and not on merits. However, he has not been able to refer to any judgment, which has taken a separate view as taken by Hon'ble the Chhattisgarh High Court.*

9. *At the same time, Learned Counsel for the respondent has referred to another judgment passed by the Chhattisgarh High Court in Vandana Global Ltd. v. Commissioner of C. Ex. & Cus., Raipur, 2018 (16) G.S.T.L. 462 (Chhattisgarh), wherein similar view has already been taken in favour of the assessee. A perusal of this judgment shows that the Chhattisgarh High Court had again considered the same question of law and observed as under :-*

"4. *In the light of the contents of the impugned order of the Tribunal and submissions of the assessee and the Revenue following substantial questions of law are formulated for consideration :*

(A) *Whether the term 'capital goods' excludes the structures embedded to earth?*

(B) *Whether the goods like angles, joists, beams, bars, plates, which go into fabrication of such structures are not to be treated as 'input' used in relation to their final products as inputs for capital goods, or none of the above?*

(C) *Is the amendment brought in CENVAT Credit Rules, 2004 as per Rule 2 of the CENVAT (Amendment) Rules, 2009*

retrospective in nature considering is it clarificatory to be applied to all matters which arise before 7-7-2009, the date of commencement of the CENVAT (Amendment) Rules, 2009 : hereinafter referred to as 'Amendment Rules'.

5. The impugned order of the Tribunal had come up for consideration before different High Courts either cited as precedent or as relied upon by the Tribunal in different other matters. The Gujarat High Court in Mundra Ports & Special Economic Zone Ltd. - 2015 (39) S.T.R. 726 (Guj.) referred to the contents of the amendment, to the extent it is relevant for the purpose of this case and held as follows :

"We do not find that amendment made in the Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification on particular thing or goods and/or input and as such, the amendment could operate only prospectively."

6. That view has been quoted with approval by the Madras High Court in M/s. Thiruarooran Sugars v. Customs, Excise and Service Tax Appellate Tribunal (CMA 3814/2014 and connections) decided on 10-7-2017 [2017 (355) E.L.T. 373 (Mad.)] to conclude that the said amendment cannot be treated as clarificatory. M/s. Thiruarooran Sugars also considered the issue as to the effect and fundamental value of the evidentiary statement made by the Finance Minister dealing with an amendment in the budget speech."

10. Hence, a consistent view has been taken that benefit of Cenvat credit is to be given in respect of the goods like angles, joists, beams, bars, plates, which go into fabrication of

structures embedded to earth, which are to be treated inputs for capital goods. In the aforesaid judgment, the Chhattisgarh High Court has examined the term 'capital goods' defined in Cenvat Credit Rules, 2004. Finally, the benefit of Cenvat credit has been extended to the assessee for using the goods as inputs.

- IOL Chemical and Pharmaceuticals [2023 (386) ELT 163 (SC)]

2. In this case, it is stated that this Court has entertained petitions involving similar questions of law whether certain categories of articles and goods are covered under the definition of "capital goods" (under the Cenvat Credit Rules, 2004). Although, the merits of the said question are engaging the intention of this Court in other pending matters, it is noticed that the impugned order merely held that the extended period of limitation could not have been invoked by the revenue, regard being had to the fact that conflicting views of the Tribunal expressed in different Benches was prevailing at that time. In these circumstances, this Court is of the opinion that no substantial question of law is involved.

From perusal of the above observations made by the Hon'ble Apex Court it is evident they have decided the upholding the order of Hon'ble High Court only on limitation. On the admissibility of the credit it is evident that court has observed that it is considering the same issue in matters pending before it. Hence this decision cannot be said to be according finality on the question of admissibility of the credit on these goods.

24. From the perusal of decision of Hon'ble Gujarat High Court and Hon'ble Chhattisgarh High Court it is observed that both these Hon'ble Court have decided the issue holding that the amendments made in the CENVAT Credit Rules, 2004 (amending Explanation 2 to the Rule 2 (k)) cannot be held to be retrospective and hence cannot be applied for denying the credit in respect of this goods for period prior to this amendment. These decision do not lay down that the CENVAT Credit for the period prior to amendments made with effect from 07.07.2009 is

to admissible in respect of these items in all situations but only lay down that the admissibility of the credit needs to be examined vis-à-vis their usage in manufacture of capital goods used in the factory. Impugned order records the findings as follows:

"26. I observe that there is no dispute regarding computation of the amount of Cenvat credit proposed to be disallowed. I find that total 9000 MT of materials of iron and steel (HR Coils, Angles, Channels, Sections, etc.) were purchased during the period 01.01.06 to 31.10.08. Out of the said stock, stock of 6500 MT was purchased on payment of duty and Cenvat credit of Rs.2.47 Cr was taken on such material. It is alleged in the show cause notice that out of Cenvated material weighing 6500 MT, a quantity of 3642.327 MT was used for other than specified purposes. So, dispute is only in regard to availment of Cenvat credit in respect of 3642.327 MT. There is no dispute in regard to remaining quantity, i.e., 2857.673MT which were undoubtedly used in manufacturing of capital goods.

27. find that 2009. 583 MT of the material of iron & steel were used for making base structure, shades and other civil work. The party have not disputed the use of said quantity of material in making base structure, shades and other civil work. As per the department base structure, shades and other civil worked items are not covered under the definition of capital goods. They are also not components, spares or accessories of capital goods. Hence, the items used for making said items are not eligible for Cenvat credit. Base structure is an item which fixes a machine. It does not have any role in operation of machine. A machine is generally used to transform energy from one form to other but structures are used for transfer of forces only. The structures do not enhance the efficiency of machines. It is not an item adjunct to any machine. It simply provides platform for working of a machine. So, it cannot be termed

as accessory of any machine. As far as component and spare are concerned, structures cannot be treated as components and spares by any stretch of imagination as the same are used for manufacturing or assembly of machines. The structures are basically part of building where the machine is to be installed. To apply the term "used in/ for" in the definition for inputs, there should be a nexus between the inputs and the final products. In the present case the manipulation/fabrication of raw materials involved in fabrication of structure which in turn is used for fixing of machines will render such nexus tenuous. It is clear that such structure far remote linkages are not within the scope of the term "used for". I also place reliance on the decision of the Hon'ble Supreme Court in the case of Saraswati Sugars Mills CCE [2011 (270) ELT 465 (SC)] where it has been held that credit on iron and steel sheets and angles used for the fabrication of a plant as steel structures would not be admissible. In view of the Apex Court's observation I hold that no Cenvat credit would be admissible on material of iron & steel used for making structure

27.1 It is also found that admissibility of Cenvat credit on the material of iron and steel has also been clarified by the CBEC vide circular No.964/07/2012-CX dated 02.04.2012 as those structural components which are to be used essentially as a part of Boiler System would be classifiable as parts of Boiler only under Heading 8402 of the Tariff. It is further clarified that since these structural components are nothing but the parts and accessories of the Boiler, they would be covered by the definition of inputs under Rule 2(k)(ii) of the CENVAT Credit rules, 2004 (i.e. all goods for generation of electricity & steam).

A natural corollary of the above is that there might be some structures which are used as part of machine. Base structure for Boiler cannot be treated as its part because the same are not essential for manufacturing of Boiler. Base

structures are goods of Heading 7308 of the Central Excise Tariff. Hence, base structures cannot be part of any machine.

27.2 As far as sheds of machine is concerned, I find that a shed is made for protection of machines from rain, sun rays, dust etc. A machine- shed cannot be termed as components or accessories or spares of any machine. Shed is basically used as building and also it is permanent structure. Hence, items used for making shed can neither be treated as input nor as capital goods and no Cenvat credit of duty paid on items used for making shed would be admissible

27.3 Similarly, goods used for civil work would also not be eligible for Cenvat credit as items emerged on account of civil work are of immovable nature. They cannot be treated as part of any machine.

27.4 The party have referred to the decision in the case of Mundra Port & Special Economic Zone Ltd and claimed that vide aforesaid decision, the High Court has allowed Cenvat credit on inputs used for making jetties. A careful reading of the decision shows that the said decision is applicable only in cases of service providers. Mundra Port are service providers of port services and the said service can be provided with the aid of jetties. So, inputs used for making jetties were declared to be eligible for Cenvat credit. In the instant case, the party are manufacturers, not service providers, hence, the said decision is of no assistance to the party.

27.5 In view of the above, I hold that Cenvat credit amounting to Rs.73,52,066 / taken on 2009.583 MT of the materials of iron & steel which were used for making base structure, shed and civil work would not be admissible to the party.

28. In the show cause notice, Cenvat credit taken on 622.912 MT was proposed to be denied on the ground that said material were used in fabrication of base of cane unloading system, base mill house crane loading and unloading system, bagasse feeding system and exhaust/vapour pipe line. I find that Shri S.P. Tomar in his statement, taken during the investigation, stated that all moveable parts of aforesaid machines were purchased outside. For installation said items, base structures were fabricated by embedding with earth on permanent basis. The said base structures thus cease the character of goods. In the case of Quality Steel Tubes Pvt Ltd [1995(75)ELT 17(SC)], the Hon'ble Supreme has observed thus:-

"Goods which are attached to the earth and thus become immoveable do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold."

In view of the above settled position the base of aforesaid systems are not goods and so they can neither be treated as capital goods nor component spares or accessories of capital goods. I am, therefore, of the view that Cenvat credit amounting to Rs.23.60,469/- taken on 622.912 MT of materials of iron & steel would not be admissible to the party

29. It is an undisputed fact that the factory was made functional in April,2007. It indicates that installation of all machines was completed by March,2007. However, it is found that the party issued 1009.832 MT of Cenvated materials of iron and steel during the period 01.04.2007 to 31.10.2008 claiming that the same were used for fabrication of capital goods and base structure. The claim of the party appears to be incorrect as when plant became operational in April,2007 there is no reason to keep on the fabrication activities even after completion of installation of plant. The said materials which were issued after

01.04.2007 were actually used in making sheds or civil work in the factory. Inputs used for making sheds and also in civil work were not be eligible for Cenvat credit as sheds and items emerged after civil work would not be goods within the framework of Central Excise. The said items are immovable goods. In view of the above, I, therefore, hold that Cenvat credit of Rs.36,94,012/ taken 1009.157 MT is not admissible to the party."

From the above findings it is evident that CENVAT Credit is not sought to be denied in respect of these items which were used for manufacture/ fabrication of capital goods, but is sought to be denied in respect of these items which were used elsewhere by the appellant. None of the decisions relied by the appellant hold that CENVAT Credit should be allowed in respect of these goods used elsewhere other than for fabrication/ manufacture of Capital Goods used within the factory of production.

25. I also find that Hon'ble Supreme Court has considered the same issue in respect of the similar clause contained in the erst while Central Excise Rules, 1944 in the case of Saraswati Sugar Mills [2011 (270) ELT 465 (SC)] (Relied in the impugned order para 27) and has observed as follows:

5. Per contra, Shri. K. Swami, learned counsel for the Revenue, supports the findings and conclusion reached by the Tribunal and the department. He further submits that the Iron and Steel structures which fall under Chapter Heading 73 of the Schedule to the Tariff Act, is neither mentioned in the Notification nor in the Table below Rule 57Q of the Rules. According to learned counsel, the Exemption Notification only exempts the capital goods as defined in Rule 57Q of the Rules. The learned counsel also argues that by applying "user test" theory, the Iron and Steel structures cannot be considered as components of the sugar manufacturing plant. It is also submitted that the Notification requires to be strictly construed and since the

assessee does not fall within the ambit of the Notification, it is not entitled for the benefit of the Notification.

The Notification :

6. To resolve the controversy, we need to notice the relevant Notification and Rule 57Q of the Rules. The relevant portion of Notification No. 67/95-C.E., dated 16-3-1995 is as under :-

"In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944... the Central Government being satisfied that it is necessary in the public interest so to do hereby exempts

(i) capital goods as defined in Rule 57Q of the Central Excise Rules 1944 manufactured in a factory and used within the factory of production;

(ii) ...

from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)."

The Rules :

Rule 57Q of the Central Excise Rules, 1944 reads :-

"(1) All goods falling under heading Nos. 82.02 to 82.11;

(2) All goods falling under Chapter 84 (other than internal combustion engines falling under heading No. 84.07 and 84.08 and of a kind used in motor vehicles, compressors falling under heading No. 84.14 and of a kind used in refrigerating and air-conditioning appliances and machinery, heading or sub-heading Nos. 84.15. 85.18. 8422.40, 8424.10, fire extinguishers falling under sub-heading No. 8424.80, 8424.91, 8424.99, 84.29 to 84.37,

84.40, 84.50, 84.52, 84.69 to 84.73, 84.76, 84.78, expansion valves and solenoid valves falling under sub-heading No. 8481.10 of a kind used for refrigerating and air-conditioning appliances and machinery);

(3) All goods falling under Chapter 85 (other than those falling under heading Nos. 85.09 to 85.13, 85.16 to 85.31 and 85.40);

(4) All goods falling under heading Nos. 90.11 to 90.13, 90.16, 90.17, 98.22 (other than for medical use), 90.24 to 90.31 and 90.32 (other than of a kind used for refrigeration and air- conditioning appliances and machinery);

(5) Components, spares and accessories of the goods specified against S. Nos. 1 to 4 above."

Analysis of this material :

7. The Tariff Act prescribes the rate of duty for each chapter head and sub-head. The Tariff Act has authorized the Central Govt. to modify the rates/duty by issuing notifications. Since exemption notifications are issued under delegated legislative power, they have full statutory force. The Notification No. 67/95-C.E., dated 16-3-1995 specifically exempts capital goods as defined in Rule 57Q of the Rules. The other condition that is envisaged in the Notification is that the "capital goods" should be manufactured in a factory and used within the factory of production. If these twin conditions are satisfied, the capital goods are exempt from payment of excise duty. A party claiming exemption has to prove that he/it is eligible for exemption contained in the notification. An exemption notification has to be strictly construed. The conditions for taking benefit under the notification are also to be strictly interpreted. When the wordings of notification is clear, then the plain language of the notification must be given effect to. By way of an interpretation or construction, the Court

cannot add or substitute any word while construing the notification either to grant or deny exemption. The Courts are also not expected to stretch the words of notification or add or subtract words in order to grant or deny the benefit of exemption notification. In Bombay Chemicals (P) Ltd. v. CCE - (1995) Supp (2) SCC 64 = 1995 (17) E.L.T. 3 (S.C.), a three Judge Bench of this Court held that an exemption notification should be construed strictly, but once an article is found to satisfy the test by which it falls in the notification, then it cannot be excluded from it by construing such notification narrowly.

8. Now coming to Rule 57Q of the Rules, these rules are framed under the Statute. While interpreting the Rules, which are framed under the Statute, they should be read as a Part of the Statute itself and require to be interpreted as intra vires to the Act under which they have been issued.

Having said that, now let us consider the submission of learned counsel Shri Lakshmikumaran for the assessee who contends that Iron and Steel structural manufactured by the assessee within its factory used for the purpose of installation of sugar manufacturing plant are components of the capital goods and therefore, exempt from payment of excise duty by virtue of Notification No. 67/1995-C.E., dated 16-3-1995. However, Shri Swami, learned counsel for the Revenue contends that the items in dispute are independent goods manufactured by the assessee, though in its factory from the goods on which excise duty is paid cannot be construed as component parts of sugar manufacturing plant and therefore, is not entitled for the benefit of Notification No. 67/1995, dated 16-3-1995.

9. As per Notification No. 67/1995 dated 16-3-1995, capital goods as defined in Rule 57Q of the Rules manufactured in a factory and used within the factory of production are exempt from payment of Excise Duty. Rule

57Q of the Rules, specifies various items of goods falling under different chapter headings and sub-headings of the Tariff Act as capital goods. It is not the case of the assessee that Iron and Steel Structures manufactured by it in its factory are the goods which fall under Items 1 to 4 of Rule 57Q, though sugar manufacturing unit would fall under Item Nos. 2 and 3 of the Table to Rule 57Q of the Rules. It is the specific stand of the assessee that the goods in dispute are components of the goods specified in Items 2 and 3 of the Table to Rule 57Q of the Rules and since the capital goods include components and accessories, the Iron and Steel Structures manufactured within the factory are exempt from excise duty.

10. The expression "components" is not defined under the Act. Therefore, reference can be made to dictionaries to understand the meaning of the expression "components". In Webster Comprehensive dictionary, it is defined as "Constituent part". In Oxford Advanced Learner's Dictionary, Volume 1, International Edition, the word "component" means a "constituent part". Further, "constituent" means "serving to form or compose as a necessary part". In Advanced Law Lexicon, 3rd Edition 2005, (by P. Ramanatha Aiyar), the word "component part" is defined as 'something which becomes an integral part of the goods in question by losing its physical and economic distinctiveness'. It defines 'constituent' (of a component) as 'that helps make up or complete a unit or a whole's one part of something that makes up a whole'. Encyclopaedic Law Lexicon, Volume 2008-09 Edition, by Justice C.K. Thakkar, describes the "components" as : It appears, therefore, that for an article to be called a component part, it is not necessary that even it becomes part of another article, it should still retain its identity. All that is necessary to make an article, a component part is that it goes in to the composition of another article. If an article is an element in the composition

of another article made out of it, such an article may well be described as a component part of another article. It may be that the final product made may be in the nature of a compound in which case, the elements forming component parts may not be capable of any more separate identification. Equally, it may be that when a machinery is assembled out of several parts forming that machinery, those machinery, those parts, even after there being filled may retain their individuality or identity.'

11. The meaning of the expression 'components' as defined in the dictionary is accepted and adopted by this Court in the case of Star Paper Mills v. Collector of Central Excise - (1989) 4 SCC 724 = 1989 (43) E.L.T. 178 (S.C.); and the same is quoted with approval in CCE v. Allied Air Conditioning Corporation - 2006 (202) E.L.T. 209 (S.C.).

12. In order to determine whether a particular article is a component part of another article, the correct test would be to look both at the article which is said to be component part and the completed article and then come to a conclusion whether the first article is a component part of the whole or not. One must first look at the article itself and consider what its uses are and whether its only use or its primary or ordinary use is as the component part of another article. There cannot possibly be any serious dispute that in common parlance, components are items or parts which are used in the manufacture of the final product and without which, final product cannot be conceived of.

13. The meaning of the expression 'component' in common parlance is that 'component part of an article is an integral part necessary to the constitution of the whole article and without it, the article will not be complete'.

14. This Court, in Star Paper Mills (supra) has made a settled distinction while considering whether paper cores are

'components' in the manufacture of paper rolls and manufacture of paper sheets. It is stated that 'paper cores' are component parts in so far as manufacture of roll is concerned, but it is not 'component part' in the manufacture of sheets. It is useful to quote the observations made by this Court :-

"... paper core would also be constituent part of paper and would thus fall within the term "component parts" used in the Notification in so far as manufacture of paper in rolls is concerned. Paper core, however, cannot be said to be used in the manufacture of paper in sheets as component part. We are conscious that the relevant tariff item uses the word "paper" but since paper in rolls and paper in sheets are nothing but different forms of paper, both of them would be excisable goods as paper under the relevant tariff item."

15. In Modi Rubber Ltd. v. Union of India, (1997) 7 SCC 13 = 1997 (94) E.L.T. 439 (S.C.), the appellant had set up tyre and tube manufacturing plant and imported various plants and machineries. While using the plants and machineries, PPLF (Polypropylene Liner Fabric) was used as a device in the form of liner components to various machinery units to protect the rubber-coated tyre fabric from atmospheric moisture and dust. This Court held that the PPLF was not a component of the machine itself. It was not a constituent part. It was used as a Liner Fabric not only in tyre production but also in similar other industrial processes.

16. In Hindustan Sanitaryware & Industries Ltd. & Lakshmi Cement v. Collector of Customs, (2000) 10 SCC 224 = 1919 (114) E.L.T. 778 (S.C.), this Court while drawing a distinction between component and spare parts observed :

"It pertains to the meaning of the phrase "component parts". The Tribunal, in the impugned order, drew a distinction between component parts and spare parts,

following its earlier decision in the case of Vaz Forwarding (P) Ltd. v. Collector of Customs¹. Component parts, according to it, were those which were initially used in the assembly or manufacture of a machine and spare parts were those parts which were used for the subsequent replacement therein of worn-out parts. The decision in Vaz Forwarding (P) Ltd.¹ and other decisions of the Tribunal were considered by a Larger Bench of the Tribunal in Jindal Strips Ltd. v. Collector of Customs². The Larger Bench took the view that a spare part was a replacement part to replace a damaged or worn-out component but it was, nevertheless, a component part. "Component" was the genus and "spare" was a species thereof; it was a component which was used for replacement. The Larger Bench judgment found that the distinction drawn in Vaz Forwarding (P) Ltd.¹ was a distinction without a difference.

2. The Larger Bench decision followed decisions of this Court, and we are of the view that its view is correct. A spare part, though fitted into a machine subsequent to its manufacture, to replace a defective or worn-out part becomes a component of the machine. It is a component part."

17. The issue for our consideration, as we have already noticed, is whether the Iron and Steel Structures are components of the Capital Goods specified in the Table below Rule 57Q of the Rules. This issue can be resolved by looking into the literature which gives some glimpse how sugar is manufactured in a sugar industry and what is the essential machinery for manufacture of sugar.

18. The process of making sugar commences from the stage of collecting the harvest, cleansing and grinding, juicing, clarifying, evaporation, crystallization, refining and lastly separation and packing. For the purpose of manufacturing cane sugar in a sugar industry, the essential

machineries that are required are sugar presses, diffusers, vaccum pans, evaporators and sugar handling equipments, crystallizers, sugar grader, elevator and cooling tower. We can call these machineries as essential items in a sugar manufacturing plant. The assessee also fabricates Iron and Steel Structures for installation of the aforementioned equipments. Even according to learned senior counsel Sri Lakshmikumaran, these Iron and Steel Structures are used for effective functioning of Sugar Manufacturing Plant. Under the Notification, the Central Government had exempted duty in respect of "capital goods", as defined in Rule 57Q of the Rules if they are utilized in a place where such goods are manufactured and used within the factory of production. The Notification specifically states that what is exempted under the Notification are "capital goods" as defined in Rule 57Q. Rule 57Q specifies five categories of items as capital goods. It is not the case of the assessee or its learned counsel that the exemption claimed was on Items 1 to 4 of the Table to Rule 57Q but as components which would fall under item No. 5 of the Table to Rule 57Q. Therefore, in order to get the benefit of non-excise duty on Iron and Steel Structures, it had to be established by the assessee that. Iron and Steel Structures are utilized as component parts for the finished products, viz. vacuum pan, crystallizers, sugar grader, elevator, cooling tower etc.

Our Analysis and Conclusion :

19. It appears to us, in the light of the meaning of the expression 'component parts' that the iron and steel structures are not essential requirements in the sugar manufacturing unit. Anything required to make the goods a finished item can be described as component parts. Iron and Steel structures would not go into the composition of vacuum pans, crystallizers etc. If an article is an element in the composition of another article made out of it. such an article may be described as a component of another article.

Thus, structures in question do not satisfy description of components'. Therefore, in our opinion, the Tribunal was right in the view it took.

20. Sri V. Lakshmi Kumaran, learned senior counsel, submits that the Iron and Steel structures are fabricated at the site of the work for use in the construction of the various machineries and, therefore, can be classified under sub-heading 7308.50 under Chapter 73 of the Schedule to the Act, which attracts nil rate of duty. Therefore, it is contended that even if his other contention is not accepted, the assessee should not be fastened with any duty liable under the Act. This issue was neither raised nor canvassed by the assessee before the Tribunal. Therefore, we cannot permit the learned counsel to argue this issue before us for the first time. Therefore, this contention of the learned counsel is rejected.

21. Now coming to the last contention canvassed by the learned counsel that the Tribunal is not correct in holding that the assessee failed to establish that the steel structures are components of the capital goods as specified in the Table below Rule 57Q of the Rules and, therefore, are not eligible for exemption under the notification. This issue requires to be answered with reference to Circular No. 276/110/96-TRU, dated 2-12-1996 issued by the C.B.E.C. The relevant portion of the Circular is as under :-

"3. The matter has been examined. With effect from 23-7-1996, capital goods eligible for credit under Rule 57Q have been specified either by their classification or by their description. Clauses (a) to (c) of Explanation (1) of the said rule cover capital goods by their classification whereas clause (d) covers goods by their description viz, components, spares and accessories of the said capital goods. It may be noted that there is a separate entry for components, spares and accessories and no reference has

been made about their classification. As such, scope of this entry is not restricted only to the components, spares and accessories falling under Chapters 82, 84, 85 or 90 but covers all components, spares and accessories of the specified goods irrespective of their classification. The same was the position prior to amendment in Rule 57Q (i.e. prior to 23-7-1996) when credit was available on components, spares and accessories of the specified capital goods irrespective of their classification.

4. Accordingly, it is clarified that all parts, components, accessories, which are to be used with capital goods of clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any chapter heading are eligible for availment of Modvat credit.”

22. The period in dispute is July 1999 to September 1999. The Circular is dated 2-12-1996. Therefore, it was applicable to the disputed period. It is not disputed and it cannot be disputed that the Circular provides that all parts, components, accessories, which are to be used with the capital goods of Clauses (a) to (c) of Explanation (1) of Rule 57Q and classifiable under any Chapter heading are eligible for availing of MODVAT Credit. However, while denying exemption under the notification, the Tribunal has concluded that the goods in question, which comes under Chapter Heading 73 of the Tariff Act has not been specified in the table below Rule 57Q. We do not find fault with the reasoning of the Tribunal, since the Circular, on which reliance is now placed by the learned counsel, was not produced before the Tribunal and. therefore, going by the language employed in Rule 57Q, there is justification for the Tribunal for coming to the aforesaid conclusion. Since in view of the circular, which is now brought to our notice, the Tribunal was not correct to reject the claim of the assessee on the aforesaid ground. However, this finding of ours will not assist the assessee, since we have held that Iron and

Steel structures are not the components of machineries used in the installation of Sugar Manufacturing Plant.

23. *Before we conclude, we must further observe that Shri Lakshmikumaran drew our attention to the judgment of this Court in CCE v. Rajasthan Spinning and Weaving Mills Ltd. - 2010 (255) E.L.T. 481 (S.C.) where the appeal preferred by the Revenue is dismissed. The facts in the said case were that the respondent-assessee availed MODVAT credit on steel plates and M.S. channels, as capital goods in terms of Serial No. 5 of the Table given below Rule 57Q, used for erection of the chimney for the diesel generating set. The parties were ad idem that diesel generating set falls under chapter Heading 85 which is mentioned at Serial No. 3 of the Table and also the chimney is an accessory in terms of Serial No. 5 of the Table given below 57Q. The issue which was agitated before the Court was whether the Steel plates and MS Channels used in the fabrication of chimney are capital goods in terms of Serial No. 5 of the Table below Rule 57Q. This Court, whilst applying the user test, had held that the steel plates and MS Channels used in the fabrication of chimney are capital goods as contemplated by Rule 57Q as the chimney is not only an accessory but also an integral part of the diesel generating set in the light of the Pollution Control laws mandating that all plants emitting effluents should be equipped with apparatus to reduce or get rid of effluent gases. We are afraid that this decision would assist the appellants in support of the contention canvassed. In this instant case, the Court was considering whether steel plates and M.S. Channels used in fabrication of chimney for diesel generating sets are entitled to avail of MODVAT credit by treating them as capital goods in terms of Rule 57Q of the Central Excise Rules. This Court, applying 'user test', has arrived at a conclusion that Steel Plates and MS Channels are used in the fabrication of chimney which is an integral part of the diesel generating set. Therefore, the*

test applied by this Court is whether the items that were at issue were integral part of a machinery. If that test is satisfied, there will not be any difficulty to hold a particular item of the machinery is a component part and therefore, will fall within the ambit of the expression 'capital goods'.

24. In Simbhaoli Sugar Mills Ltd. v. Commissioner of Central Excise, Meerut, 2001 (135) E.L.T. 1239 (Tri.-Del.), the appellant is a manufacturer of sugar and availed a MODVAT credit on the joints, channels, angles and MS Beams used in fabricating supporting structures for installation of equipments such as vacuum pan, crystallizers, sugar grader, elevator, etc., HR plates (black steel) are used in boiler of sugar plant to keep temperature high, MS bars, shapes and sections are used for erection of new cooling tower, chequered plates and ITR plates are used to construct the platforms, the cane carrier chain and spares are used to transfer the raw material/semi processed material from stage to other, as the capital goods in the terms of Rule 57Q, treating these items as the parts and components of the plant. The question which arose before the Tribunal was that whether these items used for fabricating structures to support and install various machineries of the sugar plant are capital goods in terms of the Rule 57Q. The Tribunal while allowing the MODVAT credit found that these items, except MS sections and shapes, used for raising structure to support the various machines, parts of machineries of the plant would be covered by the explanation to Rule 57Q as a capital goods. The Tribunal referred to its own decision in Malvika Steel Limited's case [1998 (97) E.L.T. 530 (Tribunal)] and without semblance of any discussion, has partly allowed the assessee's appeal. In view of our findings and the conclusion in the earlier part of the judgment, we cannot agree with the reasoning of the Tribunal.

26 In case of Steel Authority of India Limited [2022 (382) ELT
10 (SC)] Hon'ble Supreme Court has held as follows:

"Therefore, the test would be whether the 'Guide Car' can be said to be an integral part necessary to the constitution of the whole article, namely, Coke Oven Battery and whether without it, the Coke Oven Battery shall not be complete?"

9.*Considering the process and the manner in which and/or for the purpose for which the 'Guide Car' is used, by no stretch of imagination, it can be said to be a 'component' of Coke Oven Battery. It cannot be said that without the 'Guide Car' the Coke Oven Battery shall not be functional. The 'Guide Car' is being used for the purpose of transporting the hot coke after it is processed in the Coke Oven Battery. Therefore, 'Guide Car' can be said to be a different equipment distinct from the Coke Oven Battery and cannot be considered to be a part of the Coke Oven Battery. In that view of the matter, the appellant shall not be entitled to the Modvat credit on 'Guide Car' as 'component' and/or part of Coke Oven Battery as claimed by the appellant. The Adjudicating Authority as well as the learned Tribunal have rightly confirmed the demand of Modvat credit availed by the appellant on 'Guide Cars'. We are in complete agreement with the view taken by the Adjudicating Authority as well as the learned Tribunal.*

10.*However, at the same time and in the facts and circumstances of the case, the penalty was not justified at all. The appellant bonafidely believed that the goods would fall under Chapter sub-heading 8428.90 and/or that the 'Guide Car' can be said to be a 'component' of the Coke Oven Battery. Therefore, the order of penalty of Rs. 1,00,000/- imposed by the Tribunal is required to be quashed and set aside.*

11.*Now so far as the submission on behalf of the appellant that the classification of the 'Guide Car' under*

Chapter sub-heading 8603.00 shall be applicable prospectively and shall not be applicable retrospectively with respect to supply in the month of November, 1999 and the reliance placed upon the decision of this Court in the case if Cotspun Limited (supra) is concerned, the aforesaid has no substance. It is required to be noted that it was a case of self-assessment by the supplier and the supplier classified the 'Guide Car' under Chapter subheading 8428.90, though it was classifiable under Chapter sub-heading 8603.00. That thereafter the appropriate authority classified the 'Guide Car' under Chapter sub-heading 8603.00. Therefore, it will relate back to the original claim and/or relate back to the date of supply/self-assessment.

11.1*Now so far as the reliance placed upon the decision of this Court in the case of Cotspun Limited (supra) is concerned, the same shall not be applicable to the facts of the case on hand. In the case before this Court, it was a case of an approved classification list sought to be corrected subsequently and to that it is observed that the levy of excise duty on the basis of an approved classification list is the correct levy, at least until the correctness of the approval is questioned by the issuance of a show cause notice to the assessee. Therefore, on facts, the aforesaid decision shall not be applicable to the facts of the case on hand.*

12.*In view of the above and for the reasons stated above, the present appeal with respect to Modvat credit claimed by the appellant on 'Guide Car' is hereby dismissed."*

27. Thus in view of the discussions as above I find merits in the impugned order to the extent it denies CENVAT Credit in respect of these goods which have been used for activities other than manufacture of capital goods for use within the factory of production.

28. In respect of the demand made against the appellant in respect of the service tax required to be paid by them on reverse

charge basis on the GTA Services, I find that the demand is made on the basis of transportation charges paid by them against the transport of sugar cane. The demand has been made by referring to the payment figures obtained from the book of accounts of the appellant and not on the basis of GR's or Challans issued by the transporter. In absence of any GR's/ Challans, I do not find these services to be classified as GTA Services. Hence this demand cannot be upheld. Reliance is also placed on the decision in the case of Shri Prabhulingeshwar Sugars & chemicals Ltd. [2022 (64) GSTL 350 (T-Bang)].

29. On the issue of limitation impugned order records the findings as follows:

"36. On the issue of invocation of extended period for recovery of evaded Excise duty and service tax and wrongly availed Cenvat credit, under Section proviso to 11A of the Central Excise Act, 1944 and section 73 of the Finance Act, 1994, I find that extended period can be invoked for recovery of duty and service tax or wrongly availed Cenvat credit when there is presence of element of fraud or collusion or suppression of fact or misdeclaration on the part of the assessee with an intent to evade the duty. In the present case there was shortage in the stock of finished goods as compared to the stock entered in statutory record i.e., RG-1. The fact of shortage came to notice when the officer of the department visited the factory. Under rule 10 of the Central Excise Rules, 2002, it is mandatory on the part of every assessee - manufacturer to maintain correct inventory of finished goods on daily basis. Non-maintenance of records in proper manner indicates the malpractice of the assessee-manufacturer. There is also record that shortage was accepted by the representative of the factory voluntarily without any duress. Non-adherence to statutory requirements amounts suppression of facts. In this context reliance is also placed on the decision of the CESTAT in the case of Steel Abrasive [2017-TIOL-174-

CESTAT-DEL] where it has been held that invocation of extended period is justified in case of clandestine removal.

36.1 It is further noticed that the party have misdeclared the nature of items for availing Cenvat credit which was otherwise not admissible to them. As per rule 9 of the Cenvat Credit Rules,2004 burden' lies on the assessee to avail correct Cenvat credit. This burden was not discharged by the party. They availed Cenvat credit on those items which were not within purview of inputs or capital goods. In the statements recorded during investigation, the fact relating to wrong availment of Cenvat credit was admitted by the party. The facts regarding wrong availment of Cenvat credit came to notice to the department only when the officers of the department verified the records. All above activities of the party indicate suppression and misdeclaration on the part of the party. In this regard reference is made to the decision of the Hon'ble Allahabad High Court in the case of Rathi Steel & Power Ltd [2015-TIOL-HC-ALL-CX] where the Court has held that non-declaration of details of inputs to the department by an assessee is a deliberate contravention of provisions of law, hence, in such situation invocation of extended period legally justified. The Court has further observed that it is responsibility of an assessee to avail only proper Cenvat credit and also maintain proper record.

36.2 The party have removed Cenvated goods without reversing the Cenvat credit taken on the said materials whereas it is mandatory to reverse the same under rule 2(5) of the Cenvat Credit Rules,2004. Similarly, the capital goods namely weigh bridges on which Cenvat credit was taken were sent outside the factory without payment of Cenvat credit taken on such items. This fact came to notice of the department only during the course of checking in the factory by the officers of the department. This action of the

party amounts to suppression of facts. Hence, invocation of extended in this case is also justified and sustainable.”

From the facts as recorded above it is evident that appellant had not declared the relevant facts to determine the admissibility of CENVAT Credit in respect of the various inputs/ capital goods. These inputs/ capital goods have been used in contrary to the express provision of law. Even the fact about clearance of some of these goods outside the factory premises was never declared by the appellant. Non declaration of the relevant facts and diversion of the CENVATed goods to other areas amounts to mis-declaration and suppression of the facts with the intent to evade payment of Central Excise duty. The demand made from the appellant by invoking extended period as per the proviso to section 11A (1) cannot be faulted with. Number of decisions have been relied by the appellant to argue against the invocation of extended period of limitation. However I do not find any merits in such arguments, for the reason the act of suppression/ mis-declaration with intent to evade payment of duty is a question of fact and has to be determined in facts of each case. In the present case I find merits in the impugned order invoking extended period of limitation for reasons given therein. I also am convinced that the issues involved in this matter could not have been unearthed without actual verification and investigations made.

30. As I uphold the demand made by invoking extended period of limitation I uphold the demand of interest and penalty imposed under Rule 15 read with Section 11 AC of the Central Excise Act, 1944, in view of the decision of Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd. [2008 (239) ELT 3 (SC)], holding as follows:

14. *Sub-section 1A of Section 11A provides that in case the person in default to whom the notice is given under the proviso to sub-section 1 makes payment of duty in full or in part as may be accepted by him, together with interest under Section 11AB and penalty equal to 25% of the*

accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of Sections 9, 9A and 9AA) as provided in the proviso to sub-section 2 of Section 11A. Sub-section 1A and the proviso to sub-section 2 were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.

15. *Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.*

16. *The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

[11AC. Penalty for short-levy or non-levy of duty in certain cases.- *where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon

under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the*

intent to evade duty by adopting any of the means mentioned in the section.

31. Summarizing my findings, impugned order is modified to the extent of

- Setting aside the demand made by disallowing the CENVAT Credit on welding electrodes paints and varnishes along with interest and equivalent penalties.
- Setting aside the demand made in respect of service tax on reverse charge basis in respect of GTA Services along with the interest and penalties imposed.

32. Appeal is partly allowed to the extent indicated in para 31.

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

POINTS OF DIFFERENCE

In view of the above, taking note of the facts that Member (Judicial) has opined for setting aside the impugned order and Member (Technical) has held against upholding the impugned order, following questions have referred to Hon'ble President for referring the matter to Third Member for resolution in difference of opinion recorded:-

- A. Whether in respect of shortages deducted vis-à-vis the statutory records admitted by the appellant and duty paid in respect of such shortages- the demand in second round of litigation cannot be set aside without any explanation being putforth in respect of such shortages, as has been held by Member (Judicial) or such demand needs to be confirmed even without charge of clandestine clearance as held by Member (Technical);

- B. Whether the penalty imposed under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 is to be upheld for the alleged reading to such shortages, admitted by the appellant can be set aside as held by Member (Judicial) or needs to be upheld as held by Member (Technical).
- C. Whether demand made by disallowing the CENVAT Credit should be set aside along with interest and penalties as held by Member (Judicial) or the demand made is to be upheld in all other respect except for the demand in respect welding electrodes, paints and varnishes. The demand in respect of welding electrodes, paints and varnishes only needs to be set aside along with the interest and penalties imposed as held by the Member (Technical).

(Order pronounced in open court on- 17-12-2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

THIRD MEMBER: Hon'ble Mr. S. S. Garg, Member (Judicial)

DATE OF HEARING: 18.12.2025

APPEARANCE:

Shri Vikrant Kackria, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Revenue

PER: S. S. GARG

The difference on the following reproduced issues, recorded in terms of an Interim Order dated 17.12.2024 having two separate orders passed by two learned Members of the original Division Bench, have been placed before me to give my opinion as a Third Member:

- A. Whether in respect of shortages deducted vis-à-vis the statutory records admitted by the appellant and duty paid in respect of such shortages- the demand in second round of litigation cannot be set aside without any explanation being putforth in respect of such shortages, as has been held by Member (Judicial) or such demand needs to be confirmed even without charge of clandestine clearance as held by Member (Technical);
- B. Whether the penalty imposed under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 is to be upheld for the alleged reading to such shortages, admitted by the appellant can be set aside as held by Member (Judicial) or needs to be upheld as held by Member (Technical).
- C. Whether demand made by disallowing the CENVAT Credit should be set aside along with interest and penalties as held by Member (Judicial) or the demand made is to be upheld in all other respect except for the demand in respect welding electrodes, paints and varnishes. The demand in respect of welding electrodes, paints and varnishes only needs to be set aside along with the interest and penalties imposed as held by the Member (Technical).

2. Though the facts of the case have already been recorded by the Members of the original bench, therefore, I will not repeat the facts of the case.

3. Heard the both the parties and perused the material on records and also gone through the respective opinions recorded by both the learned Members. Since there are many issues involved in this case, therefore, I will take up the issue one-by-one.

A. The first issue is whether the demand of excise duty on the stock of sugar found short consequent to physical verification is sustainable in law or not?

A.1 The learned Counsel for the Appellant submits that the view taken by the Member (Judicial) is legally correct as the same has been taken on the basis of various decisions of the Tribunal and the High Courts on this issue. He further submits that he has earlier filed the written submissions, which have been reproduced by the Member (Judicial) in the interim order. The learned Counsel further submits that the issue as to whether mere shortage can lead to a conclusion of clandestine removal had been decided in earlier round of litigation by the Tribunal and specific finding was given to that mere shortage by itself does not lead to the conclusion of clearance of goods in a clandestine manner; the Tribunal while giving this finding had relied upon the decision of Hon'ble Allahabad High Court in the case of CCE, Kanpur vs. Minakshi Castings [2011 (274) ELT 180 (All.)]. He further submits that in the Final Order dated

21.06.2018 passed by the Tribunal in first round of litigation, it had been recorded that the law on this issue has been settled and the Adjudicating Authority had to decide the issue in view of the decision of Hon'ble Allahabad High Court in the case of CCE, Kanpur vs. Minakshi Castings (supra). He further submits that the department has not filed any appeal against the Final Order dated 21.06.2018 of the Tribunal and hence the order of the Tribunal has attained finality and cannot be contested at this stage. He further submits that the Adjudicating Authority has again confirmed the demand solely on the ground that there was shortage and the shortage was admitted by the officials of the factory. He further submits that it has been consistently held by the Tribunal and various Courts that mere shortage cannot lead to the conclusion that there was clandestine removal of goods. For this submission, he relies on the following decisions:

- a) CCE, Kanpur vs. Minakshi Castings (supra)
- b) Star Alloys & Chemicals Pvt Ltd vs. CCE, Raipur [2019 (21) GSTL 174 (Tri. Del.)]
- c) CCE, Raipur vs. M.S.P. Steel & Power Ltd [2017 (357) ELT 275 (Tri. Del.)]
- d) Mahavir Polyplast P Ltd vs. CCE, Kanpur [2013 (287) ELT 139 (Tri. Del.)]
- e) CCE, Chandigarh vs. Kewal Garg [2019 (369) ELT 315 (P&H)]
- f) CCE, Ludhiana vs. Anand Founders & Engineers [2016 (331) ELT 340 (P&H)]

The learned Counsel further submits that the Adjudicating Authority has held that the facts of the case of CCE, Kanpur vs. Minakshi Castings (supra) are not similar and therefore, same cannot be followed. He further submits that this finding of the Adjudicating Authority is against the judicial discipline as the

Tribunal in the remand proceedings had clearly held that the case of CCE, Kanpur vs. Minakshi Castings (supra) was applicable in the facts of the present case, and since no appeal has been filed by the department against the order of the Tribunal, thus the Adjudicating Authority is bound to decide the matter in view of the remand proceedings. He further submits that the Adjudicating Authority has not given any other evidence with respect to clandestine removal of the goods, therefore, the liability to pay central excise duty only arises when the goods are cleared from the factory and there is no evidence of actual removal of the goods from the factory then no duty is demandable.

A.2 On the other hand, the learned Authorized Representative for the Revenue has also filed the written submissions and submits that the shortage of quantity is a matter of fact and does not involve any interpretation of law; and in the present case, the shortage has been admitted and the duty has been paid without any protest; the only issue is for waiver of penalty which cannot be waived because no sufficient reason has been given for shortages. He further submits that penalty can also be imposed in the absence of suitable explanation for shortage of goods. He supports the findings of the Member (Technical) on this aspect which are recorded in para 6 of the interim order by the Member (Technical). He relies on the decision of Hon'ble Allahabad High Court in the case of M/s Bajrang Petro Chemicals [TIOL-2254-HC-All] to prove that once the shortage has been accepted, the demand can be confirmed. He also relies

on the for imposition of penalty in case of shortage, if the same is not explained:

- M/s Chicago Pneumatic India Pvt Ltd [2008 (221) ELT 373 (Tri. Mum.)]
- Shri Rama Machinery Corp Ltd [2017 (348) ELT 540 (Tri. Chennai)]
- CCE vs. International Cylinders Pvt Ltd [2010 (255) ELT 68 (HC of Himachal Pradesh)]

A.3 After considering the submissions made by both the sides on this issue, I find that the present litigation is a second round of litigation and in earlier round of litigation, the Tribunal vide its Final Order dated 21.06.2018, remanded the matter back to the Adjudicating Authority for a fresh decision. I further find that a clear-cut finding was given in the Final Order dated 21.06.2018 on the basis of the case of CCE, Kanpur vs. Minakshi Castings (supra) that mere shortage by itself does not lead to the conclusion of clearance of goods in clandestine manner.

Further, I note that the said Final Order has not challenged by the department and thus the same has attained finality and cannot be contested at this stage. I also find that instead of bringing fresh evidence of clandestine removal, the Adjudicating Authority has again confirmed the demand on the basis of mere shortage which cannot lead to a conclusion that there was a clandestine removal of goods. I find that this issue is no more *res integra* and has been settled in various decisions relied upon by the Appellant. In this regard, I may refer to the decision of the Tribunal in the case of **Star Alloys & Chemicals Pvt Ltd** (supra), wherein the Tribunal has held that mere shortage

cannot lead to the conclusion of clandestine removal of goods in the absence of any other evidence brought on record by the Revenue showing such illegal activity on the part of the assessee. Relevant finding of the Tribunal is reproduced herein below:

"6. As regards the confirmation of Rs. 73,179/- based upon the photocopies of two invoices issued by M/s. R.L. Enterprises and demand of Rs. 38,934/- based upon an entry found in the diary, I found Revenue has not conducted further investigation even the Director of appellant company has given an exculpatory statement. The names of the buyers were available with the Revenue but neither any investigation was conducted at their end nor at the end of the raw materials supplier. The Tribunal in the case of *Vikram Cement (P) Ltd. v. CCE, Kanpur - 2012 (286) E.L.T. 615* (Tri. - Del.) has held that the clandestine removal demands required to be upheld on the basis of positive evidences and in the absence of the same, demand cannot be confirmed on the basis of some entries, etc. The said decisions stand confirmed by Hon'ble Allahabad High Court in the case of *Commissioner v. Vikram Cement (P) Ltd. - 2014 (303) E.L.T. A82* (All.). Even in the case of *CIT v. Dhingra Metal Works - 2010-TIOL-693-HC-DEL-IT*, it was held that inculpatory statement by itself is not sufficient without the matters having been further investigated. Accordingly, I find no reasons to confirm the said demands and set aside the same."

Further, I find that the Hon'ble Punjab & Haryana High Court in the case of *CCE, Chandigarh vs. Kewal Garg (supra)* has considered the issue of clandestine removal/shortage and upheld the order of the Tribunal by dismissing the appeal of the department.

Further, I find that the Hon'ble Punjab & Haryana High Court in the case of **CCE, Ludhiana vs. Anand Founders & Engineers** (supra) has once again considered the similar issue and has held as under:

"6. The Commissioner (Appeals) set aside the findings of the clandestine removal of the goods

recorded by the adjudicating authority by holding that the assessee's record which were admittedly lying in the adjoining sister concern M/s. Adhunik Industrial Corporation were not scrutinized. Further, it was held that the assessee had clarified the stock position vide letter dated 9-8-2008 which was rejected summarily as an after-thought without making the verifications. Shri Kamal Kant in his statement has admitted only shortages and not the fact of clandestine removal and there was no evidence to show the clandestine activities as no further investigation was conducted to establish the identity of the buyers or the suppliers of the raw materials. The adjudicating authority had mentioned that the production was recorded by weight but in the sale invoices, the goods were sold by numbers without indicating the weight of the finished goods but nothing was proved that how the stock position was verified regarding sale invoices which only showed numbers without giving their weight. Accordingly, the Commissioner (Appeals) extending the benefit of doubt to the assessee had set aside the order passed by the adjudicating authority. The aforesaid findings of the Commissioner (Appeals) were affirmed by the Tribunal by observing that there was no other evidence on record to prove the clandestine activities of the assessee as the Revenue has not conducted further investigations to establish the identity of the buyers or the suppliers of the raw materials or the transporters. Further, it was held by the Tribunal that mere shortages detected at the time of visit of the officers cannot *ipso facto* lead to the allegations and findings of clandestine removal. The relevant findings recorded by the Tribunal read thus : -

"7. The Revenue has again reiterated the same stand that as shortages detected at the time of visit of the officers, which has to be held that the respondents had cleared their final product in a clandestine manner. Admittedly, there is no other evidence on record so as to relate to the clandestine activities of the assessee. The Commissioner (Appeals) has rightly relied upon the various decisions of the Tribunal including the decision in the case of Jai Timber Company v. CCE & C, Bhopal [2009 (234) E.L.T. 457 (Tri.-All.)] and has rightly concluded that mere shortages detected at the time of visit of the officers cannot ipso facto lead to the allegations and findings of clandestine removal."

Further, I find that the Member (Technical) has taken into consideration that the Appellant has not been able to furnish

acceptable explanation for the shortage and therefore, acceptance by the Appellant is sufficient to confirm the demand.

After considering the various decisions of the High Courts and the order of the Tribunal in earlier round of litigation which has not been challenged by the department, I am of the considered opinion that the view taken by the Member (Judicial) is legally correct, accordingly, I affirm the finding recorded by the learned Member (Judicial).

B. The second issue is whether the Cenvat Credit taken on HR Coils, Sheet, Shape, Section, Angle, Rod, Plate etc which were used for making base-structure, shades and civil-work in the factory, would be admissible or not?

B.1 The learned Counsel for the Appellant submits that the credit was disallowed on the ground that these items did not qualify as capital goods in view of the decision of the Larger Bench of Tribunal in the case of Vandana Global Ltd vs. CCE, Raipur [2010 (253) ELT 440 (Tri. LB)]. The learned Counsel further submits that the said decision of the Larger Bench, on the basis of which the credit was denied, has been set aside by the Hon'ble Chhattisgarh High Court as reported in 2018 (16) GSTL 462 (Chhattisgarh)]. He further submits that the Hon'ble Gujarat High Court in the case of Mundra Ports & Special Economic Zone Ltd vs. CCE [2015 (39) STR 726 (Guj.)] has also held that the Cenvat Credit is admissible for the impugned items before prior to 07.07.2009. He further submits that the period involved in the present case is prior to 07.07.2009 and

therefore the Appellant are entitled to Cenvat Credit for the same. He also refers to the decision of the Hon'ble Punjab & Haryana High Court in the case of Pr. Commr. of CGST, Ludhiana vs. IOL Chemicals & Pharmaceuticals Ltd [2023 (385) ELT 705 (P&H)] which has been affirmed by the Hon'ble Apex Court as reported in 2023 (386) ELT 163 (SC).

B.2 On the other hand, the learned Authorized Representative for the Revenue supports the rejection of credit on these items on the basis that there was an amendment in the Cenvat Credit Rules w.e.f. 07.07.2009 and credit on these items has been specifically excluded and the said amendment is retrospective in nature.

B.3 After considering the submissions of both the parties on this issue, I find that the Adjudicating Authority has denied the credit mainly on the basis of law laid down by the Larger Bench of the Tribunal in Vandana Global Ltd's case. Further, I find that said decision of the Larger Bench has been set aside by the Hon'ble Chhattisgarh High Court by relying upon the judgment of Hon'ble Gujarat High Court in Mundra Ports & Special Economic Zone Ltd's case (supra). In this regard, it may be noted that that Hon'ble Gujarat High Court in **Mundra Ports & Special Economic Zone Ltd's** case (supra) has considered the amendment to Explanation-2 of Rule 2(k) of the Cenvat Credit Rules w.e.f. 07.07.2009 and after considering the other decisions of various Courts and the Rules, it was been observed by the Hon'ble Gujarat High Court as under:

"8. Mr. Y.N. Ravani, learned counsel for the Revenue has placed reliance on the decision of the Larger Bench of the Tribunal in *Vandana Global Limited v. Commissioner of Central Excise, Raipur*, 2010 (253) E.L.T. 440. We have carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in *Sangam Spinners Limited v. Union of India and Others*, reported in (2011) 11 SCC 408 = 2011 (266) E.L.T. 145 (S.C.) would not be applicable to the facts of the instant case.

9. Mr. Ravani has also vehemently urged that since jetty was constructed by the appellant through the contractor and construction of jetty is exempted and, therefore, input credit would not be available to the appellant as construction of jetty is exempted service. The argument though attractive cannot be accepted. The jetty is constructed by the appellant by purchasing iron, cement, grid, etc., which are used in construction of jetty. The contractor has constructed jetty. There are two methods, one is that the appellant would have given entire contract to the contractor for making jetty by giving material on his end and then make the payment, the other method was that the appellant would have provided material to the contractor and labour contract would have been given. The appellant claims that he has provided cement, steel, etc., for which he was entitled for input credit and, therefore, in our opinion, the appellant was entitled for input credit and it cannot be treated that since construction of jetty was exempted, the appellant would not be entitled for input credit. The view taken contrary by the Tribunal deserves to be set aside.

10. For the reasons given above, this Tax Appeal succeeds and is allowed. The denial of input credit to the appellant by the respondent is set aside. The appellant would be entitled for input credit. The

question is answered in favour of the assessee-appellant and against the department. No order as to costs.”

Further, I find that the Hon’ble Punjab & Haryana High Court in the case of **Pr. Commr. of CGST, Ludhiana vs. IOL Chemicals & Pharmaceuticals Ltd** (supra) has also considered the similar facts and held as under:

“10. Hence, a consistent view has been taken that benefit of Cenvat credit is to be given in respect of the goods like angles, joists, beams, bars, plates, which go into fabrication of structures embedded to earth, which are to be treated inputs for capital goods. In the aforesaid judgment, the Chhattisgarh High Court has examined the term ‘capital goods’ defined in Cenvat Credit Rules, 2004. Finally, the benefit of Cenvat credit has been extended to the assessee for using the goods as inputs.

11. Keeping in view the above judgment, the respondent-assessee has a right to claim Cenvat credit in the items in question. The impugned order has been rightly passed after appreciating the facts in the right perspective and no ground is made out to interfere in the same. No substantial question of law arises in the present appeal.”

Further, it is pertinent to note that the decision of Hon’ble Punjab & Haryana High Court in the case of Pr. Commr. of CGST, Ludhiana vs. IOL Chemicals & Pharmaceuticals Ltd (supra) has been affirmed by the Hon’ble Apex Court as reported in 2023 (386) ELT 163 (SC).

In view of these circumstances, I am clearly of the opinion that the Appellant are entitled to Cenvat Credit on these items, therefore, in this regard the view taken by the Member (Judicial) is legally correct, accordingly, I hold the same view.

B.4 As regard the another issue whether credit can be allowed on capital goods after the factory has become operational, the learned Counsel has submitted that only allegation is that the

capital goods were received after the factory became operational and there is no allegation that the capital goods were not received in the factory. He has also submitted that it is irrelevant that the factory became operational or not; capital goods can be received even after the factory has become operational and the capital goods are regularly received in the factory and hence, credit cannot be disallowed.

Argument of the learned Counsel has a force that credit cannot be disallowed on capital goods simply because the same was received when the factory was in operation. On this issue also, I support the view of Member (Judicial).

C. The third issue is whether the Cenvat Credit taken on paints used for coating of base structure and shades and welding electrodes used for repairing purposes in the factory, would be admissible or not?

I find that on this issue, both the Members of original bench have allowed the credit in the interim order, therefore, there is no need to give any finding on this issue.

D. The fourth issue is whether the Cenvat Credit taken on HR Coils, Sheet, Shape, Section, Angle, Road, Plate etc which were cleared from the factory as such, would be allowable or not?

D.1 On this issue, the learned Counsel for the Appellant submits that the credit has been disallowed on the ground that the inputs of their capital goods received in the factory were cleared from the factory as such under Rule 3(5) of the Cenvat

Credit Rules; the appellant is liable to reverse the Cenvat credit. The learned Counsel further submits that he is not contesting the same on merits but contesting the same on limitation.

D.2 On this issue, the Member (Judicial) has given the benefit of limitation on the ground that the issue of substantial amount was decided by the Larger Bench of the Tribunal in Vandana Global Ltd's case which has already been reversed by Hon'ble High Court. Therefore, the invoking the extended period of limitation cannot sustain; accordingly, on this issue, I am of the opinion that the finding of the Member (Judicial) is correct.

E. The fifth issue is whether the Cenvat Credit taken on Weigh Bridges installed outside the factory premises, would be valid or not?

I find that this issue has been considered by the Tribunal in the case of Triveni Engg.& Inds. Ltd vs. CCE, Meerut-II [2014 (303) ELT 129 (Tri. Del.)]. I find that the Member (Judicial) while dealing with this issue, has noted in para 11 of his interim order that "denial of credit on the ground that certain weigh bridges/weigh scales were removed outside factory, hence they were liable to pay the amount of credit availed under Rule 3(5) of the Cenvat Credit Rules." The Member (Judicial) has also observed that "as per the details in the Annexure enclosed with the SCN, the items are not weigh bridges but are weigh scales; it is clear from Annexure-G of the SCN that 9 weigh scales, which were of higher capacity, were installed in the factory itself and balance 41 weigh scales of lower capacity were installed at the

Agriculture Fields to weigh the sugarcane from the farmers during the crushing season; the said weigh scales of smaller capacity are not permanently removed from the Appellant's factory and the issue regarding the eligibility of credit on weigh-scales has been decided in the case of Triveni Engg. & Inds. Ltd. (supra)"; hence, the Member (Judicial) has allowed the credit. I do not find any infirmity in the finding of the Member (Judicial) on this aspect which is based upon the earlier decision of the Tribunal in the case of Triveni Engg. & Inds. Ltd. (supra) and accordingly, I hold the same view.

F. The sixth issue is whether the Cenvat Credit taken on Computers installed in Offices of the party, would be legally correct or not?

I find that this issue is squarely covered by the decision of the Tribunal in the case of Maruti Suzuki Ltd vs. CCE, Gurugram [(2023) 4 Centax 108 (Tri. Chan.)]. By following the said decision, the Member (Judicial) has allowed the credit. I do not find any infirmity in the finding of the Member (Judicial) on this aspect also and accordingly, I hold the same view.

G. The seventh issue is whether the Appellant are liable to pay service tax under reverse charge mechanism on freight amount paid for transportation of sugarcane from cane collection centers to the factory?

I find that both the Members of original bench have allowed the appeal on this issue vide the interim order, therefore, there is no need to give any finding on this issue.

H. The eighth issue is regarding the extended period of limitation.

I find that the Member (Judicial) has held that major amount involved, was earlier decided against the assessee by the Larger Bench in Vandana Global Ltd's case which has already been reversed by Hon'ble High Court of Chhattisgarh; also, the issue relates to interpretation of the same; therefore, the invocation of extended period of limitation was held to be bad as held by the Member (Judicial). Accordingly, on this issue also, I am of the opinion that the finding of the Member (Judicial) is correct.

I. The ninth issue is whether the demand for normal period is sustainable when the extended period of limitation is not invocable?

On this issue, I note that if the SCN was issued invoking the extended period of limitation and subsequently, it was found that invocation of extended period could not sustain then the demand for the normal period also cannot be upheld in view of the judgement of Hon'ble Supreme Court in the case of Collector of C.Ex, Jaipur vs. Alcobex Metals [2003 (153) ELT 241 (SC)] that when the combined SCN is issued for both normal and extended period, and the extended period is not held sustainable then the entire SCN has to be quashed. Similar view has been taken by the Hon'ble Calcutta High Court in the case of Infinity Infotech Parks Ltd vs. UOI [2014 (36) STR 37 (Cal.) as well as by the Tribunal in the cases of Shyam Spectra Pvt Ltd [Final Order No. 56196/2024 dated 31.07.2024] and

R.S. Financial Services [Final Order No. 60489/2024 dated 27.08.2024].

4. As regards penalty under Rule 25 of the Central Excise Rules, I am of the opinion that when the demand is set aside on merit, then the penalty under Rule 25 cannot be upheld and the Member (Judicial) has rightly set aside the same.

5. In view of my above discussion, I am of the considered opinion that the view taken by the Member (Judicial) is justified in law, therefore, I also hold the same view. The view taken by the Member (Technical) is not correct.

6. Now, let the matter be placed before the original Division Bench for drawing majority view.

(Third Member's Order pronounced on 23.12.2025)

Sd/-

(S. S. GARG)
MEMBER (JUDICIAL)

MAJORITY ORDER

In view of the majority order, the appeal is allowed with consequential relief, as per law.

(Order pronounced in open court - **06.01.2026**)

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

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

LKS