

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Appeal No. E/60940/2019**

[Arising out of OIO No. LUD-EXCUS-000-COM-00-07-19-20 dated 12.07.2019  
passed by the Principal Commissioner of CGST, Ludhiana]

**M/s Avon Meters Pvt Ltd.**

**: Appellant (s)**

D-15 D-16 & D-17 Focal Point Industrial Area  
Dera Bassi Sas Nagar, MOHALI, PUNJAB, 140507

Vs

**CCE & ST- Ludhiana**

**: Respondent (s)**

CENTRAL EXCISE HOUSE, F-BLOCK RISHI NAGAR  
LUDHIANA, PUNJAB, 141001

**With**

**Appeal No. E/60997/2019**

[Arising out of OIO No. LUD-EXCUS-000-COM-00-07-19-20 dated 12.07.2019  
passed by the Principal Commissioner of CGST, Ludhiana]

**M/s Nexgen Laminators Pvt Ltd**

**: Appellant (s)**

Bahadurgarh, PATIALA  
PUNJAB, 147021

Vs

**CCE & ST- Ludhiana**

**: Respondent (s)**

CENTRAL EXCISE HOUSE, F-BLOCK RISHI NAGAR  
LUDHIANA, PUNJAB, 141001

**AND**

**Appeal No. E/61016 to 61025,61033-61034,61039-  
61040/2019**

[Arising out of OIO No. LUD-EXCUS-000-COM-00-07-19-20 dated 12.07.2019  
passed by the Principal Commissioner of CGST, Ludhiana]

**Shri Nikhil Goel**

Director M/s Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar  
MOHALI, PUNJAB, 160055

**M/s Nata Devices India Pvt. Ltd.**

113 Dsidc Shed Okhla Phase - I  
NEW DELHI, NEW DELHI, 110020

**Anil Gupta**

Director M/s Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar,  
MOHALI, PUNJAB, 160055

**R N Gupta**

Director M/s Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar,  
MOHALI, PUNJAB, 160055

**Ramesh Sharma Store Incharge**

Ms Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar,  
MOHALI, PUNJAB, 160055

**Natwar Goel**

Director M/s Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar,  
MOHALI, PUNJAB, 160055

**Deepak Agarwal**

Deputy General Manager M/s Avon Meters Pvt Ltd  
D-15 D-16 & D-17 Focal Point Industrial Area Dera Bassi District Sas Nagar,  
MOHALI, PUNJAB, 160055

**M/s D R Polymer Pvt. Ltd.**

71/7 Industrial Area Rama Road  
NEW DELHI, 110015

**M/s Dipika Polymer Pvt. Ltd.**

G-72 Kirti Nagar, NEW DELHI, 110015

**M/s DR International Pvt. Ltd.**

8/42 Industrial Area Kirti Nagar  
NEW DELHI, 110015

**Uflex Ltd.**

A-1 Sector 60 Noida  
NOIDA, UTTAR PRADESH, 201301

**M/s Garware Polyester Ltd.**

At Polyester Chips Film Plant Aurangabad Pune Road  
P O Waluj, AURANGABAD, UTTAR PRADESH, 431133

**M/s Allcon Wires Cable Industries**

27-a Focal Point, RAJPURA, PUNJAB, 140401

**M/s Sampat Polymers Pvt. Ltd.**

283/207 Piau Manihari Narela Road  
Kundli, SONEPAT, HARYANA, 131028

**: Appellant (s)**

Vs

**CCE & ST- Ludhiana**

CENTRAL EXCISE HOUSE, F-BLOCK RISHI NAGAR  
LUDHIANA, PUNJAB, 141001

**: Respondent (s)**

APPEARANCE:

Shri Surjit Bhadu, Shri Vikrant Kackria, Shri Veer Singh, Shri Sunil Arora,  
Shri R.R. Yadav and Ms. Krati Somani, Advocates for the Appellant  
Shri Rajeev Gupta, Shri Vijay Gupta, ARs for the Respondent

**CORAM : HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)**  
**HON'BLE Mr. RAJU, MEMBER (TECHNICAL)**

**ORDER No. A/61086-61101 / 2019**

Date of Hearing:22.10.2019

Date of Decision:03.12.2019

***Per : Mr. Ashok Jindal***

As all the appeals are arising out of a common order, therefore, all the appeals are also disposed of by a common order.

2. The facts of the case are that the main party, namely, M/s Avon Meters Pvt. Ltd. is engaged in the manufacture of Energy Meters and registered with the Central Excise Department. As the appellants are manufacturing excisable product, therefore, they are availing cenvat credit on capital goods, inputs and input services. The appellant is registered since 1996 and regularly filing their statutory returns and regular central excise audit was conducted in their premises. To manufacture of Energy Meters, the appellants are procuring certain inputs and taking cenvat credit thereon. The premises of the appellant was visited by the preventive team of Central Excise Department on 11.02.2015 acting on an information that the appellant were engaged in large scale evasion of central excise duty by fraudulently availing cenvat credit without actual receipt and use of raw materials. During the search, physical verification was stock of inputs as well as finished goods was conducted and as a result of verification of BOPT film (poly film) weighing 6949.900 Kgss was

found short vis-a-vis the recorded balance of 6971.900 Kgs. Records regarding availment of cenvat credit by the appellant as per details mentioned in the panchnama dated 11.02.2015 were taken into possession for scrutiny. Further 25 invoices were recovered from the 'Electronic Store' of the appellant which included 23 invoices, all dated 31.01.2015 issued by M/s Canton Textiles Mills Pvt. Ltd, Ghaziabad alongwith corresponding 'Duplicate for Transporter' copies of invoices issued by M/s Uflex Ltd., Noida, One invoice of M/s Janak Polyfilms, New Delhi alongwith corresponding "Duplicate for Transporter" copy of the invoice issued by M/s Polyplex Corportation, Gaziabad; and one "Duplicate for Transporter" copy of invoice issued by M/s Corrosion Engineers Pvt. Ltd., Ghaziabad. All the said documents were resumed and statement of Shri Ramesh Sharma, In-charge, Electronic Store was recorded wherein he stated that he was in-charge of the 'Electronic Store' and was looking after the work relating to receipt and issuance of materials when questioned regarding non-accountal of materials covered under the aforementioned 25 invoices recovered from 'Electronic Store'. Shri Ramesh Sharm admitted that they had received the invoices only and the materials covered under the said invoices had not been received. The irregularities found during the search of the factory premises of the appellant led to further investigation in the matter and discreet inquiries were conducted from their raw material suppliers, buyers, job workers, transporters and also from the Directors of M/s Avon Meters Pvt. Ltd. Therefore, it was alleged in the show cause notice that from the above facts, it appears that the appellant have fraudulently availed cenvat credit to the tune of Rs. 1,25,72,580/- on electronic parts and batteries without actually

receiving them and without using the same in their factory in the manufacture of their final product and the amount of Cenvat Credit availed fraudulently by the appellant appears to be recoverable from them in terms of Rule 14 of the Cenvat Credit Rules readwith Section 11A of the Act alongwith interest under Section 11AA of the Act and penalty.

3. It was also alleged in the show cause notice as under:-

17. Rule 3 (1) of the CENVAT Credit Rules, 2004 (hereinafter referred to 'the Credit Rules') provides that a manufacturer or producer of final products or a provider of taxable service shall be allowed to take CENVAT credit of various duties of excise/service tax paid on-

- (i) *any input or capital goods received in the factory of manufacturer of final product or premises of the provider of output service on or after the 10th day of September, 2004; and*
- (ii) *any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004.*

17.1 Further, as per sub rule (k) of Rule 2 of the Credit Rules, "input" means-

- (i) *all goods used in the factory by the manufacturer of final product; or*
- (ii) *any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products;*

17.2 As envisaged under Rule 3(1) of the CENVAT Rules, the manufacturer availing CENVAT credit had to ensure that they have taken CENVAT credit on the goods which are actually received by them duly covered by the invoices. Further, the provisions of Rule 9(5) of the Credit Rules, 2004, read as under:-

*"The manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods in which the relevant information regarding the value, duty paid, CENVAT Credit taken and utilized, the person from whom the inputs or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit."*

17.3 In view of the above said legal provisions, the manufacturer can avail CENVAT credit of the duty paid on the inputs only if the same are received and used in the factory of the manufacturer. The notice is engaged in the manufacture of Energy Meters and have been eligible to avail Cenvat credit on the inputs received and used in their factory. However, the investigation so far indicate something else and it appears that the Noticee have been availing cenvat credit on certain goods without receipt and without actual use of the same in their factory. In the proceeding paras, the major inputs on which the notice have taken cenvat credit have been discussed to critically examine their actual receipt and usage and it appears that they availed cenvat credit on certain goods as inputs which have neither been received in the factory of the Notice nor have been used or were required to be used in the manufacture of their final product, by way of indulging in paper transactions only. This conclusion is amply supported by the following among other:

17.4 As has been stated above the party appears to have been fraudulently availing cenvat credit without actually receiving/using the input materials in the factory premises. The suppliers of goods also appeared to have connived with the Noticee and Sh. Nikhil Goel, Director of the Noticee who has been in liaison with them and they have been issuing cenvatable invoices and fabricating transport documents showing movement of the goods on the premises of Noticee's factory. Some of the transporters have also connived with the Noticee and as per tacit understanding with Noticee

these transporters have been handing over blank G.R.s to the Noticee. Therefore, further statements of the concerned persons of the Noticee were to be recorded in view of emergence of new facts. Sh. Jagat Ram, Senior Manager (Production) has been looking after the production of meters on the assembly line. His statement was also required to be recorded manufacturing process and regarding purported use of BOPP film in wrapping the meters. Statement of Sh. Ramesh Sharma Store Incharge was also to be recorded as he had earlier not stated the true facts regarding recovery of invoice from Electronic Store under his charge. But, both these persons did not appear despite repeated summons issued to them. Whenever summons were sent to either of them a standard reply was submitted by the Noticee that the concerned person is on leave. Sh. Nikhil Goel, Director of the Noticee also appears to have stated false facts in his only statement dated 04/06/2015. Sh. Nikhil Goel had inter alia stated that they used to mix blend different types of plastic materials with polycarbonate; that they used to use Polyfilm extensively in wrapping different parts of the meters at each stage and the meters; there was sudden increase in the usage of poly film and during December, 2014 and January, 2015 the usage was shown as 7 to 9 MT per day (and supposedly dumped as scrap in nearby plot) which was earlier not that much and after January the Noticee appears to have received no Poly film as their CENVAT documents for February and March show. The claim of Sh. Nikhil Goel in his statement that they had done dust proofing does not hold true as in February itself 24 invoices of poly film were recovered where poly film had not been received and non receipt was ascribed to some payment dispute and not that the same was no more required. When confronted that no poly film was being used at the time of visit of the Central Excise staff, his plea was that they were forced to run their line cautiously in the absence of poly film at the time of the visit of the staff, that means the same was required as per his version whereas Sh. R. N. Gupta the other Director gave totally different reasons for non-usage of poly film at that time in his statement dated 11.02.2015. Sh. Deepak Agrawal vide his statement dated 07/09/2015 had denied that the dates on invoices recovered from electron store were written by him and similarly Sh. Ramesh Sharma had also stated falsely that the subject invoices were received by couriers and that some boy had left the same on his chair a day ago whereas the dates written on these invoices were of 10 days earlier. However, the report from CFL confirmed that the said dates were written by him only which must have been written him to enable Sh. Ramesh Sharma enter the material on those dates in their tally software. From the fact of availing of Cenvat credit by the Noticee on the basis of an invoices issued by M/s Garware Polyester Ltd., Aurangabad where they were neither buyer nor consignee and where the goods were to be delivered to M/s Aditay Poly Films, New Delhi, it appears that the receipt of the goods was neither a pre-requisite nor a fact to be verified before availing Cenvat credit by the Noticee and only receipt of invoice was sufficient. The investigations at M/s Nexgen Laminators Pvt Ltd., Bahadurgarh Patiala' and 'M/s Alcen Wires & Cables Industries, 27-A, Focal Point, Rajpura' clearly showed how the money in cash was received back by Sh. Nikhil Goel after they had made payments of the fake transactions. In respect of plastic granules, the test reports from CIPET, expert opinion, statements of the job-workers, all clearly indicate that there could be no mixing and the Noticee could use and were using polycarbonate only in the manufacture of the meter body parts. The Investigations done from the transporters have also indicated that the goods were either not transported at all or had been transported upto Delhi only. Sh. Deepak Agrawal, Accountant of the Noticee admitted to have got made entries at the ICCs where incase of plastic granules entries were made on the basis of fake invoices and GRs as for the said goods, there was a provision for payment of advance tax with the Punjab Excise & Taxation Department..

18. From the above, it appears that the Noticee had failed to discharge its statutory duty of proving the admissibility of cenvat credit since the facts on records suggest that the Noticee had indulged in mere paper transactions only, without actual receipt of impugned goods.

19. Thus, from the above facts, it appears that the Noticee have availed inadmissible CENVAT credit fraudulently on impugned goods involving CENVAT credit amounting to Rs.7,84,04,706/- (as per details given in Annexure A,B,C & D) during the period 01/08/2011 to 31/03/2015 as detailed below:

| Sr. No. | Annexure No. | Amount of CENVAT credit (Rs.) |
|---------|--------------|-------------------------------|
| 1       | A            | 2,48,92,889/-                 |
| 2       | B            | 2,43,36,840/-                 |
| 3       | C            | 1,66,02,397/-                 |
| 4       | D            | 1,25,72,580/-                 |
|         | Total        | 7,84,04,706/-                 |

Copies of Cenvat A/c register of (R.G. 23-A Part-II) are attached as **RUD-131**. The cenvat credit of Rs. 7,84,04,706/- appears to have been availed by the Noticee fraudulently without the actual receipt of goods

and usage of the same in contravention of the provisions of Rule 14 of the Cenvat Credit Rules read with section 11A of the Act alongwith interest under section 11AA of the Act.

19.1 As discussed supra, the Noticee appears to have availed the cenvat credit fraudulently and also utilized the same in contravention of the Cenvat Credit Rules, 2004 in collusion with the said purported suppliers/manufacturers of the inputs. Thus, it appears that the purported suppliers of the impugned goods did not supply the goods but they abetted the Noticee in creation of fraudulent documents showing such removal and transport of goods on paper to facilitate the Noticee to avail inadmissible credit fraudulently on fake invoices without actual receipt of the goods. The above facts would not have come to the knowledge of the department had the matter not been investigated by the Hqrs. Preventive staff of Central Excise & Service Tax Commissionerate, Chandigarh-II. It is therefore clear that the Cenvat credit in question has been taken by the Noticee fraudulently, in collusion with the suppliers of the impugned goods and in contravention of various provisions of law with intention to avail inadmissible cenvat credit and thereby reducing their liability towards Central Excise Duty with they otherwise would have discharged from PLA. As such, the extended period in terms of proviso to section 11A appears to be invokable.

19.2 The Noticee have fraudulently availed cenvat credit in collusion with the purported suppliers in contravention of the said provisions; therefore, the Noticee appear to have rendered themselves liable for penal action under Rule 15(2) of the Credit Rules readwith Section 11Ac of the Act.”

Thereafter, the show cause notice issued for disallowance of cenvat credit amounting to Rs. 7,84,04,706/- to the appellant and consequently, the duty demanded alongwith interest and to impose penalty on the co-appellants. The matter was adjudicated, the demand proposed in the show cause notice was confirmed alongwith interest and demand of duty of Rs. 6,27,92,944/- was confirmed alongwith interest and equivalent amount of penalty was imposed and various penalties were imposed on the co-appellants. Against the said order, the appellants are before us.

4. Shri Surjit Bhadu, Advocate appeared on behalf of the M/s Avon Meters Pvt. Ltd. and submits as under:-

- i. The demand in the present case was raised vide Show Cause Notice dated 30.08.2016 in respect of below mentioned four commodities : -
  - a) Plastic granules other than polycarbonate
  - b) Polyfilm
  - c) Electric Wires and Cable
  - d) Electronic component and accessories

- ii. The demand is raised on the allegation that the noticee has fraudulently availed Cenvat Credit without actual receipt / raw material, thus, the entire case of the revenue in Show Cause Notice was that the noticee / appellant did not receive the raw material in question at all. **The case of revenue is of complete non-receipt of material. The Revenue's case is not shortage of material.**

**PLASTIC GRANULES OTHER THAN POLYCARBONATE**

- iii. The appellant is engaged in manufacture of electrical energy meters and for manufacturing various meter parts, the plastic granules are used for making moulded parts of the meter. During the relevant period the appellant purchased various plastic granules i.e. polycarbonate, ABS, polypropylene, PS, PE, PMMA etc. which were received in factory of the appellant and were used in manufacture of dutiable goods i.e. electric meters. The revenue in the Show Cause Notice has not disputed the use of polycarbonate by the appellant and thus the cenvat involved in the said goods is also not disputed. However, the revenue has sought to deny Cenvat Credit on all other plastic granules on the allegation of non-receipt and non-use of the said plastic granules.
- iv. The appellant has purchased the plastic granules from three suppliers namely M/s D.R. International (P) Ltd., M/s D.R. Polymers Ltd., M/s Dipika Polymers (P) Ltd.

**NON-RECEIPT**

The allegation of non-receipt of plastic granules is raised solely on the basis of statement of one transporter namely Shri Surinder Singh of M/s Nice Carrier and three other truck owners (who only transported one consignment each).

In this regard, it is submitted as under: -

- The statements recorded of Shri Surinder Singh and three other truck owners have not passed the test of Section 9D and the Adjudicating Authority has failed to examine the said persons and to complete the requirements of Section 9D.
- The Adjudicating Authority did not allow the cross-examination of the said witnesses rather, specifically rejected the request of cross. Thus, in terms of judgment of Hon'ble Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE, Kolkata-II - 2015 (324) ELT 641 (S.C.), the Order in Original becomes a nullity and statement cannot be relied upon.
- In any case, Shri Surinder Singh specifically stated that he never issued GR without accompanying vehicle and also stated that extra GRs were given by him to his driver only. Extra GR was to accommodate extra weight of goods if the truck was overloaded.
- The bandibook (day book) shown to be resumed by investigation team from M/s Nice Carrier on 30.11.2015 was not made RUD to Show Cause Notice.
- No Show Cause Notice of penalty was issued to M/s Nice Carrier. If it is case of wrongful credit then, the nice Carrier must have been an abetter.

- Shri Surinder Singh never stated that he did not transport plastic granules other than polycarbonate.
- The appellant has paid Service Tax on reverse charge basis under Section 68(2) of Finance Act, 1994 under the category of GTA on the freight paid for transportation of entire quantity of plastic granules. Such service tax payment is not disputed by the revenue.
- It is admitted fact by revenue that the transactions of purchase of plastic granules by appellant were recorded at Information Collection Centre (ICC) established by Punjab Government as per the Show Cause Notice.
- It is also not disputed by the revenue that on entire purchase of plastic granule, the appellant deposited advance / entry tax @ 8% to the credit of Punjab VAT department.
- The revenue did not make any enquiry at the end of suppliers of plastic granules and no statement was recorded of suppliers.
- The suppliers in their reply to Show Cause Notice has categorically confirmed the actual supply of goods to the appellant.
- The goods were duly recorded in the statutory records of the appellant.
- Despite of repeated and numerous statements of different officials of the Appellant, there is no inculpatory statement. Rather, the officials of the Appellant every time confirmed the receipt of the impugned Inputs.

- There is no proof or investigation of diversion of impugned goods from the suppliers premises to 3<sup>rd</sup> party buyers
- No such investigation or proof of Exchange of money in cash to Supplier from 3<sup>rd</sup> party buyers
- No investigation for return of any cash by supplier to Appellant. The Appellant has made all payments to the suppliers of the impugned goods through banking channel.No discrepancy in cash book was found.
- No investigation on any alternate inputs procurement by the Appellant. During the visit, no inputs were found in excess.
- The panchnama clearly shows that the stock of one of the disputed inputs i.e. ABS was available and was verified by the visiting staff which was matching with the recorded balance. This demolishes the case of Revenue alleging complete non-receipt.

#### NON-USE OF PLASTIC GRANULES IN MANUFACTURE

- v. The Show Cause Notice also alleged that the appellant could not have used any plastic granules other than polycarbonate / engineering plastic of equivalent material for manufacture of body parts of meter. Relevant part of Para 16.1.1 of Show Cause Notice is reproduced as under: -

"16.1.1 As enumerated above, the purchase orders **do not allow use of any materials other than Polycarbonate/Engineering Plastic of Equivalent materials for manufacture of the body parts** (i.e., meter base, meter cover, terminal block and terminal

*cover) of the Energy Meters being manufactured and supplied by the Noticee. Polycarbonate has its specific qualities such as high melting point, structural stability in extreme conditions, and fire retardant.”*

vi. **Firstly,** it is submitted that as per Show Cause Notice itself, the appellant was permitted to use polycarbonate as well as other engineering plastics. However, in the Order in Original the Adjudicating Authority travelled beyond the Show Cause Notice to hold that the Appellant could have only used polycarbonate and no other plastic granule. Thus, on this ground itself, the Order in Original is liable to be set aside.

vii. With regard to use of the plastic granules other than polycarbonate in manufacture of final produce it is submitted as under: -

- In the present case, no verification of manufacturing plant and its capacity of manufacture was done by the department. No expert report of capacity of the plant / lab to achieve the manufacturing claimed by the Appellant since beginning, was done by the department.
- There is no verification of the process of manufacture adopted by the Appellant by any agency.
- In the present case, although the revenue has alleged that a huge quantity of the plastic granules other than polycarbonate was not used in manufacture of final product i.e. electric meters, however, at the same time there is no investigation or evidence to show how the final products

(more than 57 Lakhs electric meters) are manufactured, if disputed inputs were not used. The revenue has received excise duty on final products and their quantity is not disputed as the same are supplied to Government Departments.

- During the second visit on 16.02.2015, the visiting staff made weighment of some meter parts and other items to verify the consumption of the inputs vis-à-vis the final product manufactured by the Appellant, however, after a formality of weighment of some parts, neither any further investigation is done, nor it is relied upon in the Show Cause Notice or impugned order. In fact, the revenue had found out that the quantity final product manufactured by the Appellant could not be manufactured if the disputed inputs are alleged to be not used by the Appellant, therefore, they knowingly left out that side of investigation.
- The revenue took 8 samples of final products from the buyers of the Appellant. Out of these samples, 6 meters were supplied by the Appellant after 11.02.2015 i.e. (date of visit), thus, was supplied after relevant period and were not valid samples. Thus, revenue is left with only 2 valid samples. **It is not disputed in the Order in Original that the Appellant has cleared 57,76,551 numbers of meters to 121 different buyers.** In such a case, mere two meters as samples that too from a single buyer cannot be called as proper sampling.

- One option regarding blending plastic granule (Internal Page 19 of Order in Original) is alleged to be taken from Manager CIPET Chennai. The report states that it is difficult to mix the plastic granules to achieve the blend. It also states that the blend can be achieved after adding additive compatibilizers to the mixture. Thus, report supports case of the Appellant.
- The Appellant submitted test reports of CIPET Chennai which shows that the meter parts were manufactured out of blend of Poly carbonate and other plastic granules. The Appellant also submitted samples to the Adjudicating Authority and requested the Adjudicating Authority to get the samples tested from lab of his choice to verify the contents of the samples. The Adjudicating Authority did not get the tests done, thus, the reports submitted by the Appellant should have been accepted.
- The Appellant took a stand that the recorded receipt of other plastic granules have been actually used in manufacture of meters/final products. In some cases the meter parts were manufactured out of only polycarbonate and in some cases the parts were manufactured out of other equivalent plastic granules. There is no visible difference in the parts manufactured out of polycarbonate and that of other plastic granules. Thus, some of the parts manufactured out of other plastic granules were mixed with parts manufactured out of polycarbonate and the meters were supplied. The Appellant shown it practically to Adjudicating Authority with samples stating that with human eye no distinction can be made

between two types of parts. The samples were also produced during hearing before this Hon'ble Tribunal.

- That vide issuing Show Cause Notice the authorities have only considered four parts of the meter namely meter base, base cover, terminal block and terminal cover but has completely ignored other essential parts such as meter seals, meter switches, wires and cable glands and meter box which are manufactured by the appellant using all types of plastic granules and this fact was specifically stated in the statement of Shri Nikhil Goel in his statement dated 04.06.2015. While dealing with this submission the Adjudicating Authority admitted that the meter seals, meter switches, wires and cable glands constitute only 2 to 5% by weight of the meter base, meter cover, terminal base and terminal cover. Thus, the Adjudicating Authority itself broke the presumption of the Show Cause Notice that no plastic granules other than polycarbonate were at all received.
- The Adjudicating Authority wrongly held that the meter box are nothing but meter cover. Infact, meter box is altogether different item which consumes substantial plastic granules and the same has not at all been considered in the Show Cause Notice or the Order in Original.

### **POLYFILM**

- viii. The Cenvat Credit on polyfilm is denied to the appellant on the allegation that the polyfilm was not at all physically received in the factory of the appellant and the appellant was taken Cenvat

Credit fraudulently on only invoices. It is also alleged that the polyfilm has not been used by the appellant in manufacture of electric meters.

- ix. In this regard, it is primarily submitted that during the surprise visit of the department on 11.02.2015 in factory of the appellant, the stock of 22Kgs of polyfilm was physically available in the factory. Therefore, the presumption of complete paper transaction and very basis of the present proceedings is wrong and incorrect. The availability of polyfilm clearly shows that the appellant was actually receiving polyfilm and the transaction was not merely a paper transaction.
- x. The case of revenue is not of shortage of polyfilm but the case of revenue is paper transaction and the entire credit availed by appellant during 4 years was denied. The availability of polyfilm during surprise check demolishes the case of revenue.
- xi. With regard to non-receipt of the polyfilm, the appellant submits as under: -
- The onus to prove non-use of the polyfilm was on the revenue. There is no evidence with regard to non-use of the polyfilm.
  - **No investigation has been done with regard to use of polyfilm in the manner explained by the Appellant in its statement to find out how much polyfilm could be used in the process explained by the Appellant.**
  - The sellers of the appellant in this case has categorically confirmed that the goods were physically supplied to the

Appellant. One of the suppliers M/s Nexgen was although made to give inculpatory statement during investigation whose cross examination was not granted, however, in his reply to the Show Cause Notice he specifically confirmed the supply of goods.

- No enquiry / investigation was made at the end of any manufacturer of the polyfilm (other than M/s Jindal and M/s Garware) or at two of the dealers namely M/s Ricoh plast and M/s Polyplex
- With regard to the extensive allegations relating to M/s Garware Polyester Ltd. and M/s Jindal Polyfilm Ltd., it is submitted that the appellant did not purchase even a single gram of polyfilm from these parties rather the material was purchased from three un-registered dealers namely Shruti Polyfilm, N.K. Polyfoir Traders Pvt. Ltd. and Aditya Polyfilms. The said dealers were controlled by Shri Amit Aggarwal who clearly stated in his statement dated 10.12.2015 that the goods were physically supplied to the appellant.**No Show Cause Notice has been issued to the said three traders who arranged and sold polyfilm to the appellant.**In such a case, no demand can be raised in respect of such supplies.
- The purchase of polyfilm was on FOR basis to the factory of appellant and in all the invoices, the consignee is shown factory of the appellant.
- All the purchases was made against C-Forms issued by the Punjab VAT Department. The C forms are discharged only after the purchase inputs are validly used in manufacture of

taxable goods. The Order in Original duly notes the contention of the appellant, however, nothing is brought on record to show the misuse of C forms.

- The Adjudicating Authority did not allow the cross-examination of the witnesses including transporters whose statements are relied upon for denying Cenvat Credit on polyfilm, rather, specifically rejected the request of cross-examination. Thus, in terms of judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE, Kolkata-II - 2015 (324) ELT 641 (S.C.), the Order in Original becomes a nullity and statement cannot be relied upon.
- Despite of repeated and numerous statements of different officials of the Appellant, there is no inculpatory statement. Rather, the officials of the Appellant every time confirmed the receipt of the polyfilm.
- There is no investigation or evidence to the effect that the impugned goods were supplied to some 3<sup>rd</sup> party buyer and only invoices were supplied to the Appellant. Sale of polyfilm by the supplier is not disputed by revenue.
- No investigation for return of any cash by supplier to Appellant. The Appellant has made all payments to the suppliers of the impugned goods through banking channel. No cash was resumed during the various visits to appellant or at premises of the sellers. No difference in cash book was found in respect of any party.

- The Appellant has duly recorded the entire quantity of disputed goods in their statutory records which is not disputed by the Revenue.
- In the present case, no verification of manufacturing/assembly lines was done by the department. No expert report was obtained of the functioning of the plant to achieve the manufacturing process claimed by the Appellant since beginning of investigations.
- There is no verification of the process of manufacture adopted by the Appellant by any agency. Bald allegations have been made to state that there was no requirement of use of polyfilm in the manufacturing process.
- No verification of quantity of polyfilm used/useable was done by the revenue despite of various visits. The Revenue stuck to the point that there was no purpose of using polyfilm in relation to manufacture of final product. **Thus, there is no case of revenue that there was excessive use than required.**
- The Appellant took a stand that during the process of manufacture, the meters are assembled on assembly lines which were manual at that point in time and the meter parts were pushed from one table to other and used to be stacked in racks after moulding. In such process, to avoid scratches on the parts of meters, the polyfilm was used for wrapping the same at every stage of manufacturing as explained in detail by Director of the Noticee in his statement dated

04.06.2015. This also saved the accumulation of dust moisture etc. The scratched components were rejected in past by the buyers as it looked second hand / reused which was a larger cost than polyfilm, therefore, to avoid the rejection and to maintain good track record the appellant decided to use the polyfilm albeit the cost.

- xii. In the Show Cause Notice and order lot of stress has been given on the 25 Invoices whose copies were found in the factory, however, the goods covered by said invoices were not received. In this regard, it is **firstly** submitted that the appellant has not taken Cenvat Credit on the said invoices, therefore, there is no effect of such invoices on the present matter. **Secondly**, even in relation to conduct of appellant, all the invoices in the matter were issued between 20.01.2015 to 31.01.2015 and had been received by the appellant immediately. The visit of the Central Excise department was on 11.02.2015. If the appellant was in practice of availing credit without receipt of goods, they would not have waited for 20 days before taking credit, especially when they could have taken the credit in January 2015 and could have used the credit on 10<sup>th</sup> of February.

**WIRES AND CABLES**

- xiii. In the Show Cause Notice, denial of Cenvat Credit was proposed for the amount of Rs. 1,66,02,397/-, however, the demand of Rs. 1,22,32,390/- was dropped by the Adjudicating Authority in relation to 3 suppliers namely Goyal Electric Company, M/s KEI Industries and M/s Saurabh Sagar Enterprises. At the same

time, demand of Rs. 43,70,007 was confirmed on the wires and cables supplied by M/s Alcon Wires and Cables Industries. Penalty has been imposed on the Supplier under Rule 26 has been imposed vide the impugned order.

- xiv. The main allegation for denial of Cenvat Credit on wires and cables supplied by M/s Alcon Wires is that the same have not been used in or in relation to manufacture of meter parts, In nutshell, it is concluded that for such wires and cables, only invoices are received but goods are not received.
- xv. At the outset, it is submitted that since the Cenvat Credit on the identical goods have been allowed in respect of above three suppliers, there remains no dispute that the wires and cables in question are inputs for the appellant.
- xvi. The demand has been confirmed solely on the basis of statements of partner / employees of M/s Alcon Wires. **Firstly**, the all four persons retracted from their statements immediately stating that the statements were forcibly taken by the visiting staff. **Secondly**, The Adjudicating Authority did not allow the cross-examination of the said witnesses rather, specifically rejected the request of cross. Thus, in terms of judgment of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CCE, Kolkata-II - 2015 (324) ELT 641 (S.C.), the Order in Original becomes a nullity and statement cannot be relied upon.
- xvii. That the purchases made by the appellant were duly reported at Information Collection Centre (ICC) maintained by Punjab

Government. The appellant has placed on record 45 invoices out of total 60 invoices showing ICC receipt / acknowledgment.

- xviii. The supplier M/s Alcon Wires in their reply to Show Cause Notice categorically stated that their statements were forcibly taken and the material was actually supplied by them to the appellant. They alongwith their appeal before this Hon'ble Tribunal have also filed duly sworn affidavit of the transporter to state that the goods were physically transported by the transporter from M/s Alcon Wire to the factory of appellant.

**ELECTRONIC COMPONENTS AND ACCESSORIES**

- xix. That in the Show Cause Notice, the denial of Cenvat Credit was proposed for the amount of Rs. 1,25,72,580/-, however, the demand of Rs. 33,79,372/- was dropped by the Adjudicating Authority in relation 3 suppliers namely M/s Team Tech Electronics Ltd., M/s Rabyte Electronics and M/s Analogics Tech India Ltd.
- xx. At the same time, demand of Rs. 91,93,208/- was confirmed on the electronic components and accessories supplied by M/s Nata Devices India Pvt. Ltd. (Nata Devices). The main allegation for denial of Cenvat Credit on electronic components and accessories supplied by M/s Nata Devices is that the same have not been received by the appellant in their factory in or in relation to manufacture of meter parts, In nutshell, it is concluded that for such electronic components and accessories, only invoices are received but goods are not received.

- xxi. At the outset, it is submitted that since the Cenvat Credit on the identical goods have been allowed in respect of above three suppliers, there remains no dispute that the electronic components and accessories in question are inputs for the appellant.
- xxii. That the supplier M/s Nata Devices duly confirmed that the goods were physically supplied to the appellant. The payments of the impugned goods are made through banking channel and it is also admitted fact in the Show Cause Notice that many of the invoices were found entered in ICC data.
- xxiii. Largely, the demand has been raised on the basis of statement of transporter in respect of very a few LR's and due to the reason that on some of the LR's the invoice of M/s Nata Devices were entered at S.No. 2 or with a different pen / handwriting. In this regard, it is submitted that no cross examination was allowed for the transporter/other persons, thus, the statement is inadmissible in evidence. The revenue has constructed its case merely on clerical issues in the transport document and there is no tangible evidence to deny the Cenvat Credit.
- xxiv. The premises of M/s Nata was visited by central excise Delhi and their entire record was verified wherein no discrepancy was found when compared with physical stock and recorded balance. M/s Nata specifically confirmed sale and supply of material to the Appellant since past 15 years and confirmed that the payments were received through banking channel. Huge amount of records was resumed by central excise Delhi including all invoices issued to the Appellant in period of 3 years but no

discrepancy was found and no such documents are relied upon in the Show Cause Notice for demand.

xxv. Further, there is no legal provision to make GR invalid, if, some entry is made by a different handwriting and others are made in different one while filling up GR. The said entry has been found mentioned at ICC data showing actual transport of goods. In fact, it is the case of Appellant that the electronic component supplied by M/s Nata were small items and the contract also was not on FOR basis, therefore, one Mr. Rakesh Kumar was authorized by Appellant to received the goods in capacity of agent from M/s Nata and load the same in a truck which is already transporting other goods to the Appellant because it is not advisable to hire independent truck for a small load. The fact of small consignment is confirmed by statement of Shri Rajesh Nakra dated 22.02.2016 wherein he stated that they supply their goods in NCR/Delhi on motorcycle and Innova. The said person Mr. Rakesh Kumar used to add the said material to the truck and made the transport arrangement as per his wisdom, under authority of Appellant. The entry in GR may have been made either by driver or by some persons of transporter who were present at the time of loading consignment of M/s Nata. As the such truck would be already loaded with some other material of another supplier of the Appellant, the first name remains in the name of supplies whose material is already loaded in truck and accordingly, the entry in ICC and / or in freight account of Appellant was made. Such an

arrangement was though beneficial for the Appellant in commercial terms, however, is not to prejudice of revenue as there was no violation of law or tax evasion.

- xxvi. The revenue has not discharged its onus to prove that the material was not actually received by the appellant. There is no tests or expert report or any other finding to the effect that the electronic components and accessories supplied by M/s NATA devices were not used OR could not be used, in manufacture of the final products of the Appellant.

In view of the above it is prayed that the impugned Order in Original No. LUD-EXCUS-000-COM-00-07-19-20 dated 12.07.2019 may be set aside to the extent it is prejudicial to the appellant and set aside the demand of Cenvat Credit and penalties confirmed vide the impugned Order.

5. Shri Vikrant Kackria, Advocate on behalf of the M/s Nexgen Laminators Private Limited the issue relates to imposition of penalty on the appellant under Rule 26(2) of the Central Excise Rules, 2002 is also been imposed on the appellants and submits as under;-

That the issue relates to imposition of penalty on the appellant under Rule 26(2) of the Central Excise Rules, 2002 on the grounds that the appellant had not actually supplied the material but had only issued the invoices for wrongful passing on of Cenvat Credit.

**SUBMISSION IN DEFENCE**

- i. That the appellant had categorically pleaded that there is no evidence other than the dictated statement of the director

recorded forcibly by the department which stands retracted in the reply filed by the appellant. There is no other evidence like any statement of the driver, transporter to support the stand that the goods have not been actually supplied to M/s Avon Meters Pvt. Ltd. It is to be mentioned that the appellant had enclosed the copy of the ledger account and other documents which have not been rebutted by the Adjudicating Authority in the impugned order. There is not even a single finding regarding the role played by the appellant and the reason for the imposition of the penalty on the appellant in the impugned order. In the absence of any reasons no penalty can be imposed on the appellant when there is no finding by the Adjudicating Authority with respect to non-supply of the goods by the appellant.

- ii. Further it is to be mentioned that the penalty has been imposed under Rule 26(2) of the Central Excise Rules, on the company which is not legally imposable as Rule 26(2) provides for the imposition of penalty on a person. The said view has been upheld by the Larger Bench of the Tribunal in the case of **M/s Steel Tubes of India Ltd. Versus Commissioner of Central Excise, Indore reported as 2007 (217) E.L.T. 506 Tribunal (L.B.)**. The said decision has been followed in the following cases:-

(1) ***Homage India Ltd. Versus Commissioner of Central Excise and Service Tax and Custom, Bangalore reported as 2017 (356) E.L.T. 119 (Tri.)***

**(2) *Apple Sponge and Power Ltd. Versus  
Commissioner of Service Tax, Audit-III reported  
as 2018 (362) E.L.T. 894 (Tri.)***

It is further to be mentioned in this context that even otherwise there is no provisions in the Central Excise Act, for the imposition of penalty for merely issuing of invoices without actual supply of material. The act does not prescribe the imposition of penalty for such an offence. Even though the appellant are taking categoric stand that they have actually supplied the goods yet it is to be mentioned that in the absence of any provisions in the Act for imposition of penalty for mere issuance of invoices without actual supply of material, the penalty cannot be imposed under Rule 26(2) of the Central Excise Rules. Rules cannot override the provisions of the Act. Rules 26(2) has been incorporation in the Central Excise Rules in terms of Section 37 of the Central Excise Rules Act, 1944 which is reproduced hereunder:-

***Section 37. Power of Central Government to make rules:-***

*[\(1\)](#) The Central Government may make rules to carry into effect the purposes of this Act.*

*[\(2\)](#) In particular, and without prejudice to the generality of the foregoing power, such rules may—*

*[\[\(i\)](#) provide for determining under section 4 the nearest ascertainable equivalent of the normal price;*

*[\(ia\)](#) having regard to the normal practice of the wholesale trade, define or specify the kinds of trade discount to be excluded from the value under section 4 including the circumstances in which and the conditions subject to which such discount is to be so excluded;]*

*[\[\(ib\)](#) ] provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of*

*notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;*

*[([ibb](#)) provide for charging or payment of interest on the differential amount of duty which becomes payable or refundable upon finalization of all or any class of provisional assessments.]*

*[([ic](#)) provide for the remission of duty of excise leviable on any excisable goods, which due to any natural cause are found to be deficient in quantity, the limit or limits of percentage beyond which no such remission shall be allowed and the different limit or limits of percentage for different varieties of the same excisable goods or for different areas or for different seasons;]*

*[([id](#)) provide for the amount to be paid<sup>267</sup> [for compounding and the manner of compounding] under sub-section (2) of section 9A;]*

*([ii](#)) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;*

*([iii](#)) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, [\*\*\*] the transit of excisable goods from any part of [India] to any other part thereof;*

*([iv](#)) regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the*

*premises of a [registered] person, or a bonded warehouse, or to a market;*

*(v) regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, or of any component parts or ingredients or containers thereof;*

*(vi) provide for the employment of officers of the Government to supervise the carrying out of any rules made under this Act;*

*(vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;*

*(viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;*

*(ix) provide for the distinguishing of goods which have been<sup>271</sup> [manufactured after registration], of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;*

*(x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and*

*returns, the particulars to be contained therein, and the manner in which they shall be verified;*

*[\(xi\)](#) require that excisable goods shall not be sold or offered or kept for sale in [India] except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;*

*[\(xii\)](#) provide for the issue of [registration certificates] and transport permits and the fees, if any, to be charged therefore:*

***Provided*** *that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—*

*[\(xiii\)](#) provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connection with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated;*

*[\[\(xiiia\)](#) provide for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on manufacturer or exporter or suspension of registration of dealer, for dealing with evasion of duty or misuse of CENVAT credit;]*

*[\(xiv\)](#) authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;*

[\(xv\)](#) *authorise and regulate the composition of offences against, or liabilities incurred under this Act or the rules made thereunder;*

[\(xvi\)](#) *provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India<sup>275</sup> [including interest thereon]; [\*\*\*]*

*[[\(xvia\)](#) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods;]*

*[[\(xviaa\)](#) provide for credit of service tax leviable under Chapter V of the Finance Act, 1994 (32 of 1994), paid or payable on taxable services used in, or in relation to, the manufacture of excisable goods;]*

*[[\(xvib\)](#) provide for the giving of credit of sums of money with respect to raw materials used in the manufacture of excisable goods;]*

*[[\(xvic\)](#) provide for charging and payment of interest as the case may be, on credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods where such credit is varied subsequently;]*

[\(xvii\)](#) *exempt any goods from the whole or any part of the duty imposed by this Act;*

*[[\(xviiia\)](#) provide incentives for increased production or manufacture of any goods by way of remission of, or any concession with respect to, duty payable under this Act;]*

[\(xviii\)](#) *define an area no point in which shall be more than one hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;*

[\(xix\)](#) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;

[\(xx\)](#) authorize the [Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] or<sup>283</sup> [Commissioners of Central Excise] appointed for the purposes of this Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section;

[\[\(xxi\)\]](#) provide for the publication, subject to such conditions as may be specified therein, of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or of any rule made thereunder;]

[\[\(xxii\)\]](#) provide for the charging of fees for the examination of excisable goods intended for export out of India and for rendering any other service by a Central Excise Officer under this Act or the rules made thereunder.]

[\[\(xxiii\)\]](#) specify the<sup>287</sup> [form and manner] in which application for refund shall be made under section 11B;

[\[\(xxiv\)\]](#) provide for the manner in which money is to be credited to the Fund;]

[\[\(xxv\)\]](#) provide for the manner in which the Fund shall be utilised for the welfare of the consumers;]

[\[\(xxvi\)\]](#) specify the form in which the account and records relating to the Fund shall be maintained;]

[\[\(xxvii\)\]](#) specify the persons who shall get themselves registered under section 6 and the manner of their registration.]

[\[\(xxviii\)\]](#) provide for the lapsing of credit of duty lying unutilised with the manufacturer of specified excisable goods on an appointed date and also for

*not allowing such credit to be utilised for payment of any kind of duty on any excisable goods on and from such date.]*

*[(2A) The power to make rules conferred by clause (xvi) of sub-section (2) shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs.]*

*(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding<sup>291</sup> [five thousand rupees].*

*[(4) Notwithstanding anything contained in sub-section (3), and without prejudice to the provisions of section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse—*  
*(a) removes any excisable goods in contravention of the provisions of any such rule, or*

*(b) does not account for all such goods manufactured, produced or stored by him, or*

*(c) engages in the manufacture, production or storage of such goods without having applied for the [registration as] required under section 6, or*

*[(d) contravenes the provisions of any such rule with intent to evade payment of duty, then all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or [two thousand rupees], whichever is greater.]*

*This Act has been applied to— "(1) The Central Government may make rules, including rules conferring the power to issue notifications with*

*retrospective effect under those rules, to carry into effect the purposes of this Act.”. Note. — Amendment made to sub-section (1) shall be in addition to, and not in derogation of, the provisions of section 4. Vide The Central Excise Laws (Amendment and Validation) Ordinance, 2005 (1 of 2005), sec. 2 (w.e.f. 25-1-2005).*

*[(5) Notwithstanding anything contained in sub-section (3), the Central Government may make rules to provide for the imposition upon any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or the rules made thereunder, a penalty [not exceeding the duty leviable on such goods or [two thousand rupees], whichever is greater].*

It is to be mentioned that even otherwise Rule 26(2) of the Central Excise Rules, is ultravires of the Central Excise Act, 1944. The Tribunal can even hold that the provisions of Rules is ultravires of the Act as the Tribunal is constituted under Article 320-B of the Constitution of India and possess the powers to hold ultravires the provisions of delegated rules if they are not in conformity with the provisions of the Act this view has been held by the Hon’ble Tribunal in the case of **M/s Mitra Steel & Alloys Pvt. Ltd. Vs. Commissioner of Central Excise, Raigarh reported as 2016 (204) 144 E.L.T. (Tri)**. Thus in view of the above, Rule 26(2) does not have any legal backing thus the same merits to be declared ultravires by this Hon’ble Tribunal. Even otherwise also since this

provision is ultravires of the Act thus the penalty cannot be imposed on the appellant under the said rules.

None of the sections of the Central Excise Act, 1944 provide for imposition of penalty for such an offence and hence the rules which are a creature of the statute cannot override act itself. Thus in the absence of provisions in the Act for imposition of penalty of the said offence, the penalty cannot be imposed under the said rules as the said rules would be beyond the legislative competence. Thus in the absence of any provisions in the Act for imposition of penalty for mere issuance of invoices, the penalty cannot be imposed on the appellant.

6. On the other hand, the Ld. AR draw our attention to the impugned order as well as the show cause notice to rely that on various statements recorded during the course of investigation of drivers, various suppliers, transporters and buyers which revealed that the appellant has not received the inputs in question in the factory premises and it was a mere paper transaction, therefore, they are not entitled to avail cenvat credit.

7. Heard the parties and considered the submissions.

8. Form the above submissions and facts placed before us, the sole issue arises, (i) whether the appellant M/s Avon Meters Pvt. Ltd. is entitled for cenvat credit which has been denied by the Ld. Commissioner alleging that it was mere a paper transaction or not?, and (ii) Whether the penalty under Rule 26 of Central Excise Rules can be imposed on the co-appellants or not?

**Issue No. 1**

In this case, the intelligence was gathered by the Revenue that the appellant is availing cenvat credit on the inputs in question without receiving in their factory and there are not input, therefore, the investigation was conducted. During the course of investigation, the stock taking was conducted and on verification of the stock on the date of investigation. The stock of the following goods were found are as under:-

**Stock verification at the premises of M/s Avon Meters Pvt. Ltd., Derabassi**

**Stock Verified(Electrical) from stock summary upto 11 Feb., 2015**

| Sr. No. | Name of Goods                          | Quantity as per records of the Party | Quantity as per physical verification | Remarks  |
|---------|----------------------------------------|--------------------------------------|---------------------------------------|----------|
| 1       | 3 V Coin Cell Penasonic/Maxell CR-2032 | 927900                               | 927900                                | Verified |
| 2       | Bare PCB-AV-315                        | 84840                                | 84840                                 | Verified |
| 3       | Cap TANT 22uf                          | 874834                               | 874834                                | Verified |
| 4       | Hall Sensor AH 180 3 PIN               | 457724                               | 457724                                | Verified |
| 5       | HCPL-817-50AE / H11A817A3SD            | 145932                               | 145932                                | Verified |
| 6       | IC ADE 7758                            | 3504                                 | 3504                                  | Verified |
| 7       | IR333/ HO-A 5 MM                       | 318990                               | 318990                                | Verified |
| 8       | LCD GLASS AV-286622 R-O                | 75146                                | 75146                                 | Verified |
| 9       | LED 5MM, RED                           | 349478                               | 349478                                | Verified |
| 10      | LED BASE 12 MM (GRAY)                  | 115631                               | 115631                                | Verified |
| 11      | Poly carbonate ABS Grey                | 475 KG                               | 475 KG                                | Verified |
| 12      | Poly carbonate Grey                    | 1625 KG                              | 1625 KG                               | Verified |
| 13      | Poly carbonate Grey HD                 | 25 KG                                | 25 KG                                 | Verified |
| 14      | Poly carbonate P/C Black               | 3900 KG                              | 3900 KG                               | Verified |

*[Signature]*  
Inspector (Central Excise)

*[Signature]*  
Party (Signature)

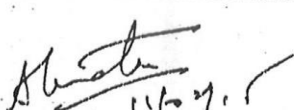
**For AVON METERS P. LTD.**

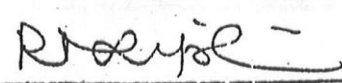
**Director**

## Stock verification at the premises of M/s Avon Meters.Pvt. Ltd., Derabassi

Stock Verified(Mechanical) from stock summery upto 11 Feb., 2015

| Sr. No. | Name of Goods                 | Quantity as per records of the Party | Quantity as per physical verification | Remarks         |
|---------|-------------------------------|--------------------------------------|---------------------------------------|-----------------|
| 1       | Aluminum Seal with hole       | 18001                                | 18001                                 | Verified        |
| 2       | Brass Screw M 4*7 Cheese Head | 2125985                              | 2125985                               | Verified        |
| 3       | Brass Screw M 4* 48 4 Hole    | 544366                               | 544366                                | Verified        |
| 4       | Brass Sealing Screw M 4*20    | 1782305                              | 1782305                               | Verified        |
| 5       | Cap Bearing                   | 3000                                 | 3000                                  | Verified        |
| 6       | Core                          | 500                                  | 500                                   | Verified        |
| 7       | Meter base Neo Gray           | 39930                                | 39930                                 | Verified        |
| 8       | Nut M 5                       | 5000                                 | 5000                                  | Verified        |
| 9       | Screw M 5*10 MM               | 5732                                 | 5732                                  | Verified        |
| 10      | Sliding Link Outer            | 5500                                 | 5500                                  | Verified        |
| 11      | Washer 4.00 MM MS             | 491000                               | 491000                                | Verified        |
| 12      | DOPET Films                   | 6971.900 KG                          | 22.00 Kg                              | 6949.9 KG Short |

  
Inspector (Central Excise)

  
Party (Signature)

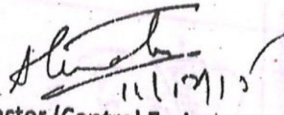
For AVON METERS 11/2/15

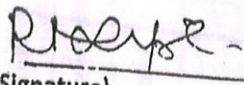
Director

## Stock verification at the premises of M/s Avon Meters Pvt. Ltd., Derabassi

Stock Verified(Finished Product) from stock summary upto 11 Feb., 2015

| Sr. No. | Name of Goods  | Quantity as per records of the Party | Quantity as per physical verification | Remarks  |
|---------|----------------|--------------------------------------|---------------------------------------|----------|
| 1       | Finished Goods | 9950                                 | 9950                                  | Verified |
| 2       | Coded          | 20000                                | 20000                                 | Verified |
| 3       | Finished Goods | 84                                   | 34                                    | Verified |
| 4       | Finished Goods | 540                                  | 540                                   | Verified |
| 5       | Finished Goods | 520                                  | 520                                   | Verified |
| 6       | Finished Goods | 1016                                 | 1016                                  | Verified |

  
Inspector (Central Excise)

  
Party (Signature)

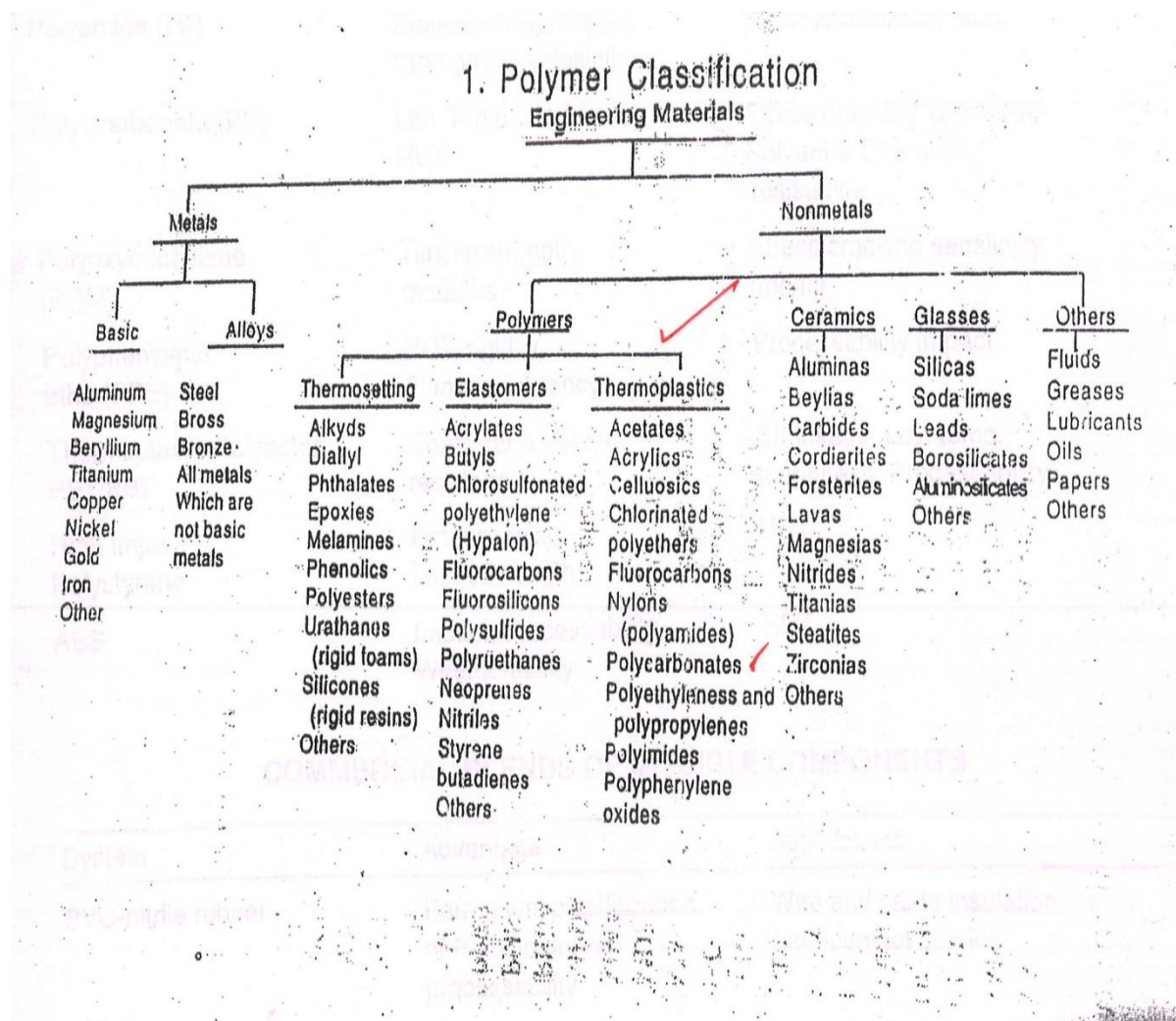
For A...

Director

The allegation of the revenue is based on the test conducted on the finished goods recovered from the premises of one of the buyer which show that the main material to manufacture the goods in question is polycarbonate only, but, some other inputs were found in the premises of the appellant, the same were alleged that these are not input for the appellant, therefore, they are not entitled to take cenvat credit and it was a mere paper transaction.

9. We find in this case, the appellant has placed on record, the opinion of Dr. K. Prakalathan (M. Tech. Ph.D.), Manager (Testing), CIPET Chennai, regarding feasibility of mixing of the Polycarbonate granules with granules of polymers of ethylene, in primary forms or with granules of polymers of propylene or of other olefins, in primary forms or with granules of polymers of styrene, in primary forms to mould Energy Meter parts i.e., meter base, meter cover, terminal base and terminal cover at an injection moulding machine. But, the contention of the appellant is that the report is not conclusive as the said expert did not report that mixing of Polycarbonate with PE, PP, PS was impossible, rather, states that the same is '**difficult**'. Further, it is states that the Polycarbonate is more polar then PE, PP, PS but do not say that PE, PP, PS are non-polar. It makes general statement that due to non-compatibility, mixing of polar polymers with non polar polymers results into incompatibility but does not mention, out of PC, PE, PP, PS which polymer is polar or non polar and there is no certain conclusive to say PC, PE, PP and PS cannot be mixed in any case. However, in last para, "the said expert admits that Polycarbonate can be mixed with PE, PP, PS if additive compatibilizer are added into the mixture".

10. Further, he relied on the technical manual and as per the technical manual, following the engineering materials are as under:-



We find that the Polycarbonate is one of the engineering material and as per the tender document; the electric meter should be manufactured either of polycarbonate or engineering material. Admittedly, all the inputs in question do qualify as engineering materials as per the tender documents.

11. We further take a note of the fact that the suppliers of the goods were not investigated. Merely on the basis of the test report, it has been concluded that the supplies of the other inputs except polycarbonate are not input to manufacturer the final product.

12. We further take a note of the fact that in most of the cases, there is a entry at Information Collection Centre (ICC) of the state VAT, which show that the goods have been passed through ICC and reached to the factory of the appellant. Moreover, no cross

examination of the persons whose statements have been relied upon were granted cross examination, neither their statements have been taken in compliance to the provisions of Section 9D of the Central Excise Act, 1944 as held by this Tribunal in the case of ***CCE, Delhi-I vs. Kuber Tobacco Industries. reported in 2016 (338) ELT 113 (Tri. Del.)*** wherein this Tribunal has observed as under:-

*“7. We have gone through the facts of the case wherein the certain machines were installed at Sandeep Poultry Farm Khasra No. 63/3, Village Khera Khurd, New Delhi-110082 found wherein ‘Kanchan/Kanchann’ brand gutka and ‘wiz’ brand pan masala manufactured clandestinely without declaring the said premises as registered premises for manufacture of the said gutka. The contention of M/s. Kuber is that they were not involved in the activity of manufacture of gutkhas and the said activity was illicit and misused of their brand name and goodwill of the appellant by certain elements who were manufacturing duplicate goods bearing M/s. Kuber brand names and clearing them in the market. The facts of the case are not in dispute, the appellants have raised the dispute that the statements recorded during the course of investigation cannot be relied upon as admissible evidence in terms of the provisions of Section 9D(2) of the Act. In that circumstance, it is better to extract the provisions of Section 9D which are reproduced as under :-*

***“9D Relevancy of statements under certain circumstances*** -. A statement made and signed by a person before any Central Excise (1) Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

*(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*

*(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*

*(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.”*

**8.** *The main contention of the appellant is that the deponents whose statements have been relied upon by the adjudicating authority were not put to examination-in-chief before providing an opportunity of cross-examination. A plain reading of sub-section (1) of Section 9D makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made*

*and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein. Therefore, there is no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, inasmuch as in adjudication proceedings as in criminal proceedings relating to prosecution. Therefore, sub-section (1) of Section 9D set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer shall be relevant, for the purpose of proving the truth of the facts contained therein. If the circumstances are absent, therefore, the statement, which has been made during the course of inquiry/investigation, before a gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the fact contained therein as observed by Hon'ble Delhi High Court in the case of J.K. Cigarettes (supra) wherein Hon'ble High Court has observed as under :-*

*12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazetted rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal.*

*9. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a gazetted Central Excise officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, in so far as proving the truth of the contents thereof is concerned, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1). Therefore, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1)(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and (ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. The same view has been taken by Hon'ble Allahabad High Court in the case of Parmarth Iron Pvt. Ltd. (supra) wherein the High Court has observed as under :-*

*16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon*

*have to be made available for cross-examination for the evidence or statement to be considered.*

**10.** *We further find that in the case of Smt. Sharadamma (supra), Hon'ble Karnataka High Court has observed as under :-*

9. *It is not the duty of the Court to direct the parties or compel the parties as to in what manner they should conduct their case before the Court or also what quality of evidence they should place before the Court. But the duty of the court is only to appreciate the case in the proper perspective and on the basis of what is placed before the Court. Even with regard to the prayer for permitting the applicant to cross-examine the plaintiff, the prayer is misconceived as the question of cross-examination arises only when a witness has tendered evidence in chief-examination. Under section 138 of the Indian Evidence Act, cross-examination follows chief-examination, but not without chief-examination. If there is no chief-examination, there is no cross-examination. It is only witness who is examined in chief who can be cross-examined. Therefore, a prayer for cross-examination of the plaintiff even when the plaintiff has not been examined in chief is ridiculous and not provided for under Section 138 of the Indian Evidence Act. The Trial Court has rightly rejected the application. No scope for interference with an order of this nature.*

**11.** *We further find that in the case of Swiber Offshore Construction Pvt. Ltd. (supra), this Tribunal has further observed as under :*

6. *We therefore have no hesitation in holding that the impugned Order passed by the Commissioner as an adjudicating authority is appealable order in terms of Section 129A of the Act, even as per the ratio laid down in the above binding precedent. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section 138B without there being any objective formation of opinion based on any material on record to come to the conclusion that any specified circumstance mentioned in Section 138B(1)(a) exists. These circumstances mentioned in Section 138B(1)(a) are also contained in pari materia Section 9D(1)(a) and were recorded as follows in J.K. Cigarettes Ltd., [2009 \(242\) E.L.T. 189 \(Del.\)](#).*

*"25 Section 9D of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant. These are :-*

- (a) when the person who had given the statement is dead;*
- (b) when he cannot be found;*
- (c) when he is incapable of giving evidence;*
- (d) when he is kept out of the way by the adverse party; and*
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable."*

*These circumstances show that if witness cannot be examined for any of these five reasons, the statement previously recorded would be relevant. The adjudicating authority was therefore bound to follow the binding precedent and in absence of any specified circumstance to consider the statement relevant*

*without examining the witnesses, erred in rejecting the request of the appellant to examine the witnesses and to offer them for cross-examination.*

8. *The appellant has also relied on the judgment of Hon'ble Apex Court in Sukhwant Singh v. State of Punjab, (1995) 3 SCC 367 to give emphasis on his submission that examination of witness is mandatory unless specified exceptional circumstances mentioned in clause (a) of Section 138B(1) exist. The Hon'ble Apex Court was pleased to hold that -*

*"8. It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :*

***Order "138. of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.***

*The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*

*Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*

10. *We therefore find force in the submission of the Id. counsel for the appellant. We find no reason to justify rejection of request made by the appellant to the adjudicating authority in light of Section 138B of the Act, to summon witnesses for examination and to offer them for cross-examination if their statements were to be considered as relevant and admitted in evidence in the interest of justice.*

**12.***We further find in the case of Bussa Overseas Properties Ltd., this Tribunal again observed as under :-*

24. *The fact that in cases relating to smuggling or indeed any case civil or criminal cannot or need not been proved for degree of mathematical precision or that the department governed by strict rules of evidence is again no answer. The department is certainly bound by the contents of the Customs Act, 1962 and the general principles of evidence.*

*which has been affirmed by the Apex Court.*

**13.***We further find that Hon'ble Punjab & Haryana High Court in the case of Sukhwant Singh, it has been observed as under :-*

8. *It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :*

***Order of examinations. "138. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.***

*The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*

*Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*

9. *It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross- examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898.*

14. *In view of the above analysis, it is clear that during adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. In the absence of examination-in-chief, allowing the cross-examination, is a futile exercise. We further find that the appellant have challenged the impugned order on the ground that the evidence in the form of statements gathered have no link of the appellant to the activities took at Sandeep Poultry Farm which is required to be examined on the basis of records available during the course of adjudication and the same has not been considered judicially.*

15. *In view of the above, the impugned order is set aside. The adjudicating authority shall be at liberty to re-adjudicate the matter after following the procedure laid down under Section 9D of the Act as discussed above.*

16. *The appeals are disposed of in the above terms".*

Therefore, all the statements recorded during the course of investigation cannot be relied upon.

13. We further take a note of the fact that in the show cause notice although various discrepancies were found during the course of investigation in the records of the appellant, but, the main allegation made in the show cause notice is that the input in question on which cenvat credit sought to be denied are not input of the appellant as were not used in the manufacture of their final product, but, it is mere paper transaction. It means that if it is a paper transaction then no goods have been received in the factory premises of the appellant but

the stock found during the course of investigation with the statutory records are showing all the inputs on which cenvat credit sought to be denied were in the stock. It is not the case of shortage of inputs by the revenue.

14. Moreover, no efforts were made to know that to manufacture of such huge quantity of 57,76,551 electric meters how much polycarbonate is required to manufacture the said goods and the quantity of polycarbonate purchased by the appellant is sufficient to manufacture such a huge quantity of 57,76,551 electric meters or not? This shows that the investigation is faulty. The faulty investigation cannot be rectified at this stage.

15. We further take a note of the fact that the Revenue has not able to brought on record the evidence to show the diversion of the goods in question. No investigation was conducted with regard to the fund flow or the money has been received back in cash by the suppliers.

16. In view of the above discussion, we hold as under:-

- a) the input on which cenvat credit sought to be denied alleging that it is a mere paper transaction were found in stock.
- b) It is not the case of revenue that there is a shortage of inputs.
- c) The procedure laid down under Section 9D of the Central Excise Act, 1944 has not been followed.
- d) No ascertainment with regard to how much quantity of raw material is required to manufacture the finished goods manufactured by the appellant during the impugned period.

e) No inculpatory statement on behalf of the appellant or its Director were recorded.

f) the purchases made by the appellant were found recorded at Information Collection Centre (ICC) established by the Punjab Government.

17. In view of this, we hold that the appellant has correctly taken the cenvat credit on the inputs in question, therefore, the impugned order is not sustainable.

18. As we hold that the cenvat credit taken by the appellant correctly, therefore, the recovery thereof is set-aside. Consequently, the penalty imposed on all the appellants are also set-aside.

19. In result, the impugned order is set-aside and the appeals are allowed with consequential relief, if any.

*(Order pronounced on 03.12.2019)*

**(Ashok Jindal)**  
Member (Judicial)

**(RAJU)**  
Member (Technical)

G.Y.