IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75204 of 2016

(Arising out of Order-in-Original No.CCE/SHILLONG NO.13/2015 dated 18 November 2015 passed by Commissioner of Central Excise, Shillong.)

M/s. Byrnihat Ispat Private Limited (Unit-I)
(41, B.K.Kakati Road, Ulubari,
Guwahati-781007.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Shillong
.....Respondent
(Morellow Compound, M.G. Road,
Shillong-793001.)

WITH

Excise Appeal No.75205 of 2016

(Arising out of Order-in-Original No.CCE/SHILLONG NO.13/2015 dated 18 November 2015 passed by Commissioner of Central Excise, Shillong.)

Shri Bhagwati Prasad Agarwala, Director
M/s. Byrnihat Ispat Private Limited (Unit-I)
(41, B.K.Kakati Road, Ulubari,
Guwahati-781007.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Shillong
.....Respondent
(Morellow Compound, M.G. Road,
Shillong-793001.)

AND

Excise Appeal No.75206 of 2016

(Arising out of Order-in-Original No.CCE/SHILLONG NO.13/2015 dated 18 November 2015 passed by Commissioner of Central Excise, Shillong.)

M/s. Byrnihat Ispat Private Limited (Unit-II)
(41, B.K.Kakati Road, Ulubari,
Guwahati-781007.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Shillong
.....Respondent

(Morellow Compound, M.G. Road,
Shillong-793001.)

APPEARANCE

Shri Arvind Baheti (C.A.) & Shri Vipin Kumar (C.A.) for the Appellant (s)
Shri T.Mondal, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 76376-76378/2019

DATE OF HEARING : 8 August 2019
DATE OF DECISION : 8 August 2019

P.K.CHOUDHARY :

Excise Appeal Nos. 75204 and 75206 of 2016 have been filed by the 2 Units i.e. Unit – II and Unit – I of M/s Byrnihat Ispat Private Limited, Meghalaya and Excise Appeal No. 75205 of 2016 has been filed by one of its Director against a common order bearing No. 13/2015 dated 18 November 2015 (along with 2 Corrigendum) dated 15 December 2015 and 15 January 2016.

2.1 The facts of the case in brief are that, Unit – I commenced commercial production in 2001 and is engaged in manufacture of **MS Ingots,** whereas Unit – II commenced commercial production in 2004 and is engaged in manufacture of **MS Rods**. Both the units are located at the same compound in Byrnihat, Meghalaya but hold separate Central Excise Registration since their inception. Bulk of the production of MS Ingots from Unit – I was cleared on payment of central excise duty to Unit – II, for use in the manufacture of MS Rods. The MS Rods manufactured by Unit – II were cleared on payment of central excise duty to interstate buyers based in Arunachal Pradesh and Assam. Both the Units were operating under the area-based exemption Notification No. 32/99 and claimed refund of the excise duty paid thereunder, on their respective finished goods cleared during the period 2004 to 2007 (the relevant period). Pursuant to a search conducted on 3 May 2007 at the factory and office premises of both the Units, along with the residence of one of their Director, followed by an investigation spanning over a period of 3 years by the DGCEI, Regional Unit, a common Show Cause Notice dated 21 January 2010 was issued. The investigation, basis which the SCN was issued, mainly focused on establishing three aspects i.e.

(i) There was no movement of goods from Unit – I to Unit – II or from Unit – II to the independent inter-state buyers [two major Proprietorship firm (M/s. Tangum and M/s. Khar in Naharlagun A.P.) and a cabal of 80 buyers at Dibrugarh, Assam] as the goods were not intercepted at the intervening Sales Tax Check Posts;

(ii) Buyers of goods from both the Units were non-existent as the Summons served to them were returned undelivered and the addressee could not be traced by the postal/local police authorities;

(iii) A total of 117 transport vehicles claimed to have been engaged in transportation of goods by the Units – I and II were found to be fake and/or non-goods carrying vehicles. Even in cases where the trucks/goods carrying vehicles were found to be in existence, owners of these vehicles denied its usage of the same.

In essence, the allegation was that both the Units resorted to paper clearances for fraudulently availing the benefit of Notification No. 32/1999-CE dated 8 July 1999, resulting in erroneous grant of refund to Unit – I (Rs. 12,83,610/-) and Unit – II (Rs. 7,49,00,925/-) recoverable under the proviso to Section 11A read with Section 11D of the Central Excise Act, along with interest and penalty including personal penalty upon its Director under Rule 26 of the Central Excise Rules for the alleged omissions and commissions. Further, the Cenvat credit of Rs. 12,00,944 in respect of 447 MT of Ingots only involving 25 consignments procured from Unit – I during the relevant period was also conversely sought to be denied in the hands of Unit – II on the purported ground that the credit was taken without actual receipt of the inputs in the factory.

2.2 The demand proposed in the Notice vis-à-vis that confirmed by the Order-in-Original against both the Units are tabulated below.

Noticee	Erroneous Refund		Irregular Cenvat Credit avalied	
	Demand Proposed	Confirmed	Demand Proposed	Confirmed
Unit – II	7,49,00,925/-	7,49,00,925/-	12,00,944/-	9,39,570/-
Unit – I	12,83,610/-	9,81,522/-	Nil	Nil

The above demands were confirmed under Section 11A of the Act. Further, a sum of Rs. 2 Lacs each paid by the two Units in the course of investigation has also been appropriated against these demands. However, the adjudicating commissioner dropped the demands under Section 11D of the Act, in so far as Unit – II is concerned, as the buyers were non-existent and the question of recovery of any duty from the non-existent buyers did not arise.

3. The Learned Counsel for the Appellants (Units – I & II) has assailed the demands confirmed in the Order-in-Original on the following legal and factual grounds:

A **Contentions on legal points**

A1 The sanction of refund under Notification No. 32/1999 is a quasi judicial function and the same is subject to pre-audit/post audit in accordance with the Board's Circular No. 809/6/2005-CX dated 1st March 2005 unlike any other refund processed under Section 11B of the Central Excise Act. Therefore, each and every refund adjudication orders passed during the relevant period, were appealable orders. However, such refund adjudication Orders were not reviewed and appealed against in the manner prescribed under Section 35E of the Act. Since the refund adjudication orders have attained finality, parallel proceedings could not have been initiated for recovery of refund alleged to have been erroneously granted by invoking Section 11A of the Central Excise Act alone without reviewing such refund adjudication orders. It is a well settled law that something which cannot be done directly cannot be permitted indirectly either. Reference in this regard is invited to the following decisions:

- TFL Quinn India Pvt. Ltd. Vs. CCE, Hyd-IV reported in 2016 (339) ELT 129 (para 6);
- Eveready Industries Ltd. Vs. CESTAT, Chennai reported in 2016 (337) ELT 189 (para 51)
- Union of India Vs. Amalgamated Plantations Private Limited – 2016 (340) ELT 310

A2 Excise duty paid in cash alone (i.e. after adjustment of Cenvat credit) is refunded under Notification No. 32/1999. Moreover, no refund of Education Cess and Higher Education Cess as prevalent during relevant period was allowed. Since none of the buyers of goods from

Unit – II were registered under the Central Excise Law so as to avail any Cenvat credit of the duty paid by the Appellant and given that they were allegedly non-existent (duly accepted at para 5.2 of the 'OIO'), it is bereft / devoid of any commercial sense / financial benefit for the Appellant to initially pay duty without actual clearances and get the same or lesser sum refunded. Since the payment of excise duty in cash and seeking the refund thereof at best becomes tax neutral for the Appellant, no intention to evade can be attributed in this case and the demand deserves to be set aside having been issued beyond the normal period of one year by invoking extended period of limitation. Reference in this regard is also invited to the following decisions:

- Nirlon Ltd. Vs. CCE reported in 2015 (320) ELT 22 (SC);
- CCE, Chennai Vs. Tenneco RC India Pvt. Ltd. reported in 2015 (323) ELT 299.

It is also a settled law that the burden of proving *mala fide* conduct on the part of the assessee so as to justify the invocation of extended period of limitation is upon the revenue as held by the Hon'ble Supreme Court in the case of Uniworth Textiles Ltd - 2013 (288) ELT 161 and in the instant case the revenue has grossly failed to discharge the said burden in view of the tax neutral situation.

A3 Presuming that there was no clearance from the factory at all as alleged in the Notice and the Order-in-Original passed thereunder, no central excise duty was payable by the two Units under the law yet paid to the revenue. If no central excise duty was payable surely the department had no authority under the Act to retain the central excise duty so paid by the Appellant as no taxes/duties could be collected without the authority of law. In which case, the duty paid by Unit II acquires the character of a deposit and the same had to be refunded to Unit II applying the principles of restitution, more so when there was no case for unjust enrichment as the buyers of Unit II were allegedly non-existent. Reference in this regard is invited to the following decisions:

(i) Parimal Roy Vs. Commissioner (Port), vide 2015 (318) ELT 379 (Cal. HC);

(ii) M/s Geojit Bnp Paribas Financial Services Ltd reported in 2015-TIOl-1602

B. **Contentions on factual points**

B1 No discrepancy in Production/Stock/Inputs

Quantum of Production or electricity consumption at either of the Units has not been disputed/questioned in the entire proceedings, as evident from para 4.85 of the OIO. No variation found in stock of inputs/finished goods as at the date of search and neither is there any allegation as regards clandestine clearance of the goods produced. Under these circumstances the charge of paper clearance of the finished goods is ex-facie un-sustainable and devoid of substance.

B1.1 Major inputs of Unit II during Financial Year 2005-06 & 2006-07 were as under:

A. Iron Materials:

M.S. Ingots from Unit I	8944.945 MT
M.S. Ingots imported from Bhutan	7958.260 MT
M.S. Ingots from Others	5471.065 MT
Re Roller Scrap Purchase from others	21967.070 MT

Total Input Quantity of materials (in MT)	44341.340 MT
Value of Raw Materials	Rs. 75,27,41,416/-
Cenvat Credit availed on Input Materials	Rs. 3,42,81,921/

Out of the total input quantity of 44341 MT of ingots procured by Unit II during the relevant period, only 477.08 MT procured from Unit I has been disputed. Duty position of Unit-II for the Financial Year 2005-06 & 2006-07, is also summarized hereunder:

Charged Duty in Invoice : Rs. 11,72, 17,295/-

Cenvat Credit Availed : Rs 3,42,81,921/-

Amount Paid through PLA : Rs. 8,29,35,374/-

Amount refunded under Notification No. 32/99- : Rs. 8,12,74,803/-

From the above referred chart it is well evident that the alleged erroneous refund of Rs. 7.49 crores for the relevant period works out to 92.25% [7.49 crores /8.12 crores*100] of the actual refund claimed. Therefore, it is extremely intriguing, that when 99% inputs are accepted, production has not been disputed and there is no allegation of clandestine clearances, how 92.25% of the refund claimed could be attributable to paper clearances.

B2 <u>Movement of Finished goods was duly intercepted at Byrnihat Sales Tax Check Gate</u>

The allegation as regards movement of goods having not been recorded/intercepted at the intervening Check Post is also incorrect as the goods cleared from Unit – II had passed through Byrnihat Check Gate in Meghalaya located within 300 Meters of the factory gate of Unit – I and II and the same is duly certified by the Superintendent of Taxes, Taxation Check Gate Byrnihat, vide his letter dated 7 January 2016 (marked as pages 102 to 175 and enclosed as Annexure "G" of the Appeal Petition)].

B2.1 There was a shorter route for Naharlagun, A.P from Byrnihat, Meghalaya of nearly 322 KM then the enquired route of 370 Km. in which Narayanpur Check Gate, did not come. In the shorter route there was no Check Gate in Assam but one in Holongi in A.P, which was again not enquired by DGCEI. During the relevant period, there was no check gate in Assam between Byrnihat to Dibrugarh route. Khanapara Check Gate (enquired by DGCEI) was not at all coming between Byrnihat to Naharlagun (322 KM route) or Byrnihat to Dibrugarh, as Khanapara Check gate was relocated to Jorabat in January 2009. Hence before January 2009 there was no question of interception of goods at Khanapara, for routing to Naharlagun or Dibrugarh. The concerned Road Distance certificates issued by Assam State Transport Corporation dated 14/01/2016 and the concerned Sales Tax Check Gate Position in Assam in the mentioned two routes to Naharlagun from Byrnihat and route to Dibrugarh from Byrnihat are certified by the Commissioner of Taxes, Assam *[Pages 80 to 85 of the Appeal Paper Book]**.***

B3 Improper verification of Transport Vehicles in violation of the principles of natural justice

Exact list of the said 117 No. of vehicle is not clearly apparent in the SCN. The annexure to the **SCN at Page 530 to 542 refers to 159 cases** but between **Page 612 to 618 covers only 79 cases.** Amongst those if repetition of cases are excluded then the number of vehicles are reduced to 51 only. Appellant tried to verify the vehicle number mentioned in the list from the concerned vehicle no. mentioned in the concerned invoice (duly certified by DGCEI) and was surprised to note that out of 51 Vehicle number mentioned in Page 530 to 542 of SCN, 48 Vehicle numbers were different from invoice vehicle numbers. Appellants specifically requested to ld. Commissioner to cross verify the differences of vehicle number in SCN List and in the list jotted down by Appellant as accepted in **para 4.81** but no findings on the same. This might have led for wrong side enquiry from concerned RTO/ DTO/ Sales Tax Authority/ Owners of vehicle as number of vehicle enumerated in enquiry list was not matching with Invoice. The concerned A1, A2, A3, A4, A5, A5, A6 forming part of Annexure A7 said to be sent by the DGCEI to RTO/ DTO not produced to the Appellants for a cross verification/examination although specifically requested.

B4 Non existence of buyers as summons returned

Copy of said returned back summons from postal authorities in respect of 80 buyers situated at Dibrugarh could not be produced to the Appellant to cross check for errors/gaps and in any event the sales made to buyers were ex-factory. ***(Para 2.68 of the OIO)*****.** Summons was duly served on the residence address of 2 dealers of Naharlagun. Photograph & land line telephone bill of Smt. T.Kachi also given ***(Para 4.70 of the OIO and page 86-87 of the CESTAT Appeal Paper Book)***. Further allegation of DGCEI that the Two Firms having common Proprietor situated at Nahalagun was not registered to deal M.S. Rod is not correct as in their registration certificate Hardware & Govt. Supply was covered. M.S. Rods comes within the purview of Hardware ***(Para 4.69 of the OIO)***. Both the firms at Naharlagun were duly registered with the sales tax authorities in AP and furnished C Form, which has not been disputed by the sales tax authorities. ***(Para 1.36 of the OIO)***

C With respect to irregular availment of cenvat credit in respect of 25 consignments involving 447 MT out of 8944.94 MT of ingots procured from Unit I, the learned adjudicating authority has jotted down the list *at para 4.102 of the OIO.* From the list referred it is apparent that the alleged fake clearance against Unit-I is only in respect of 25 consignments and not a single consignment is in the name of the so called nonexistent buyers. Since Unit I and Unit –II are in a common adjoining premise at Byrnihat, Meghalaya and there is no intervening sales tax check post, the possibility of recording of movements in respect of the 23 inter-unit consignments at any Sales Tax Check Post does not arise. Further, there was no check gate between Byrnihat, Meghalaya & Dibrugarh, Assam such that the 2 inter-state consignments to NESL (another group company based in Dibrugarh), could also be intercepted. Thus, allegation of non-recording of these consignments at Sales Tax Check Post as contended at para 4.88 of the OIO is also totally baseless.

C1. Further, the investigations made with owners of the vehicles have been referred at para 4.46 of the OIO wherefrom it can be deciphered that only 4(Four) owners of the vehicles, namely Shri Harkanta Talukdar, (Vehicle No. AS01B0824), Shri Baljeet Singh (Vehicle No. AS01E 4176), Shri Bikash Jyoti Das (Vehicle No. AS01D9967) & Shri Kanhaiyalal Pandey (Vehicle No. AXA 5884), were interrogated. But none of these four vehicles no(s) are referred in the list of above referred 25 consignments. Therefore, the observations have been generalized against Unit I & Unit II, without any verifiable independent evidence in support of the allegation as regards paper transaction between Unit I & Unit II so as to deny the refund as well as the cenvat credit of Rs. 9,39,570/- thereby causing double jeopardy to the Appellant.

D Lastly, it is submitted that since the grant of refund was not erroneous, the imposition of penalty on the Director under Rule 26 of the Central Excise Rules is completely unsustainable and unjustified.

3 The Learned AR justifies and supports the confirmation of demands under the Order-in-Original.

4 Heard both sides and perused the appeal records.

5 The crux of the issue involved in the present proceedings is whether Units I and II resorted to paper clearances for availing erroneous refund of excise duty paid under the area-based Notification No. 32/99 dated 8 July 1999. Before going into the factual controversy, we traverse into the scope and remit of Notification No. 32/99. The said notification is essentially an exemption notification aimed at promoting industrialization and operationalized by way of grant of refund equivalent to the amount of duty paid by the manufacturer in cash i.e. the amount of duty paid after utilization of the Cenvat credit. Therefore, the duty paid through Cenvat credit is not at all refunded under the notification. The question of misuse of the notification could still be relevant if a case of dual benefits i.e. refunds of duty paid by the manufacturer in cash and corresponding availment of Cenvat credit by the buyers, is made out. However, in the instant case, we find that the adjudicating authority has himself accepted that the buyers of finished goods from Unit – II were non-existent and that no duty incidence could be passed on to such non-existent buyers while dropping invocation of Section 11D and thereby, ruling out the question of any double benefit being claimed. Under these circumstances, we concur with the contention of the Appellants that no intent to evade duty could be attributed on the part of Unit – II with reference to which the bulk of duty demand has been confirmed as the entire exercise turns out to be revenue neutral. Therefore, the demand confirmed by invoking the extended period

deserves to be set aside on this limited point alone, by following the ratio of the decision of the Hon'ble Supreme Court in Nirlon Ltd.'s case (supra). Even otherwise as per the revenue's allegation, the excise duty was not at all required to be paid on the manufactured excisable goods for want of clearance thereof. Therefore, the excise duty collected from Unit – II could not have been retained under Article 265 of the Constitution and in any event, ought to have been refunded by applying the principle of restitution more so when there was no case for unjust enrichment as the buyers were allegedly non-existent. The issue can be looked at from another angle also. The grant of refund under the said notification is subject to such verification as may be deemed necessary by the jurisdictional Assistant Commissioner or the Deputy Commissioner of Central Excise. We would like to refer to a sample refund adjudication order passed under Notification No. 32/99 in favour of Unit – II of the Appellant.

REFUND ORDER NO. R.302
F.NO. IV(10)329/SH.CEX.DIV/2006
Date 15.5.2006

> *1. **M/s Byrnihat Ispat Pvt Ltd. Unit-II** is an assessee holding Registration No. AABCB5768L-XM-002 engaged in the manufacture of excisable goods, viz. **1) Bars 2) Rods** etc. They are availing exemption from payment of central excise duty in terms of **Notification 32/99 CE dated 08.07.99** as amended and claiming refund of the excise duty paid in cash in respect of the final products viz. **1) Bars 2) Rods** w.e.f. 01.02.2004.*
>
> *2. They have filed a refund claim for **Rs. 78,87,069.00** paid by them in cash during the month of **April 2006**. They claimed that they have paid total excise duty of **Rs. 85,94,278.00** during the month out of which **Rs. 78,87,069.00** was paid in cash vide **TR-6 Challan No. 01 dated 03.05.06** and **Rs. 7,07,209.00** by way of debit in the CENVAT Credit amount. The assessee had an amount of Rs. **0.00** as balance in their PLA.*

3. The assessee's claim for eligibility to exemption from payment of duty and consequential refund in terms of notification ***32/99 CE dated 8.7.99*** *as amended was examined by the undersigned.*

4. The assessee has claimed refund in terms of notification ***32/99 CE dated 8.7.99*** *as amended. The factory of the assessee is found to be situated in EPIP, Byrnihat which is a specified area figuring in Para III(B) of the annexure to the notification* ***32/99 CE dated 8.7.99*** *as amended.*

5. I find that the assessee is claiming exemption from duty and consequential refund in terms of paragraph 3(a) of the Notification ***32/99 CE dated 8.7.99*** *as amended being a new industrial unit, which commenced commercial production on or after 24.12.97. I have verified and found that the unit had commenced commercial production on* ***01.02.2004****. Reliance is placed on the following records produced by the assessee to this office in this regard.*

- *Copy of Intimation of Commencement of Commercial Prodn served to Superintendent Range*

6. I have caused verification of the records such as ER-I, RG 23 A & C Part-I & II, PLA, TR-6 Challan of the assessee relating to their claim of production and clearance of the goods and payment of duty in cash as well as by debit in the CENVAT Credit Account. I am satisfied that the manufacturer has first utilized the whole of CENVAT Credit available to them on the last day of the month towards payment of duty on excisable goods cleared during the month.

7. In view of the above I find that the assessee is eligible for the refund of duty paid by them in cash in terms of notification ***32/99 CE dated 8.7.99*** *as amended. Accordingly, I pass the following order.*

<u>O R D E R</u>

*I sanction **Rs. 78,87,069.00 (Rupees Seventy Eight Lakhs Eighty Seven Thousand and Sixty Nine only)** as refund of excise duty for the month of **April 2006** in terms of notification No. **32/99 CE dated 8.7.99** as amended.*

Sd/- (APALAK DAS)
ASSISTANT COMMISSIONER

The refund sanctioning authority has caused necessary verification and satisfied itself as to the existence of the factory, commencement of commercial production therefrom and the eligibility of the Appellant to refund while sanctioning the refund under the said notification. It is now settled by the decision of the **Guwahati High Court** in the **Amalgamated Plantations Private Limited** case that refunds processed under Notification No. 32/99 are also covered by Section 11B of the Act. We find force in the contention of the Appellant that when such refund orders were not reviewed or appealed against under Section 35E(2) of the Act, and therefore, attained finality, no parallel proceedings for recovery of such alleged erroneous refund under Section 11A of the Act was maintainable as something which could not be done directly cannot be permitted indirectly either. This legal question had also fallen for consideration before the **Madras High Court** in **Eveready Industries India** case at **para 4** thereof and was answered in favour of the assessee and against the revenue. The decision of the Tribunal in **TDL Quinn** case at **para 6** thereof, set out herein below, also supports the said legal proposition.

> *"The issue that came up for consideration in the said case before the Hon'ble High Court was whether department can recover refund by invoking provisions of Section 11A, without exercising the power of review under Section 35E and the order of refund not being reviewed by a superior officer. The Court*

> *referred to the case of Commissioner of Customs & Central Excise v. Panyam Cements & Mineral Industries Ltd. – 2016 (331) E.L.T. 206 (A.P), to observe that when no appeal was filed against order under Section 11B, the department cannot take recourse to Section 11A. The Hon'ble Court held as follows:*
>
> > *"Once an application for refund is allowed under Section 11B, the expression 'erroneous refund' appearing in sub-section (1) of Section 11A cannot be applied. If an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to enable the order of refund to be revoked under Section 11A(1). One Authority cannot be allowed to say in a collateral proceeding that what was done by another Authority was an erroneous thing. Therefore, the question of law has to be answered in favour of appellant/assessee and the appeal deserves to be allowed."*
> >
> > *7. The proposition laid in the case of M/s. Eveready Industries India (P) Ltd. is squarely applicable to the case in hand, the fact an disuse being identical. In view thereof, I hold that the impugned orders are not sustainable. The same are set aside.*
> >
> > *8. The appeals are allowed with consequential reliefs, if any.*

However, from para 4.99 of the impugned Order-in-Original extracted below we find that the adjudicating authority has clearly passed a non-speaking order by not specifically dealing with this averment of the Appellant.

> *"Regarding the contention of the Noticees that the recovery proceeding of Refund initiated without review of the refund*

> *order by the Commissioner is illegal as each and every refund order is an appealable order and the legality and propriety of such orders are to be examined in terms of Section 35E (2) of Central Excise Act, 1944, I find that the contention of the Noticee is not sustainable as Section 11A ibid made it clear that the amount short levied or short paid or erroneously refunded will be covered under Section 11A ibid. The noticees also cited some case laws to augment their point. <u>I have gone through the said case laws and found that the ratio of these case laws is not applicable in the instant case</u>."*

The adjudicating authority has not adduced any reason as there was none for not following the cited precedents.

6. Factually also we find that the investigation is half-hearted and full of infirmities for the reasons mentioned below.

6.1 **Production / Stock / Inputs** – None of these have been disputed by the revenue as tacitly evident from para 4.85 of the 'OIO' set out below.

> *"It is also seen that the Noticees have made arguments in support of their defence on the basis of utilization of raw materials and consumption of High tension power supplied by the Meghalaya State Electricity Board. I have gone through the impugned SCN and it is seen in para 13, i.e., Result of Investigation, that "Noticees No. 1, 2 & 3 were involved in conducting a fraudulent and fictitious transaction with buyers by reporting much larger sales figures than what is actually sold by them." In para 12(i), the charge was of fraudulent sale; in para 14(i) of the SCN, the charge was regarding suppression and misrepresentation of the actual quantity of excisable goods cleared from the factory, <u>but nowhere in the</u>*

> *<u>SCN the production of the factories of the Noticees was questioned</u>."*

Neither is there any allegation as regards clandestine clearance of the produced goods. Given that production is not disputed and neither was any shortage detected on physical verification or any allegation of clandestine clearance, the charge of paper clearance of the produced goods cannot sustain in vaccum.

6.2 **Movement of finished goods -** The contentions of the Appellant that the movement of goods was intercepted at the Byrnihat Check Gate duly manned by the Sales Tax Official has been brushed aside for having not been relied upon in the Notice. However, the adjudicating authority should have enquired in the said matter before discarding the contentions as the certificates issued by the Superintendent of Taxes, Byrnihat Check Gate duly supports the movement. Moreover, the question of any interception at the sales tax check gate does not arise in respect of supplies from Unit I to Unit II located within the same compound in Byrnihat itself.

6.3 **Verification of Transport Vehicles -** We find that the Appellants have adduced a list of 51 instances, set out below, wherein the vehicle number mentioned in the invoice vis-à-vis those referred in the Notice were different. Despite a specific request for verification of such differences, no findings were given by the adjudicating authority thereby passing a non-speaking order.

S. No.	Invoice No & Date .	Vehicle No. in		S. No.	Invoice No. & date	Vehicle No. in	
		Invoice	List			Invoice	List
1	31/ 13.04.2005	AXA 6488	AKA 9188	27	499/27.08.2005	AS01X4806	AS01K4801

2	40/ 15.04.2005	AS01J 8040	AS01K 8849	28	503/28.08.2005	AS01R2731	AS01D9362
3	45/ 17.04.2005	AS25C4086	AS25U2625	29	513/29.08.2005	**AMK3567**	**AMK3567**
4	126/ 09.05.2005	AS25B8647	AS20B8917	30	527/01.09.2005	AS01L1657	AS01L1627
5	140/ 17.05.2005	AS01U4891	AS01V9973	31	529/01.09.2005	AS01A4569	AS01A7571
6	156/18.05.2005	AS01C7325	AS01C7379	32	544/03.09.2005	AXM8487	AXU5487
7	200/26.05.2005	AMX8569	AMK3567	33	545/03.09.2005	MN01A4685	MN01A4575
8	215/29.05.2005	AS01J8040	AS01Q8040	34	555/04.09.2005	AS01E2448	AS01F1721
9	259/16.06.2005	AS01L1675	AS01L1677	35	561/10.09.2005	AS01C7325	AS01C1095
10	266/18.06.2005	AS01G7649	AS01Q7579	36	563/12.09.2005	AS01E7865	AS01F7760
11	296/24.06.2005	AS01B8489	AS01D3485	37	565/14.09.2005	AS01A7695	AS01A7265
12	304/26.06.2005	AS25B8947	AS20B8917	38	566/16.09.2005	AS01L1675	AS01L7765
13	338/29.06.2005	AMK8567	AMK3567	39	568/18.09.2005	AS01D7804	AS01D7701
14	348/04.07.2005	AS01R4078	AS01E4176	40	571/20.09.2005	AS01R2731	AS01E2160
15	389/16.07.2005	AS01E8964	AS01E0914	41	572/21.09.2005	AS01C7325	AS01C7576
16	399/19.07.2005	AS25A6451	AS25D6651	42	574/22.09.2005	AS01C7325	AS01C7765
17	418/28.07.2005	**AS25 2988**	**AS25 2988**	43	576/23.09.2005	AS01R2731	AS01S2075
18	442/12.08.2005	AS01C0844	AS01C0811	44	578/23.09.2005	AS01P4847	AS01P1547
19	449/17.08.2005	AS01R4420	AS01K1420	45	579/23.09.2005	AS01R2731	AS01S2567
20	454/19.08.2005	**AXA5884**	**AXA5884**	46	580/23.09.2005	AS01C7325	AS01C2795
21	474/23.08.2005	AS01B8944	AS01B0314	47	581/23.09.2005	AS01P2589	AS01A2567
22	484/24.08.2005	AS01B7227	AS01E1227	48	583/23.09.2005	AS01B3685	AS01P3475
23	486/25.08.2005	AS01B6498	AS01D5445	49	584/24.09.2005	AS01J8040	AS01P3176
24	490/25.08.2005	MN01A4878	MN01A4575	50	585/24.09.2005	AS01Q7856	AS01J7656
25	492/26.08.2005	MN015048	MN015043	51	587/24.09.2005	AS01R2731`	AS01E3765
26	498/27.08.2005	AS01R7848	AS01K7018				

Similarly, the investigations made with owners of the vehicles have been referred in page 22 to 24 of the SCN. The investigation shows interrogation of only 4(Four) owners of the vehicles, namely Shri Harkanta

Talukdar, (Vehicle No. AS01B0824), Shri Baljeet Singh (Vehicle No. AS01E 4176), Shri Bikash Jyoti Das (Vehicle No. AS01D9967) & Shri Kanhaiyalal Pandey (Vehicle No. AXA 5884). But none of these four vehicles no(s) are referred in the list of 25 consignments involving supplies from Unit I to Unit II.

In view of the above, the impugned Order cannot be sustained and is accordingly set aside on multiple grounds as discussed above and all the three appeals are allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(BIJAY KUMAR)
MEMBER (TECHNICAL)

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