IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]

Appeal Nos.: E/410, 411, 412/2011

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/410/2011	M/s. Titan Industries Ltd., (Watch Division), No.3, SIPCOT Industrial Complex, Hosur- 635 126	The Commissioner of G.S.T. & Central Excise, Chennai North Commissionerate
Arising out of Order-in-Original No. 13/2011 dated 21.04.2011 passed by the Commissioner of Central Excise, Chennai-III Commissionerate			
2.	E/411/2011	M/s. Titan Industries Ltd., (Jewellery Division), No. 29, SIPCOT Industrial Complex, Hosur – 635 126	The Commissioner of G.S.T. & Central Excise, Chennai North Commissionerate
Arising out of Order-in-Original No. 14/2011 dated 21.04.2011 passed by the Commissioner of Central Excise, Chennai-III Commissionerate			
3.	E/412/2011	M/s. Titan Industries Ltd., (Precision Engineering Division), No. 28, SIPCOT Industrial Complex, Hosur – 635 126	The Commissioner of G.S.T. & Central Excise, Chennai North Commissionerate
Arising out of Order-in-Original No. 15/2011 dated 21.04.2011 passed by the Commissioner of Central Excise, Chennai-III Commissionerate			

Appearance:-

Ms. Radhika Chandrasekhar, Advocate
for the Appellant

Shri. B. Balamurugan, AC (AR)
for the Respondent

INTERIM Order No. 40052-40054/2019 DT. 25.04.2019.

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: 08.01.2019

Date of Pronouncement: 30-7-2019

Final Order Nos. 40968-40970/2019

Per Madhu Mohan Damodhar :

The facts of the case are that the appellants are engaged in the manufacture of Quartz Analog Watches and parts thereof. M/s.

Titan Industries Ltd., Watch Division (WD) is stock transferring watch parts and components manufactured by them to their units at Dehradun, Baddi and Roorkee, who assemble watches and clear the same at nil rate of duty in terms of Notification No. 50/2003-CE dated 10.06.2003 as they enjoy special area exemption status. M/s. Titan Industries Ltd., Jewellery Division (JD) is stock transferring Watch parts and case assembly manufactured by them to M/s. Titan Industries, WD, Hosur. M/s. Titan Industries Ltd., Precision Engineering Division (PED) is stock transferring Watch Parts and Bracelets manufactured by them to M/s. Titan Industries Ltd., WD, Hosur.

2.1 During verification of records of the appellant, it appeared that they were not following correct valuation for the said clearances in terms of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. It further appeared that appellants had not included certain cost components to arrive at the cost of production, as specified in the Cost Accounting Standard - 4 (CAS-4). The Department took the view that appellants are indulged in a deliberate attempt to evade payment of excise duty by undervaluing the said goods; that duty is required to be levied at relevant rate on the assessable value to be arrived at after including all cost components under CAS-4.

2.2 Accordingly, proceedings were initiated by way of the following Show Cause Notices for the period from 01.04.2005 to 31.03.2010 :

Sl. No.	Appellant	SCN No. & Dt.	Proposed demand (in Rs.)	Ground alleged
1.	M/s. Titan Industries Ltd., Watch Division	SCN No. 37/2010 dt. 05.05.2010 read with corrigendum dt. 28.03.2011	3,63,73,973/-	Clearance of watch parts and components manufactured by them to their units at Dehradun, Baddi and Roorkee for captive consumption; under Rule 8 of the Central Excise Valuation Rules, 2000.
2.	M/s. Titan Industries Ltd., Jewellery Division	SCN No. 38/2010 dt 20.05.2010 read with corrigendum dt. 28.03.2011	78,43,016/-	Clearance of watch parts and case assembly manufactured by them to M/s. Titan Industries Ltd., WD, Hosur for captive consumption; under Rule 8 of the Central Excise Valuation Rules, 2000.
3.	M/s. Titan Industries Ltd., Precision Engineering Division	SCN No. 39/2010 dt 20.05.2010 read with corrigendum dt. 28.03.2011	37,92,563/-	Clearance of watch parts and bracelets manufactured by them to M/s. Titan Industries Ltd., WD, Hosur for captive consumption; under Rule 8 of the Central Excise Valuation Rules, 2000.

2.3 The above Show Cause Notices culminated in the issuance of the following Orders-in-Original :

Sl. No.	Appeal No.	O-I-O No. & dt.	Demand (in Rs.)	Penalty imposed
1.	E/410/2011	O-I-O No. 13/2011 dt. 21.04.2011	3,63,73,973/-	Under Section 11AC of the Central Excise Act.
2.	E/411/2011	O-I-O No. 14/2011 dt. 21.04.2011	78,43,016/-	Under Section 11AC of the Central Excise Act.
3.	E/412/2011	O-I-O No. 15/2011 dt. 21.04.2011	37,92,563/-	Under Section 11AC of the Central Excise Act.

2.4 Aggrieved by the Orders-in-Original No. 13/2011, 14/2011 and 15/2011 all dt. 21.04.2011, the appellant has filed Appeal Nos. E/410/2011, E/411/2011 and E/412/2011 respectively before this forum.

3. Today when the matter came up for hearing, Ld. Advocate Ms. Radhika Chandrasekhar appearing on behalf of the appellant made oral and written submissions which can be broadly summarized as under :

(i) Appellant had applied for provisional assessment of the goods manufactured by them and the same had been sanctioned by the Department;

(ii) None of the ingredients set out in proviso to Section 11A(1) have been made to justify invocation of extended period of limitation. In any case, the Department could have raised the demand at the time of finalization of assessment;

(iii) The Department had conducted audit for the disputed units (for all the three units of the appellant) and therefore, there is no question of suppression. Hence, the extended period of limitation cannot be invoked.

(iv) She also submitted that the question of suppression of facts does not arise for the following reasons :

(a) For the period from 01.02.2005 to 31.01.2006, audit of the appellant's entire books and records were done between 22.02.2006 and 25.02.2006;

(b) For the period from 01.02.2006 to 28.02.2007, the appellant's records were also audited;

(c) For the period from 11.03.2007 to 31.01.2008, audit had been done between 12.02.2008 and 13.02.2008;

(d) For the period from 01.02.2008 to 28.02.2009, audit was conducted on 20.03.2009.

(v) So also, office of the Accountant General (CERA) pursuant to their letter dated 10.11.2006, conducted audit for the period 2003-04, 2004-05 and 2005-06. Pursuant to letter dated 17.09.2009, CERA conducted audit of the appellant for the period 2004-05, 2005-06 and 2006-07. Pursuant to letter dated 18.01.2010, CERA conducted audit for the period 2006-07, 2007-08 and 2008-09. For all these reasons, the entire proceedings are hit by limitation.

4.1 On the other hand, Ld. AR Shri. B. Balamurugan appearing on behalf of the respondent supported the findings in the impugned Orders. He submitted that as per Rule 8 of the Central Excise Valuation Rules, 2000 read with CAS-4 norms, the appellants should have adopted the actual cost data relating to the production of the said watch parts and components meant for captive use by their own units at Dehradun, Baddi and Roorkee and added 10% towards profit and paid duty on such value, as prescribed. However, the appellants have followed some arbitrary means of costing. The appellants have left out certain elements of cost which are required to be included in the assessable value as per CAS-4 norms.

4.2 Ld. AR also submitted that appellants have adopted estimates instead of actuals and failed to adequately provide for unseen variations of cost so as to avert any possible undervaluation. Hence, there is clear suppression of facts with intent to evade payment of appropriate duty liability.

5. Heard both sides and have gone through the facts of the case.

6. We first intend to take up the plea of limitation. Ld. Advocate has contended that a number of audits have been conducted at their units. We find that this contention has been made before all the three adjudicating authorities herein right from their reply to the Show Cause Notices. In fact, the said contention has even been found recorded in paragraph 24 of the Order-in-Original No. 13/2011 dated 21.04.2011 (impugned Order with regard to Appeal No. E/410/2011), paragraph 18 of the Order-in-Original No. 14/2011 dated 21.04.2011 (impugned Order with regard to Appeal No. E/411/2011) and paragraph 20 of the Order-in-Original No. 15/2011 dated 21.04.2011 (impugned Order with regard to Appeal No. E/412/2011).

7. It has been submitted by the Ld. Advocate along with arguments that they have been filing their monthly returns in which the value of duty has been reflected. These contentions are more or less the same in all the three adjudication proceedings. For example, in paragraphs 24 and 25 of the Order-in-Original No. 13/2011 dated 21.04.2011, it has been contended as under :

"24. That the question of suppression of fact does not arise at all for the following reasons:

(i) They are registered under Central Excise Law duly filing their monthly returns in which the value as well as duty is reflected.

(ii) An audit was conducted by the Central Excise Department during February 2006 completely examining all their records and accounts including their removals for the period of three years prior to the audit.

(iii) An audit was conducted during February 2007 completely examining all their records and accounts including all our removals for the period of three years prior to the audit.

(iv) CERA Audit was conducted and all the revenue particulars for 2002-2003; 2003-2004 and 2004-2005 and all relevant records were examined by the Audit Team from 12.06.2006 to 16.06.2006. The audit took place and all records were verified including their costing statements, calculation of value, calculation of duty and no adverse objections or comments were raised.

(v) CERA Audit was conducted and all the revenue particulars for 2004-2005; 2005-2006 and 2006-2007 and all relevant records were examined by the Audit Team from 04.06.2007 to 08.06.2007. The audit took place and all records were verified including their costing statements, calculation of value, calculation of duty and no adverse objections or comments were raised.

25. They relied on the following decisions of the Hon'ble Supreme Court/CESTAT in support of their defence, that the demand is barred by limitation:

a) Jaiprakash Industries Ltd. Vs. Commissioner of Central Excise - (2002) 146 E.L.T. 481.

b) M/s. Continental Foundation Joint Venture Vs. C.C.E. - (2007) 216 E.L.T. 177.

c) Pushpam Pharmaceuticals Company Vs. Collector of C.Ex., Bombay – (1995) 78 E.L.T. 401.

d) C.C.E. Vs. Ballarpur Industries – (2007) 8 S.C.C. 89.

e) Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise – (2005) 188 E.L.T. 149.

f) Nestle India Ltd. Vs. C.C.E. – (2009) TIOL 26.

g) Padmini Products Vs. Collector of Central Excise - (2002) TIOL 289.

h) Collector of Central Excise Vs. Chemphar Drugs and Liniments – (2002) TIOL 266.

i) Collector of Central Excise Vs. H.M.M. Ltd. – (1995) 76 E.L.T. 497.

j) C.C.E. Vs. Wockhardt Ltd. – (2009) 248 E.L.T. 517.

k) Associated Drug Co. Vs. C.C.E. – (2009) 245 E.L.T. 252.

l) Sands Hotel Pvt. Ltd. Vs. C.S.T. – (2009) 16 S.T.R. 329 "

8.1 We find, from the appeals filed by them before this forum, that the following additional audits have also been conducted :

(i) For the period from 11.03.2007 to 31.01.2008 – Department audit between 12.02.2008 and 13.02.2008;

(ii)For the period from 01.02.2008 to 28.02.2009 – Department audit conducted on 20.03.2009.

8.2 The appellants have also provided the details of CERA audit pursuant to letters dated 10.11.2006, 17.09.2009 and 18.01.2010 respectively.

9. Discernibly, it can be seen that the appellants have been subjected to a spate of audits both by the Department and by CERA all throughout the period of dispute and it is inconceivable that the matter of stock transfers effected by the appellant whether to Dehradun, Baddi and Roorkee or to its Hosur unit would not have come to the attention of the audit officers. After all, these are very 'standout' clearances that would be effected by any manufacturing unit.

10. This being so, we are of the considered opinion that all these audits should have brought out enough procedural and valuation discrepancies to light, which could have been brought to the notice of the appellants as and when the audits were done. If this had been done, it may well have been possible that the appellants would have accepted any differential duty liabilities as pointed out by the

Department and also corrected their valuation methodology. Certainly, this was not done.

11.1 On the other hand, Show Cause Notices have been issued as late as May, 2010 and to enable coverage of the disputed period from 01.04.2005 to 31.03.2010, the extended period of limitation has been invoked. The *raison d'être* given in all these Show Cause Notices for invocation of such extended period of limitation is that "they have wilfully suppressed the fact from the Department that they were clearing the goods at a lower value from their unit at Hosur" to other units. Surely, this could and should not have escaped attention in the plethora of audits that had been conducted of the appellant.

11.2 We further note that even the Show Cause Notices themselves did not quantify the amounts involved, which was eventually done only by the issue of corrigenda in March 2011, quantifying the amounts. The quantification of the amounts has thus happened almost around ten months after the issuance of the Show Cause Notices.

12. In view of the discussions and conclusions hereinabove, we hold that the proceedings in all these appeals are hit by limitation

since there is no justification for invocation of extended period in all these cases. This being so, the impugned Orders in all these appeals cannot be sustained and will require to be set aside, which we hereby do.

13. Appeal Nos. E/410/2011, E/411/2011 and E/412/2011 are therefore allowed, with consequential benefits, if any, as per law.

(Pronounced in open court on ____________)

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

Sdd

I beg to disagree. Kindly refer to my separate order.

12/04/2019

Customs, Excise & Service Tax Appellate Tribunal

Per: P. Dinesha, Member (Judicial)

I do not agree with the finding of Hon'ble Member (Technical) that there was no justification for invoking the larger period of limitation, for the following reasons:-

1. The SCN though issued by invoking larger period, alleges incorrect valuation, by not adopting Rule 8 of CEV. Further, during investigation, one of the queries was, whether appellant was following CAS-4 and certificates issued in terms thereto. Statement of the concerned Manager recorded, which is also in the negative when he says that he is just a graduate and that he was issuing such certificates (CAS-4) for several years.

2. It boils down to fact that the certificate CAS-4 was issued by irrelevant/incompetent person and this fact has remained unchallenged by the appellant. The issue has now travelled up to this stage with the appellant very conveniently not questioning the correctness of SCN on this. With this lacuna on record, it is difficult to say that the revenue was wrong. It only exonerates the mis-deeds of the appellant and the appellant would get away despite being on the wrong side of the law. It is the settled position that the Law would come to the rescue of a bona fide litigant, but here, I do not see anywhere the appellant acting in good faith and even on being pointed out, it has only very conveniently ignored the same by not even responding to any of these specific allegations of technical breach.

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3. Circular issued in 2003 is very much on board. Still, from 2005, the appellant happily/blissfully and conveniently continued with its old practice, not because of ignorance or innocence, since undoubtedly, it had a team of very able and well qualified/specialised hands for assistance and legal compliances. It is not a one man company but a reputed/respected one. It is important to note here that, the SCN points out to not only the non-compliance with the conditions of Notification/Circular & statutory requirements, but also the technical breach in the certificate (CAS-4) which was prepared/issued **NOT** by a qualified person, but by an **employee** who was admittedly, just a graduate.

4. The non-compliance with conditions of Notification, non-furnishing of proper CAS-4 certificate, but an obviously interested employee preparing CAS-4 certificate and furnishing the same as compliance, that too incomplete, clearly amounts to (c) wilful misstatement & (d) suppression of facts & (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

5. When the Law prescribes the format of a certificate of CAS-4, It recognises certificate issued by a qualified person and none else. It is not certainly something unknown to a Company, of the Stature/reputation/Brand of the assessee herein. Going by

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the brand name perhaps the revenue did not doubt the credibility, for long, till they verified before issuing SCN.

6. CBEC circular 692/8/2003 mandates as under ....

   " ....(3) It is, therefore, clarified that cost of production of captively consumed goods will henceforth be done strictly in accordance with CAS-4. Copies of CAS-4 may be obtained from the local Chapter of ICWAI...."

7. A close look at CAS-4 and the Appendix -1 thereto requires the seal and signature of the Cost Accountant along with Membership No. and not that of an employee. As against this here the senior manager admits that he has been issuing such certificates for the last 7 years and that he is not a qualified cost accountant [refer paragraph 5(a), (b) & (c)]. Other most relevant items in paragraph 5 are (h), (j), (l) & (m) which categorically demolishes appellant's claim of arguments as to suppression, etc. Hence, it is a clear case of hoodwinking and therefore clearly falls under furnishing misstatement, etc., to mislead the revenue thereby evade duty. It is even more surprising that the appellant has tried to play it down by not even bothering to respond to the above factual allegation and nor has it even whispered about the quality of its certificate in CAS-4 or the qualification of the issuing person, anywhere, right from its reply to SCN. For these reasons, Appellant's claim that there was repeated audits by the revenue including CERA, may not be of any use or help since, as indicated above, there

was an element of trust placed on the brand of the appellant which finally proved to be mis-placed.

8. Obviously the revenue's audit went by the camouflaged certificate on record, signed and sealed, without realising the faulty aspect that the same was invalid/improper; it is only thereafter, during follow up action, that the same was realised and thus was raised in the SCN. Thus, when a statutory requirement is to be complied with, it is only as per the procedures laid down or known to law and not in short cuts, camouflaged manner, by hood-winking the revenue. The action clearly tantamount to taking advantage of a trust placed by the revenue on the brand name, which is difficult to pardon.

9. For the above reasons therefore, I am of the view that the SCN is proper and the larger period is rightly invoked. The appeal will have to be decided only on merits.

In view of the above, the following difference of opinion is proposed:-

(i) Even though a SCN is issued by invoking larger period of limitation with an accusation of not following a certain mandatory legal procedure which impacts the valuation, whether the burden is on the assessee to rebut/ discharge/justify its adherence or otherwise, to the mandatory legal procedure, but also to at least reply on its stand to such legal points and only thereafter does the onus shifts to the Revenue to justify invoking larger period?

(ii) Whether the CESTAT can ignore the allegations of non-compliance with legal procedures that has a direct impact on the valuation of a product and in turn, its taxability, and whether such allegation which has never been rebutted by the assessee, either in its reply to SCN or during adjudication proceedings, for the reasons best known to the appellant, tantamount to: (c) wilful mis-statement; (d) suppression of facts; and (e) contravention of any of the provisions of this Chapter or of the Rules made thereunder with an intent to evade payment of service tax, of Section 73(1) of the Finance Act, 1994, and accordingly justify invoking the larger period of limitation?

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

Registry is directed to forward attested copy of this order to Hon'ble President for nominating Third Member to resolve the dispute.

PER SULEKHA BEEVI

The above matter has come up for hearing as per the order of reference by the Hon'ble President dated 02.05.2019.

2. The facts of the case having been narrated in detail in the interim order, I do not think it necessary to repeat the same. The issue is with regard to the question whether the demands raised in the show cause notice are barred by limitation.

3. Member (Technical) has held that the demand is time-barred for the reason that series of audits were conducted in the premises of the appellants and the department was well aware of all facts relating to valuation adopted by appellants. Member (Judicial) has taken the view that the demand raised invoking the extended period is legal and proper and there was deliberate suppression of facts on the part of assessee. The questions formulated by the Members on the difference of opinion are as under :

> "(i) Even though a SCN is issued by invoking larger period of limitation with an accusation of not following a certain mandatory legal procedure which impacts the valuation, whether the burden is on the assesse to rebut/discharge/justify its adherence or otherwise, to the mandatory legal procedure, but also to at least reply on its stand to such legal points and only thereafter does the onus shifts to the Revenue to justify invoking larger period?
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> (ii) Whether the CESTAT can ignore the allegations of non-compliance with legal procedures that has a direct impact on the valuation of a product and in turn, its taxability, and whether such allegation which has never been rebutted by the assessee, either in its reply to SCN or during adjudication proceedings, for the reasons best known to the appellant, tantamount to : (c) wilful mis-statement; (d) suppression of facts; and (e) contravention of any of the provisions of

this Chapter or of the Rules made thereunder with an intent to evade payment of service tax, of Section 73 (1) of the Finance Act, 1994, and accordingly justify invoking the larger period of limitation?"

4. In the second question framed as above, there is an error in indicating the provision of law since in the present case, the issue is with regard to demand of short payment of duty under Central Excise Act, 1944 whereas in the issue framed by the Member it is noted as Section 73 (1) of Finance Act, 1994. This being only an error can be ignored. Although the questions formulated above are lengthy and appear less easy to comprehend, the crux of the difference of opinion as reflected from the interim order passed by both the Members is that Member (Technical) placed reliance on series of audits conducted to hold that there is no evidence of suppression of facts with intent to evade payment of duty. Member (Judicial) has placed much reliance on the costing certificate issued by the Manager of the company to hold that such issuance of certificate was itself a misstatement and suppression of facts with intend to evade payment of duty.

5. Today when the matter came up for hearing before me, Ld. Counsel Ms. Radhika Chandrasekar appeared and argued the matter. She submitted that the clearances of goods by these appellants were mainly to their sister units from where such goods were captively consumed for further manufacture. The clearances can be diagrammatically represented as under :

M/s.TIL (JD) [E/411/2011] → M/s.TIL (WD) [E/410/2011]

M/s.TIL (PED) [E/412/2011] → M/s.TIL (WD) [E/410/2011]

M/s.TIL (WD) [E/410/2011] → M/s.TIL Dehradun; M/s.TIL Badlee; M/s.TIL Rourkee

6. Thus clearances were on stock transfer basis and Rule 8 of the Central Excise Valuation Rules 2000 would apply. The appellants have filed regularly periodical returns and also paid the Central Excise duty. This was on the basis of costing arrived by the Senior Manager (Costing) of the appellant units. The department later entertained a view that certain costs have not been included in the costing to arrive at the assessable value. Since continuous audits were conducted, the appellants believed that the valuation done by them and duty discharged was correct. She adverted to the various audit intimations received by the appellants. Several notices dated 28.11.2005, 31.07.2006, 19.10.2006, 18.12.2007, 24.07.2008, 03.02.2009, 06.07.2009 and 28.01.2010 were issued to the appellant's PED unit. For all these audit intimations, the appellants had furnished necessary documents as required by the department. After completion of the audit, Department has not raised any objections. An audit notice dt. 10.11.2006 was issued to appellant's watch division for conduct of CERA audit. A further audit notice for conduct of CERA audit was issued on 28.12.2007 also. Thus two CERA audits were done in Watch Division. The Jewellery Division of the appellant's unit received audit notice for CERA audit on 29.05.2006 and further notices on 07.05.2007 and 19.10.2006. Thus several audits were conducted in all three appellant units. There is no case for the department that during the audit the appellants did not produce the documents/records as requested. During the relevant period of dispute (1.4.2005 to 31.3.2010), the department had not requested the appellant to furnish any cost accountant certificate as per CAS-4. Only on 11.02.2010, the Range officer vide their letter specifically asked clarification from the

appellants whether they were following CAS-4 norms and adopting valuation on the basis of costing certificate issued by Cost Accountant. Appellant had given statement that the Senior Manager (Costing) was issuing certificates for the past seven years and on such basis they were doing the costing for arriving at the assessable value. This fact that appellant was arriving the assessable value on the basis of certificates issued by the Senior Manager and discharging duty on this method of costing was very much in the knowledge of the department as there were series of audits conducted by them. It is also stated by her that when department pointed out in 2010 that the costing has to be done as per the certificate of a Cost Accountant, appellants themselves appointed Cost Accountant and did the costing. These details were furnished to the department. On the basis of such costing done by the Cost Accountant appointed by the appellant, department quantified the duty and raised demand in respect of present SCNs. It is stressed by her that since there were no objections raised pursuant to audits the appellants were under bonafide belief that costing done by the Senior Manager was sufficient compliance. Moreover another SCN was issued to the appellant's Watch Division for the year 2003-04 invoking extended period alleging wrong availment of credit. The Tribunal vide Final order No.40600/2018 dt. 09.03.2018 had set aside this demand on the ground of limitation observing that series of audits were conducted and there was no suppression on the part of the appellant.

7. Ld. Counsel relied upon the decision of the Hon'ble High Court of Allahabad in the case of *CCE Noida Vs Accurate Chemical Industries* - 2014 (310) ELT 441 (All.) to argue that when the assessee has filed ER-1 returns on monthly basis, the Range Officer is required to carry

out a detailed scrutiny of ER-1 returns. The decision in the case of *CCE Vs Mahindra and Mahindra Ltd.* - 2018 (11) G.S.T.L. 126 (Bom.) was relied by Ld. counsel to submit that if all facts were within the knowledge of the department after the conduct of audit, allegation of suppression cannot sustain. In *CCE Bangalore Vs MTR Foods Ltd.* – 2012 (282) ELT 196 (Kar.), the Hon'ble High Court of Karnataka held that when the materials reflected in the accounts / records were accepted by the first audit party proceedings initiated after second audit, invoking extended period alleging suppression of facts cannot sustain.

8. Ld. Counsel emphasized that though the SCN was issued on 05.05.2010 to Watch Division and on 20.05.2010 to the Jewellery Division and Precision Engineering Division respectively, the quantification of demand was done by issuing a corrigendum to the SCN only in March 2011. That major portion of the demand is hit by limitation. That findings of the Member (Technical) on the ground of limitation is legal and proper.

9. Ld. A.R Shri B. Balamurugan appeared and argued for the Revenue. He submitted that till 2010, the appellants were arriving the assessable value of goods cleared by them on the basis of Costing certificate issued by the Senior Manager (Costing) of the appellants. As per the Board's circular No.692/8/2003 dt. 13.02.2003 it is necessary that cost of production is to be done strictly in accordance with CAS-4. Thus appellants have to obtain costing certificate from a qualified Cost Accountant. The argument of the appellants that since audits were conducted, the department was aware that costing was done on the basis of certificate by the Senior Manger (Costing) cannot be accepted

since these documents may have been accepted by the department on the face value at the time of audit. The department had no occasion to understand that these are not certificates issued by a qualified Cost Accountant. He adverted to the discussion made by Member (Judicial) that the said certificate has been used by the appellant to evade payment of duty. The reliance placed by the appellants on such certificate which is not in accordance with law, itself amounts to suppression and misstatement of facts Later in 2010, it came to the knowledge of the department that appellants were not complying with the requirement of CAS-4 certificate and were discharging duty on the basis of costing done by their own Manager. In the statement of the Senior Manager he has categorically deposed that he is not a qualified Cost Accountant. These facts indicate suppression of facts with intention to evade payment of duty. Therefore, the demand raised invoking extended period is correct and proper and has been rightly concluded so by the Member (Judicial).

10. Heard both sides.

11. From the submissions made as well as the questions referred, the duty cast upon me is to decide whether the invocation of extended period is sustainable. It is not disputed that the valuation should be under Rule 8 of Central Valuation (Determination of Price of Excisable Goods) Rules 2000. As per Rule 8, "where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten percent of the cost of production or manufacture of such goods."

12. The above Rule merely says that the value shall be 110% of the cost of production. It does mention the method of arriving at the cost of production. When different methods were adopted, the Board vide Circular 692/8/2003 clarified that the cost of production of captively consumed goods has to be henceforth done strictly in accordance with CAS-4. Thus in order to achieve uniformity in arriving at cost of production Board mandated compliance of CAS-4. From the date of the circular the costing is to be done as per the certificate in CAS-4 issued by a Cost Accountant.

13. In the present case, the appellants for many years have been following the costing done by their Senior Manager. Though several audits were conducted, including CERA, the department has not raised any objection with regard to the method of costing adopted by them. Undisputedly a series of audits have been conducted during the disputed period by the department. As per Rule 22 of Central Excise Rules, 2002, the department has powers to conduct audit. The relevant provision of law as it stood at the relevant period is reproduced as under :

> "**RULE 22**. Access to a registered premises. — (1) An officer empowered by the Principal Commissioner or Commissioner, as the case may be in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.
>
> (2) Every assessee, an importer who issues an invoice on which CENVAT credit can be taken and first stage and second stage dealer shall furnish to the officer empowered under sub-rule (1), a list in duplicate, of –
>
> (i) all the records prepared and maintained for accounting of transaction in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods, as the case may be;
> (ii) all the records prepared and maintained for accounting of transaction in regard to payment for input services and their receipt or procurement; and
> (iii) all the financial records and statements (including trial balance or its equivalent)
>
> (3) Every assessee, an importer who issues an invoice on which CENVAT credit can be taken and first stage and second stage dealer shall, on demand make available to the officer empowered under sub-rule (1) or the audit party deputed by the

[Principal Commissioner or Commissioner, as the case may be] or the Comptroller and Auditor-General of India, or a cost accountant or chartered accountant nominated under section 11A or section 14AA of the Act. –

(i) the records maintained or prepared by him in terms of sub-rule (2);
(ii) the cost audit reports, if any, under section 233B of the Companies Act, 1956 (1 of 1956); and
(iii) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961 (43 of 1961)"

for the scrutiny of the officer or the audit party or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case may be."

14. The intention and object of such audit is for verification of the accounts and also to ensure that mandatory compliances under law have been satisfied. The audit officers while conducting such audit, indeed mainly look into quantum of goods cleared as well as the Central Excise duty paid. During the scrutiny of accounts / documents / records, the audit party would certainly have occasion to look into the costing certificate furnished by the appellants. Needless to say that the Central Excise duty is paid by appellants on the basis of the valuation done as per this costing details. In a series of notices for conduct of audit, the appellant has been required to furnish various documents. For better appreciation, some sample of the notices issued by the department are reproduced as under :

"No.AG(C&RA)/CERA/Prog/2006-07/222 Date:29-5-2006

To
Titan Industries (Jewellery)
HOSUR – 635 126

Sir,

Sub : Central Excise Revenue Audit – Intimation – Reg.

Please refer to Rule 22 (3) of Central Excise Rules, 2002.

1. The audit of the accounts of the Central Excise Receipts and Remittance in respect of your concern/company is programmed to conducted by the Central Excise Revenue Audit Party of this office from 12-6-06 to 16-6-06.

2. The assessee may see the identity cards of the party members and authority letter issued by CERA Headquarters and in case of any problem/difficulties with CERA Party, the assessee may contact the undersigned / the Deputy Accountant General personally or by telephone.

3. Necessary facilities may please be afforded to them for conducting the audit. In Addition if the Cenvat and Sales invoices are kept in computerized form in your unit, then, the vital details may be produced to Audit Party in soft forms on the final day of Audit. Also one computer may be made available to the audit party for their exclusive use.

4. Revenue particulars of PLA and CENVAT for the period of last 3 years Viz., 2002-03, 2003-04 and 2004-05 separately may please be forwarded along with acknowledgement.

5. Request for postponement will not be entertained.

6. The receipt of this letter may please be acknowledged immediately.

Yours faithfully,

For Senior Audit Officer / CERA"

"No.AG (C&RA)/CERA-Special Party I /2006-07/1115 Date:10-11-2006

To
Titan Industries (Watch)
Hosur

Sir,

Sub : Central Excise Revenue Audit – Intimation – Reg.

Please refer to Rule 22 (3) of Central Excise Rules, 2002

1. The audit of the accounts of the Central Excise Receipts and Remittance in respect of your concern/company is programmed to conducted by the Central Excise Revenue Audit Party of this office from 27-11-2006 to 1-12-2006.

2. The assessee may see the identity cards of the party members and authority letter issued by CERA Headquarters and in case of any problem/difficulties with CERA Party, the assessee may contact the undersigned / the Deputy Accountant General personally or by telephone.

3. Necessary facilities may please be afforded to them for conducting the audit. In Addition if the Cenvat and Sales invoices are kept in computerized form in your unit, then, the vital details may be produced to Audit Party in soft forms on the final day of Audit. Also one computer may be made available to the audit party for their exclusive use.

4. **<u>IMPORTANT :</u>**Details called for in the annexure may be sent urgently.

5. Request for postponement will not be entertained except for reasons of strike and lockout.

6. Revenue particulars of PLA and CENVAT for the period of last 3 years Viz., 2003-04, 2004-05 and 2005-06 separately may please be forwarded along with acknowledgement.

Yours faithfully,

For Senior Audit Officer / CERA"

"C.No.III/10/911 / 2008-IA

Dated : 03.02.2009

To

2 : NAME : TITAL INDUSTRIES BRACELET & CLOCK
DOOR NO:28, SIPCOT INDUSTRIAL STREET : HOSUR
LOCALITY : HOSUR
AREA : HOSUR INDUSTRIAL COMPLEX
DISTRICT : DHARMAPURI
PINCODE : 635126

Gentlemen,

Sub : Central Excise – Information relevant for the New Audit System in respect of your unit – called for – Regarding

****

Since it is proposed to conduct Audit of accounts of your factory under New Audit System, you are requested to furnish the following information which is relevant for the Audit within ten days from the date of receipt of this letter to this office to enable us to conduct Audit during the period from

1. Nature of business of the unit
2. Details of the goods manufactured (excisable and non-excisable)
3. Details regarding the process of manufacture and a flow chart of the process.
4. Details of intermediate products, by products, joint products, waste and scrap arising during the course of manufacture.
5. Licensed Installed capacity and actual production during the last financial year with comments for decrease/increase.
6. Normal Input-Output ration and the main raw material for each product separately.
7. Percentage of waste and scrap and invisible loss allowed / actually occurred during the last THREE years.
8. Consumption of main / crucial raw materials for the production of each final product during the last THREE years.

8A. Value of Raw Material purchased – Cenvat Credit availed.

8B. Additions of Capital goods since last audit – Cenvatavailment.

8C. Other Income – Sales

9. Details of power consumption per unit of production.
10. If both excisable goods / exempted goods are manufactured using common inputs, furnish details.
11. Declaration of marketing pattern
12. Details of various abatements claimed and typed and rate of discount allowed.
13. List of Branches / Depots Consignments Agents / Dealers and a copy of the agreement of consignment Agents / Dealers
14. Quality and Value of production / Clearance of each excisable goods separately for the last THREE years along with the details of duty payment in PLA and through CENVAT credit with reasons for decrease / increase
15. List of reports and returns filed to other departments like Income Tax, Sales Tax, etc.
16. Copy of Articles of Memorandum / Association
17. Copy of Balance Sheet, Trial Balance for the last TWO financial years.

18.Informations regarding various procedures followed like Chapter X procedure / goods sent to job workers / re-entry of duty paid goods.
19.Details of Captive consumption of any intermediate / final products.
20.Details of trading activity if any taken place.
21. Energy Audit Report

It is once again impressed upon you that the information called for may be furnished completely and in time to enable the visiting audit party to prepare an Audit Plan to conduct a qualitative audit. Any request for postponement / cancellation received within a weeks time prior to the date of the audit shall not be entertained.

Receipt of this letter may be acknowledged.

Yours faithfully,

For JOINT COMMISSIONER (AUDIT)"

"No.AG (C&RA)/CERA/PARY X /2009-10/277 Date:6-7-2009

To

M/s.Titan Industries (Bracelet Division)
28, Sipcot Industrial Street : Hosur
HOSUR- 635126

Sir,

Sub : Central Excise Revenue Audit – Intimation – Reg.

Please refer to Rule 22 (3) of Central Excise Rules, 2002

1. The audit of the accounts of the Central Excise Receipts and Remittance in respect of your concern/company is programmed to conducted by the Central Excise Revenue Audit Party of this office from 20-7-09 to 24-7-09.

2. The assessee may see the identity cards of the party members and authority letter issued by CERA Headquarters and in case of any problem/difficulties with CERA Party, the assessee may contact the undersigned / the Deputy Accountant General personally or by telephone.

3. Necessary facilities may please be afforded to them for conducting the audit. In Addition if the Cenvat and Sales invoices are kept in computerized form in your unit, then, the vital details may be produced to Audit Party in soft forms on the final day of Audit. Also one computer may be made available to the audit party for their exclusive use.

4. Request for postponement will not be entertained except for reasons of strike and lockout.

5. Revenue particulars of PLA and CENVAT for the period of last 3 years Viz., 2006-07, 2007-08 and 2008-09 separately may please be forwarded along with acknowledgement.

Yours faithfully,

Assistant Audit Officer Programme"

"C.No.III/10/50 / 2004-IA

Dated : 28.01.2010

To

(Speed Post)

M/s. Tital Industries Ltd.
(Precision Engg.Dn)
Door No:28, SIPCOT Industrial Complex,
Hosur
PIN : 635126

Gentlemen,

Sub : Central Excise – Information relevant for the New Audit System in respect of your unit – called for – Regarding

****

Since it is proposed to conduct Audit of accounts of your factory under New Audit System, you are requested to furnish the following information which is relevant for the Audit within ten days from the date of receipt of this letter to this office to enable us to conduct Audit during the period from

1. Nature of business of the unit
2. Details of the goods manufactured (excisable and non-excisable)
3. Details regarding the process of manufacture and a flow chart of the process.
4. Details of intermediate products, by products, joint products, waste and scrap arising during the course of manufacture.
5. Licensed Installed capacity and actual production during the last financial year with comments for decrease/increase.
6. Normal Input-Output ration and the main raw material for each product separately.
7. Percentage of waste and scrap and invisible loss allowed / actually occurred during the last THREE years.
8. Consumption of main / crucial raw materials for the production of each final product during the last THREE years.

8A. Value of Raw Material purchased – Cenvat Credit availed.

8B. Additions of Capital goods since last audit – Cenvat availment.

8C. Other Income – Sales

9. Details of power consumption per unit of production.
10. If both excisable goods / exempted goods are manufactured using common inputs, furnish details.
11. Declaration of marketing pattern
12. Details of various abatements claimed and typed and rate of discount allowed.
13. List of Branches / Depots Consignments Agents / Dealers and a copy of the agreement of consignment Agents / Dealers
14. Quality and Value of production / Clearance of each excisable goods separately for the last THREE years along with the details of duty payment in PLA and through CENVAT credit with reasons for decrease / increase
15. List of reports and returns filed to other departments like Income Tax, Sales Tax, etc.
16. Copy of Articles of Memorandum / Association
17. Copy of Balance Sheet, Trial Balance for the last TWO financial years.
18. Information regarding various procedures followed like Chapter X procedure / goods sent to job workers / re-entry of duty paid goods.
19. Details of Captive consumption of any intermediate / final products.
20. Details of trading activity if any taken place.
21. Energy Audit Report

It is once again impressed upon you that the information called for may be furnished completely and in time to enable the visiting audit party to prepare an Audit Plan to conduct a qualitative audit. Any request for postponement / cancellation received within a weeks time prior to the date of the audit shall not be entertained.

Receipt of this letter may be acknowledged.

Yours faithfully,

Asst.Commissioner (Audit), Chennai-III Commissionerate"

"No.AG (C&RA)/CERA- Party-XII /2009-10/895 Date:18-01-2010

To
Titan Industries Limited
Watch division
Hosur – 635 126

Sir,

Sub : Central Excise Revenue Audit – Intimation – Reg.

Please refer to Rule 22 (3) of Central Excise Rules, 2002

1. The audit of the accounts of the Central Excise Receipts and Remittance in respect of your concern/company is programmed to conducted by the Central Excise Revenue Audit Party of this office from 08-02-2010 to 12-02-2010.

2. The assesse may see the identity cards of the party members and authority letter issued by CERA Headquarters and in case of any problem/difficulties with CERA Party, the assessee may contact the undersigned / the Deputy Accountant General personally or by telephone.

3. Necessary facilities may please be afforded to them for conducting the audit. In Addition if the Cenvat and Sales invoices are kept in computerized form in your unit, then, the vital details may be produced to Audit Party in soft forms on the final day of Audit. Also one computer may be made available to the audit party for their exclusive use.

4. Request for postponement will not be entertained except for reasons of strike and lockout.

5. Revenue particulars of PLA and CENVAT for the period of last 3 years Viz., 2006-07, 2007-08 and 2008-09 separately may please be forwarded along with acknowledgement.

Yours faithfully,

Assistant Audit Officer / Programme"

15. From the above audit notices, it can be seen that the appellants have been asked to produce all documents with regard to manufacture of goods as well as discharge of excise duty. There is no allegation that appellants did not produce the documents as required by the

department. So also, CERA Audit has been conducted which is by Office of the Accountant General (C & RA) and the officers of AG takes part in such conduct of audit. In spite of these repeated audits, the department did not raise any objection or query to the appellant as to why they have adopted cost of production on the basis of cost details given by their Senior Manager. Only in 2010, the department has raised this query. Immediately on being pointed out, appellants appointed a Cost Accountant and the costing details of accountant was furnished to the department. The demand in these cases have been raised on the basis of such costing details furnished by Cost Accountant appointed by appellant. From these facts, it is very clear that the department was fully aware that appellant was discharging duty on the basis of cost of production as per the details of the Senior Manager (Costing). When all the documents were put forward before the department, it cannot be said that the costing certificate issued by the Senior Manager (Costing) of the appellant was an act of suppression or misstatement on the part of appellant with an intention to evade payment of duty. Further when the department made enquiries in 2010, the appellant has sufficiently cooperated and appointed a Cost Accountant on their side and obtained a cost certificate which was furnished to the department. Thus, if the appellant had any intention to evade payment of duty, they would not have taken initiative to appoint a Cost Accountant. Had the department raised this query in any of the audits during the disputed period, the appellant would have done this exercise of appointing a Cost Accountant then itself. It is well settled law that when the facts were within the knowledge of the department, the allegation that appellants suppressed facts cannot sustain. For the omission on the part of the audit officers to find out the mistake in the method of valuation adopted by appellant cannot be a reason to saddle the appellant with intention to evade payment of duty.

16. The decisions relied by the Ld. Counsel for appellant have held that when the department was aware of facts the extended period cannot be invoked. Similar view was taken in *Visen Industries Ltd. Vs CCE Vapi* – 2009 (235) ELT 280 (Tri.-Ahmd.).

17. From the above discussions, I agree with the view taken by Member (Technical) that the demand is barred by limitation. Registry is directed to place the matter before the Division Bench for recording majority / final orders accordingly.

(order dictated and pronounced in court on 26.06.2019)

Sulekha Beevi. C
28/6/2019
(Sulekha Beevi, C.S)
Member (Judicial)

gs

FINAL ORDER

In view of the order of the Third Member, Hon'ble Smt. Sulekha Beevi C.S., Member (Judicial), agreeing with the view taken by the Hon'ble Member (Technical), the demand is held to be barred by limitation and accordingly set aside.

(Order pronounced in the open court on **30.07.2019**)

30/7/2019

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICICAL)

Sdd