

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

REGIONAL BENCH - COURT NO.1

Excise Appeal No.158 of 2012

(Arising out of Order-in-Original No.95-99/COMMR/BOL/11/21 dated 28.12.2011
passed by Commissioner of Central Excise, Bolpur.)

M/s. Jai Balaji Industries Limited (Unit-IV)

(Banskopa, P.O.Rajbandh, Durgapur-713212, Dist. Burdwan, West Bengal.)

...Assessee

VERSUS

Commissioner of Central Excise, Bolpur

.....Revenue

(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

WITH

(i) Excise Appeal No.161 of 2012 (Sri Gaurav Jajodia, Director of M/s. Jai Balaji Industries Limited v. Commissioner of Central Excise, Bolpur); (ii) Excise Appeal No.165 of 2012 (Commissioner of Central Excise , Bolpur v. M/s. Jai Balaji Industries Limited (Unit-I)); (iii) Excise Appeal No.166 of 2012 (Commissioner of Central Excise , Bolpur v. M/s. Jai Balaji Industries Limited (Unit-I));

(Arising out of Order-in-Original No.95-99/COMMR/BOL/11/21 dated 28.12.2011
passed by Commissioner of Central Excise, Bolpur.)

APPEARANCE

Shri K.K.Anand, Advocate & Shri S.K.Mohapatra, G.M. for the Assessee

Shri J.Chattopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75907-75910/2023

DATE OF HEARING : 20 June 2023
DATE OF DECISION : 04.07.2023

Per : ASHOK JINDAL :

Both sides are in appeal against the impugned order and Shri Gaurav Jajodia has also filed appeal against imposition of penalty thereon. The adjudicating authority has passed the following order:-

- (i) I confirm the demand of the CENVAT duty amounting to Rs.2,23,110/-, Education Cess amounting to Rs.4,462/- and Secondary & Higher Education Cess amounting to Rs.2,231/- altogether amounting to Rs.2,29,803/- (Rupees two lakh twenty nine thousand eight hundred three only) evaded by the Noticee No.1 in respect of finished excisable goods namely Pig iron, Sponge iron, Silico Manganese, & Ferro Manganese found short in course joint physical stock taking in terms of proviso to sub-section (1) of Section 11A read with Section 11A(2) of the Central Excise Act, 1944;
- (ii) I confirm the demand of CENVAT duty amounting to Rs.99,255/-, Education Cess amounting to Rs.1,985/- and Secondary & Higher Education Cess amounting to Rs.992/- altogether amounting to Rs.1,02,232/- (Rupees one lakh two thousand two hundred thirty two only) evaded by the Noticee No.1 out of the total demand of Rs.4,79,62,368/- (Rupees four crore seventy lakh sixty two thousand three hundred sixty eight only) in respect of finished excisable goods namely Sponge Iron cleared during the period from 2006-07 to 2009-10 in terms of proviso to sub-section (1) of Section 11A read with Section 11A(2) of the Central Excise Act, 1944 and the rest of the demanded amount to the extent of Rs.4,78,60,136/- (Rupees four crore seventy eight lakh sixty thousand one hundred thirty six only) is set aside;
- (iii) I also charge the interest to the tune of Rs.16,083/- (Rupees sixteen thousand eighty three only) against the Noticee No.1 leviable on the aforesaid amounts of duty in terms of Section 11AB of the Central Excise Act, 1944;
- (iv) I impose penalty to the tune of Rs.83,008/- (Rupees eighty three thousand eight only) upon the Noticee No.1 in terms of Section 11AC of

the Central Excise Act, 1944 allowing the benefit of payment of reduced penalty i.e. 25% (twenty five percent) of the duty amount as confirmed since the said Noticee No.1 has fulfilled the conditions laid down in 1st and 2nd proviso to Section 11AC of the Central Excise Act, 1944.

(v) I do hereby appropriate a sum of Rs.4,31,846/- (Rupees four lakh thirty one thousand eight hundred forty six only) out of the amount of Rs.70,00,000/- (Rupees seventy lakh only) voluntarily deposited by the Noticee No.1 towards Central Excise duty, interest and penalty to the Government Account.

(vi) I confirm the demand of the CENVAT duty amounting to Rs.1,57,958/-, Education Cess amounting to Rs.3,159/- and Secondary & Higher Education Cess amounting to Rs.1,580/- altogether amounting to Rs.1,62,697/- (Rupees one lakh sixty two thousand six hundred ninety seven only) being the amount of duty evaded by the Noticee No.2 in respect of finished excisable goods namely Rejected Melting Scrap cleared during the period from 27.01.2008 to 21.10.2008 in terms of proviso to sub-section (1) of Section 11A read with Section 11A(2) of the Central Excise Act, 1944;

(vii) I hereby drop the demand of CENVAT duty amounting to Rs.6,30,83,612/- as Central Excise duty, Rs.12,61,672/- as Education Cess and Rs.5,05,360/- altogether amounting to Rs.6,48,50,644/- (Rupees six crore forty eight lakh fifty thousand six hundred forty four only) being the amount of duty alleged to have been evaded by the Noticee No.2 in respect of finished excisable goods namely Sponge Iron cleared during the period from 2006-07 to 2009-10;

(viii) I deny Cenvat credit and confirm the demand of the CENVAT duty amounting to Rs.19,14,400/-, Education Cess amounting to Rs.38,288/- and Secondary & Higher Education Cess amounting to Rs.19,144/- altogether amounting to Rs.19,71,832/- (Rupees nineteen lakh seventy one thousand eight hundred thirty two only) being the amount of Cenvat credit irregularly availed and utilized by Noticee No.2 in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 22A(1) of the Central Excise Act, 1944 read with Section 11A(2) of the Central Excise Act, 1944;

(ix) I confirm the demand of the CENVAT duty amounting to Rs.10,50,749/-, Education Cess amounting to Rs.21,015/- and

Secondary & Higher Education Cess amounting to Rs.10,508/- altogether amounting to Rs.10,82,272/- (Rupees ten lakh eight two thousand two hundred seventy two only) being the amount of duty evaded by the Noticee No.2 in respect of finished excisable goods namely pig iron, sponge iron, Silico Manganese & Ferro Manganese found short in course joint physical stock taking in terms of the first proviso to Section 11A(1) of the Central Excise Act, 1944 read with Section 11A(2) of the Central Excise Act, 1944;

(x) I also order payment of interest leviable on Noticee No.2 in terms of Section 11AB of the Central Excise Act, 1944 and Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 on the amounts of duty evaded as demanded in clause (vi), (viii) and (ix) above;

(xi) I impose penalty to the tune of (Rs.1,62,697/- + Rs.10,82,272/-)Rs.12,44,969/- (Rupees twelve lakh forty four thousand nine hundred sixty nine only) upon the Noticee No.2 in terms of Section 11AC of the Central Excise Act, 1944. However, I allow the benefit for payment of reduced penalty i.e. 25% (twenty five percent) of the duty amount to the Noticee No.2 subject to fulfillment of conditions laid down in 1st and 2nd proviso to Section 11AC of the Central Excise Act, 1944.

I also impose penalty to the tune of Rs.19,71,832/- (Rupees nineteen lakh seventy one thousand eight hundred thirty two only) upon the Noticee No.2 in terms of Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. However, I allow the benefit for payment of reduced penalty i.e. 25% (twenty five percent) of the duty amount to the said assessee subject to fulfillment of conditions laid down in 1st and 2nd proviso to Section 11AC of the Central Excise Act, 1944.

(xii) I also order for appropriation of Rs.18,00,000/- (Rupees eighteen lakh only), voluntarily deposited by the Noticee No.2 against the instant demand, interest, penalty etc. to the Government Account.

(xiii) I confirm the demand of the CENVAT duty amounting to Rs.6,27,129/-, Education Cess amounting to Rs.12,543/- and Secondary & Higher Education Cess amounting to Rs.6,271/- altogether amounting toRs.6,45,943/- (Rupees six lakh forty five thousand nine hundred forty three only) being the amount of duty evaded by the

Noticee No.3 in respect of finished excisable goods namely MS Rejected Ingots/Shorts and Light Melting/Local Scrap cleared during the period from September 2008 to November 2008 in terms of proviso to sub-section (1) of Section 11A read with Section 11A(2) of the Central Excise Act, 1944;

(xiv) I confirm the demand of the CENVAT duty amounting to Rs.90,758/-, Education Cess amounting Rs.1,815/- and Secondary & Higher Education Cess amounting to Rs.908/- altogether amounting to Rs.93,481/-(Rupees Ninety three thousand four hundred eighty one only) being the amount of duty evaded by the Noticee No.3 in respect of finished excisable goods namely 0.075MT of Alloy Ingots and 18.71 MT of Non Alloy Ingots found short in course joint physical stock taking in terms of proviso to sub-section (1) of Section 11A read with Section 11A(2) of the Central Excise Act, 1944;

(xv) I also order payment of interest leviable on Noticee No.3 in terms of Section 11AB of the Central Excise Act, 1944 on the amount of duty evaded as demanded in clause (xiii) and (xiv) above;

(xvi) I impose penalty to the tune of (Rs.6,45,943/- + Rs.93,481/-) Rs.7,39,424/- (Rupees seven lakh thirty nine thousand four hundred twenty four only) upon the Noticee No.3 in terms of section 11AC of the Central Excise Act, 1944. However, I allow the benefit for payment reduced penalty i.e. 25% (twenty five percent) of the duty amount to the Noticee NO.3 subject to fulfillment of conditions laid down in 1st and 2nd proviso to Section 11AC of the Central Excise Act, 1944.

(xvii) I also order for appropriation of Rs.4,00,000/- (Rupees four lakh only), voluntarily deposited by the Noticee No.3 against the instant demand, interest, penalty etc. to the Government Account.

(xviii) I impose penalty to the tune of Rs.10,00,000/- (RupeesTen lakh only) upon Shri Gaurav Jajodia, Director (Noticee No.4) of M/s. Jai Balaji Industries Limited Unit-1 [Noticee No.1], M/s. Jai Balaji Industries Limited Unit-IV [Noticee No.2] and M/s. Jai Salasar Balaji Industries (P) Limited, (Noticee No.3) in terms of Rule 26(1) of the Central Excise Rules, 2002.

(xix) I impose penalty to the tune of Rs.5,00,000/- (Rupees Five lakh only) upon Shri Satya Narayan Dey Proprietor of M/s. Shyam Sons

India (Noticee No.5), 18, Atul Ghosh Lane, Salkia Howrah-711106 in terms of Rule 26(1) of the Central Excise Rules, 2002.

Again the said order, both sides are in Appeal.

2. The facts of the case are that the assessee is having five units, but this matter relates to Unit No.I and IV of the assessees and one Shri Jai Salasar Balaji Industries Limited. On the basis of an intelligence that all these firms are evading payment of duty by way of suppressing their actual quantum of manufacture of excisable goods and subsequently removal of such unaccounted manufacture of finished goods, a search was conducted in their premises on 05.10.2008 on 13.30 hrs. The physical stock-taking of inputs and finished goods was conducted wherein shortage of finished goods was detected as under:-

| Product | Qty. |
|------------------|-------------------|
| Sponge Iron | 5.055 MT |
| Billets | 15.46 MT |
| Ingots | 0.705 MT |
| Silico Manganese | 87.002 MT |
| Ferro Manganese | 50.99 MT |
| TOTAL | 159.212 MT |

3. It was also alleged that the suppliers namely Neo Metaliks Ltd. and KIC Metaliks Ltd. issued 36 invoices to the appellant, but the assessees received only the invoices and not the physical goods which has been diverted and therefore, the assessees are not entitled to take Cenvat credit of 750 MT of Pig iron on the strength of 36 invoices issued by the above said suppliers. It was also found that the assessee has cleared melting scrap without payment of duty. Further from the records, it was revealed that during the financial year 2004-05 the quantity of iron ore of 1,06,309 MT was consumed to manufacture 70,872 MT of Sponge Iron therefore, input output ratio works out to 1.50:1. This input output ratio was maintained in the financial year 2005-06, but in subsequent financial years, the input output ratio has gone up as per the chart below:-

| Year | Name of the manufacturing unit | Qty. of iron ore consumed (in MT) | Qty. Sponge Iron manufactured [in MT] | Input-Output ratio |
|---------|--------------------------------|-----------------------------------|---------------------------------------|--------------------|
| 2004-05 | Unit-I | 106309 | 70872 | 1.50:1 |
| 2006-07 | Unit-IV | 128574 | 80945 | 1.59:1 |
| 2007-08 | Unit-IV | 146575 | 90354 | 1.62:1 |
| 2006-07 | Unit-IV | 169191 | 105516 | 1.60:1 |
| 2007-08 | Unit-IV | 161009 | 98310 | 1.64:1 |
| 2008-09 | Unit-I | 143946 | 91502 | 1.57:1 |
| 2009-10 | Unit-I | 150642 | 98379 | 1.53:1 |
| 2008-09 | Unit-IV | 157429 | 98843 | 1.59:1 |
| 209-10 | Unit-IV | 173334 | 111734 | 1.55:1 |

Therefore, it was alleged that the input output ratio is to be 1.50:1 and by showing excess input output ratio, the assesseees have clandestinely removed the goods, therefore, a demand of Rs.6,48,50,644/- was sought from the assesseees.

4. In view of the above facts and circumstances of the case, show cause notice was issued to the assesseees alleging clandestine removal of goods without payment of duty and availment of Cenvat credit on pig iron without receiving the same in the factory premises, to demand of duty and reversal of Cenvat credit along with interest and penalty upon the appellant. The matter was adjudicated and the order was passed as mentioned in paragraph 1 hereinabove, wherein the adjudicating authority dropped the demand sought to be evaded by the assesseees on the basis of the input output ratio, but confirmed the demand of duty on account of shortage of finished goods and denial of Cenvat credit on pig iron and also imposed various penalties on the appellants. Against the order of confirmation of demand of duty, reversal of Cenvat credit and imposition of penalty, the assesseees are in appeal and against the order of dropping the demand against the assessee, the revenue is in Appeal.

5. Ld.Counsel for the assesseees fairly conceded the demand of duty confirmed on account of clearance of melting scrap in the absence of any evidence of clearing the same on payment of duty, therefore, the said demand of Rs.1,62,697/- is not being contested by the assessee and the same is confirmed. A demand of Rs.10,82,271/- confirmed against the assessee on account of shortage of finished goods, the

Ld.Counsel for the assessee submits that it is evident that on 05.02.2008 13.30 hrs., the factory of the assessee were visited and there was a finished stock of 618932 MT was available in their records and it is very strange how such a huge quantity can be weighed in such a short span of time. As for weighing of such huge quantity 619 trucks are required and in 10.30 hrs. time, the weighment of 619 trucks cannot be done in any stretch of means. Therefore he submits that demand has been raised against the appellant on the basis of assumption and presumption and the shortages were also found of negligible quantity of finished goods as per the chart given in paragraph 3.

6. To support this contention he relied on the decision of this Tribunal in the case of Sada Shiv Steel Mills v. CCE, Chandigarh-I [2017 (357) ELT 481 (Tri.Chan.)], which has been upheld by the Hon'ble Punjab & Haryana High Court reported in 2019 (369) ELT 315 (P &H). He also relied on the decision of National Engineering Industries Ltd. CCE, Jaipur-I [2015 (330) ELT 681 (Tri.Delhi.)]. Therefore, he prayed that demand of Rs.10,82,272/- is not sustainable against the assessee. He also submitted that on mere oral statement is not sufficient to establish illicit removal of goods without cogent and corroborative evidence. To show that the statement of Shri Gaurav Jajodia or Shri Niranjana Gaurisaria cannot be relied upon in the absence of some tested under the mandatory provisions of section 9D of Central Excise Act. To support this contention he relied the following decisions:-

- (i) 2016 (339) ELT 209 (P &H) G-Tech Industries vs. Union of India
- (ii) 2018 (362) ELT 961 (Chattisgarh) Hi-Tech Abrasives Ltd. v. CCE & C, Raipur
- (iii) 2016 (338) ELT 113 (T) CCE, Delhi-I v. Kuber Tobacco India Ltd.

7. With regard to denial of Cenvat credit on the invoices issued by M/s. Neo Metaliks Ltd. and KIC Metaliks Ltd. he submits that the allegation that the assessee have availed Cenvat credit on 750 MT of pig iron on the strength of 36 invoices out of which 12 invoices pertained to KIC Metaliks Ltd. and remaining 24 invoices pertained to M/s. Neo Metaliks. The case is that invoices of pig iron were issued on

assessee 1's name but the same pig iron was not received in their manufacturing unit but was handed over to one agent Shri Satya Narayan Dey of Shyam Sons India, who used to load it in the containers and transported the same by means of trailers to Railway sliders at Majherhat Kolkata from where such containers were mounted in railway wagons/rakes for onward transportation and disposal mostly to northern parts of India. These all consignments had a specific quantity of 25.7 MT/28 MT which could not be transported by a trailer without the service of a container.

8. It is his contention that to buy peace the appellant has reversed the cenvat credit pertaining to 9 invoices wherein container number is mentioned. Without admitting the same, it is his contention that to manufacture of their finished goods, which has been cleared on payment of duty such a huge quantity of 750 MT if it was not received in the factory, then from which sources they have procured the pig iron to manufacture their finished goods. The Revenue has failed to prove the source of procurement of pig iron in their factory, which was ultimately used in manufacture of final product. Therefore, the said demand is not sustainable against the assessee and he drew our attention to the records before us, which shows that out of 36 consignments only 9 consignments were having mention of containers whereas in 3 cases quantity is less than 27.5 MT, but he fairly conceded that with regard to Cenvat credit pertained to 9 consignments are having mention of container numbers, the assessee is reversing cenvat credit and which has already been reversed. For denial of Cenvat credit, he relied on the decision of this Tribunal in the case of CCE, Chandigarh v. Shakti Roll Cold Strips Pvt.Ltd. [2008 (229) ELT 661 (P & H)] which has been affirmed by the Hon'ble Apex Court reported in 2009 (242) ELT A-83 (SC). He also relied on the decision of the Punjab & Haryana High Court in the case of CCE, Chandigarh v. Neepaz Steels Ltd. [2008 (230) ELT 218 (P &H)].

9. With regard to penalties imposed on the assessees, it is his submission that most of the demand is not sustainable against the

assesseees and whatever demand has been admitted by the assessee is negligible in the facts and circumstances of the case and there is no mala fide of the assesseees to evade payment of duty, in that circumstances penalties are not imposable.

10. With regard to the appeal filed by the revenue for dropping the demand of duty on the basis of input output ratio he supported the impugned order.

11. On the other hand the Ld.AR for the department submitted that the physical verification of the stock was done in the presence of the officers of the assessee, who admitted the shortage of finished goods while doing physical verification and same was not objected by the Managing Director Shri Gaurav Jajodia in his statement, therefore, the duty demand on account of shortage of finished goods is to be confirmed.

12. With regard to the denial of Cenvat Credit it is his submission that Shri Satya Narayan Dey in his statement has stated that the goods has not been received by the assessee and they have been diverted to northern states of India, therefore, the cenvat credit is rightly denied.

13. With regard to dropping of demand by the Ld.Commissioner on account of input output ratio is not properly appreciated the fact that the production of sponge iron was recorded in daily stock account mainly on the basis of Fe(T) in iron ore and input output ratio. It is also submitted that from the production log sheet for the year 2005-06, the assessee themselves have recorded production of sponge iron maintaining input output ratio 1.5:1 throughout the year so it is clear that Fe(T) content in iron ore used throughout the year 2005-06 remained the same. During 2006-07 and onwards the input output ratio has been varied from day to day and even from kiln to kiln of a particular day although it cannot be said that Fe(T) content in the iron ore fed into the kilns on a particular day is varied from kiln to kiln. On the day of search, shortage of physical stock of sponge iron was detected in both the factories and demand on such shortages of sponge iron has also been confirmed by the adjudicating authority. Demand on

unaccounted sponge iron collectively weighing 62.740 MT cleared against challans dated 01.12.2008, 02.12.2008 and 03.12.2008 has also been confirmed by the adjudicating authority. So it is an admitted fact that the assesseees are engaged in surreptitious manufacture and clandestine clearance of sponge iron. Therefore, the order of the Ld.Commissioner for dropping the demand on the basis of input output ratio is to be set aside.

14. Heard the parties, considered the submissions.

15. After hearing the parties we find that the demand has been proposed in the show cause notice on the following grounds.:-

- (a) Clearance of melting scrap clandestinely without payment of duty of Rs.1,62,697.00.
- (b) Demand of shortage of finished goods of Rs.10,82,271/-
- (c) Denial of Cenvat credit of Rs.19,71,832/-.
- (d) Demand of Rs.6,48,48,644/- on account of input output ratio.

(a) Clearance of melting scrap clandestinely without payment of duty.

16. The appellant has conceded the said demand of Rs.1,62,692/- stating that the said clearance may be negligible and in such a big plant, therefore, to buy peace they are admitting the said demand and paid the duty. Therefore, the above said demand is confirmed.

(b) Demand of shortage of finished goods of Rs.10,82,271/-

17. We find that although it is claimed that stock verification was done physically in the presence of the offices of the assesseees, but it is very strange that such a huge quantity of 6189.32 MT be weighed with a short span of time of 10.30 hrs. which is next to impossible and in such a big plant, negligible quantity of shortages were found as per recorded stock and physical stock as claimed. Therefore, we hold that the shortage ascertained during the course of stock-taking are on the basis

of assumption and presumption. The same is not sustainable as held by this Tribunal in the case of Sada Shiv Steels Mills (supra), wherein Paragraph 12 this Tribunal observed as under:-

12. *We have seen that in the impugned order duty has been demanded on shortage of finished goods. The sole contention of the appellant is that weighment has been done on the average basis not on actuals. The learned Adjudicating Authority while adjudicating the case has adopted the method of average weighment by sending the team to inspect and find out the average weight of ingots of different sizes. If the average weight during the course of adjudication has been taken, in that case also the shortage of 120 MT will come down to 38.796 MT i.e. too when the average weight of dimensions 3½' x 4½' and 4' x 5' are not available, therefore, we hold that the weighment done on average basis to alleged shortage of finished goods is not sustainable in the absence of any corroborative evidence of clearance of finished goods without payment of duty. Admittedly, no corroborative evidence has been produced by the Revenue in support of their claim, therefore, we hold that demand of duty on shortage of raw material/finished goods against M/s. SSCL is not sustainable, the same is set aside.*

The said order has been affirmed by the Hon'ble High Court. Further in the case of National Engineering Industries Ltd. (supra), this Tribunal has given an option to deal the issue and observed as under:-

5. *The admitted facts of the case are that the assessee is having computerized accounting which manages end to end operations i.e. from the set of procurement of raw material to sale of finished goods. It is also admitted fact that there are large varieties of raw materials, work-in-progress and finished products. The consumption of raw material goods which are used in process of making and the finished goods are not physically numbered and accounted on day-to-day basis. The standardized system of accounting based on measurement and conversion of raw material to finished product on weight/length basis is fed to the computer. The assessee undertakes with the help of cost auditor stock verification on annual basis to reconcile the*

inventory position. In such a situation it is but natural that minor variation (0.5% and below) do occur during reconciliation. The explanations provided by the assessee during the original proceedings have been accepted by the lower authority and he allowed the possibility of shortages and excesses in respect of various individual category of raw materials and finished goods. However, he confirmed the reversal of credit in respect of raw material found short after netting of excess with shortage among various varieties. Same method has been adopted for finished goods also. We find that the shortages and excesses found during physical stock verification which remained unreconciled are within the tolerance limit keeping in view the thousands of types of raw material and finished goods involved in the accounting by the assessee. Such view has been taken by this Tribunal in the cases of Maruti Udyog Ltd. v. CCE, Delhi-III reported in [2004 \(173\) E.L.T. 382](#) (Tri. - Del.) and in Widia India Ltd. v. CCE, Bangalore reported in [2007 \(207\) E.L.T. 562](#) (Tri. - Bang.) later affirmed by the Hon'ble High Court of Karnataka in [2010 \(255\) E.L.T. 36](#) (Kar.). Another important point to be noted here is that while the whole discrepancy in physical stock has come to light only as per the stock taking conducted by the assessee, there is no allegation or evidence to the effect that the shortages/excesses are not attributable to accounting errors or complexities but are due to unaccounted clearances finished goods and consumption of raw material. In the absence of any such corroboration the assessee's plea on the non-sustainability of order reversing credit or demanding duty has strong force and is to be admitted. Accordingly, we find the reversal of credit on the raw material and the demand of duty on the finished goods solely on the ground of physical stock taking done by the assessee is not sustainable in the facts and circumstances of the present case."

18. As in this case it is claimed that physical stock taking has been done, but which is next to impossible to weighment of such a huge quantity in 10.30 hrs. without deployment of excess labour and transporting vehicles and the shortage is also of the negligible quantity of their production, in that circumstances, we hold that the shortages of finished goods are calculated on the basis of assumption and

presumption. In the absence of any documentary evidences, therefore, relying on the above cited decision of this Tribunal, which has been affirmed by the Hon'ble High Court, we set aside the demand of Rs.10,82,271/- confirmed against the assessee.

(c) Denial of Cenvat credit of Rs.90,71,832/-.

19. We find that Cenvat credit has been denied to the assessee on the basis of 36 invoices issued by M/s. Neo Metaliks Ltd. and KIC Metaliks Ltd amounting to Rs.19,71,832.00. From the statement of Shri Satya Narayan Dey, which was relied by the adjudicating authority, has stated that he used to load it in the containers and transported the same by means of trailers to Railway sliders at Majherhat Kolkata from where such containers were mounted in railway wagons/rakes for onward transportation and disposal mostly to northern parts of India. These all consignments had a specific quantity of 25.7 MT/28 MT which could not be transported by a trailer without the service of a container. The details of the same is available as under :-

Chart showing diversion of Pig Iron through container of Container Corporation of India and otherwise

Annexure-P

| 04/SSI/OFF/10 | | | | | | | | | | 08/SSI/OFF/0908/SSI/OFF/09 | | | | | |
|---------------|-------------------|--------------------|-----------------|----------|----------|---------------------------------|------------------|-------------|--------|----------------------------|----------|---------------|-------------|---------|--|
| Sl. No. | From | To | Seizure Sl. No. | Page No. | Date | DO No. | C.E. Invoice No. | Trailer No. | Weight | Seizure Sl. No. | Page No. | Container No. | Trailer No. | Remarks | |
| 1 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 05.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 165 | WB 15A 1673 | 10.720 | 08/SSI/OFF/09 | | | | | |
| 2 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 06.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 178 | WB 73 3884 | 21.560 | 08/SSI/OFF/09 | | | | | |
| 3 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 07.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 210 | WB 37 4971 | 22.600 | 08/SSI/OFF/09 | | | | | |
| 4 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 09.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 234 | WB 41 8833 | 24.920 | 08/SSI/OFF/09 | | | | | |
| 5 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 09.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 256 | WB 37 4731 | 25.490 | 08/SSI/OFF/09 | | | | | |
| 6 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 11.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 311 | WB 41 8833 | 18.550 | 08/SSI/OFF/09 | | | | | |
| 7 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 10.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 278 | WB 73 5102 | 22.680 | 08/SSI/OFF/09 | | | | | |
| 8 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OFF F/10 | 5 | 12.04.07 | NML/DO/06-07/946 DATED | 328 | NL 02 3582 | 22.040 | 08/SSI/OFF/09 | | | | | |

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| | | | | | | 29.03.07 | | | | | | | | | |
| 9 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 5 | 13.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 362 | WB 73 3884 | 8.570 | 08/SSI /OFF/09 | | | | | |
| 10 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 5 | 10.04.07 | NML/DO/06-07/946 DATED 29.03.07 | 283 | WB 41 6338 | 22.870 | 08/SSI /OFF/09 | | | | | |
| 11 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 13.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 382 | WB 39 6511 | 21.410 | 08/SSI /OFF/09 | | | | | |
| 12 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 14.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 414 | WB 37 4791 | 24.590 | 08/SSI /OFF/09 | | | | | |
| 13 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 13.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 362 | WB 73 3884 | 12.650 | 08/SSI /OFF/09 | | | | | |
| 14 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 16.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 459 | WB 23A 1141 | 26.810 | 08/SSI /OFF/09 | | | | | |
| 15 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 17.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 520 | WB 15A 0405 | 27.500 | 08/SSI /OFF/09 | | | | | |
| 16 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 18.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 533 | WB 11A 4074 | 27.500 | 08/SSI /OFF/09 | | | | | |
| 17 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 16.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 444 | WB 37 4791 | 19.710 | 08/SSI /OFF/09 | | | | | |
| 18 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 17.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 513 | WB 39 6511 | 20.120 | 08/SSI /OFF/09 | | | | | |
| 19 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 19.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 546 | WB 37 2346 | 18.640 | 08/SSI /OFF/09 | | | | | |
| 20 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 7 | 20.04.07 | NML/DO/06-07/968 DATED 30.03.07 | 593 | WB 29 3621 | 1.070 | 08/SSI /OFF/09 | | | | | |
| 21 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 16 | 30.04.07 | NML/DO/06-07/111 DATED 28.04.07 | 795 | HR 38H 1130 | 8.400 | 08/SSI /OFF/09 | | | | | |
| 22 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 16 | 02.05.07 | NML/DO/06-07/111 DATED 28.04.07 | 813 | HR 38J 1130 | 42.010 | 08/SSI /OFF/09 | | | | | |
| 23 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 16 | 07.05.07 | NML/DO/06-07/111 DATED 28.04.07 | 944 | JH 12A 9831 | 40.300 | 08/SSI /OFF/09 | | | | | |
| 24 | Neo Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 16 | 17.05.07 | NML/DO/06-07/111 DATED 28.04.07 | 1151 | NL 04A 7843 | 9.270 | 08/SSI /OFF/09 | | | | | |
| 25 | KIC Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 98 | 06.12.07 | 559 DATED 28.11.2007 | 5190 | WB 23A 5496 | 27.500 | 08/SSI /OFF/09 | | | | | |
| 26 | KIC Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 98 | 10.12.07 | 559 DATED 28.11.2007 | 5286 | WB 23A 5494 | 27.500 | 08/SSI /OFF/09 | | | | | |
| 27 | KIC Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 98 | 13.12.07 | 559 DATED 28.11.2007 | 5320 | WB 37 1270 | 19.070 | 08/SSI /OFF/09 | | | | | |
| 28 | KIC Metaliks Ltd. | Jai Balaji Unit-IV | 04/SSI/OF F/10 | 98 | 15.12.07 | 559 DATED 28.11.2007 | 5344 | WB 41 1977 | 18.490 | 08/SSI /OFF/09 | | | | | |

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| | ics Ltd. | aji U-IV | OFF/10 | | | dated 30.03.07 | | | | | | 6 | | |
| 5 | Neo Metals Ltd. | Jai Bal aji U-IV | 04/S SI/OFF/10 | 16 | 17.05.07 | NML/DO/06-07/111 dated 28.04.07 | 1151 | NL 04A 7843 | 9.27 | 08/SSI/OFF/09 | 9 | ILCU 5019501 | NL 04A 7843 | 19/05/2007 |
| 6 | KIC Metals Ltd. | Jai Bal aji U-IV | 04/S SI/OFF/10 | 98 | 05.12.07 | 559 dated 28.11.2007 | 5190 | WB 23A 5495 | 27.5 | 08/SSI/OFF/09 | 34 | ILCU 5219198 | WB 23A 5496 | 07/12/2007 |
| 7 | KIC Metals Ltd. | Jai Bal aji U-IV | 04/S SI/OFF/10 | 98 | 10.12.07 | 559 dated 28.11.2007 | 5288 | WB 23A 5494 | 27.5 | 08/SSI/OFF/09 | 34 | ILCU 5020863 | WB 23A 5494 | 13/12/2007 |
| 8 | KIC Metals Ltd. | Jai Bal aji U-IV | 04/S SI/OFF/10 | 98 | 19.12.07 | 559 dated 28.11.2007 | 5415 | WB 76 4689 | 27.5 | 08/SSI/OFF/09 | 36 | ILCU 5106967 | WB 76 4689 | 20/12/2007 |
| 9 | KIC Metals Ltd. | Jai Bal aji U-IV | 04/S SI/OFF/10 | 96 | 23.12.07 | 559 dated 28.11.2007 | 5520 | WB 764689 | 27.5 | 08/SSI/OFF/09 | 36 | ILCU 5106503 | WB 764689 | 25/12/2007 |

21. We also take note of the fact that all these 36 consignments contained 750 MT of pig iron which is alleged that same has not been received by the assessee, therefore the question arises if it has not been received in the factory of the assessee, then how the assessee procured the raw material of pig iron to manufacture sponge iron. The revenue has not come up with any evidence to show that the assessee has procured pig iron from illicit means which has gone in manufacture of sponge iron or have been procured by the assessee from some other means. In the absence of the same, Cenvat credit cannot be denied as held by the Hon'ble Punjab & Haryana High Court in the case of Shakti Roll Cold Strips Pvt.Ltd. (supra), wherein the Hon'ble High Court has observed as under:-

"5. We have heard Mr. Kamal Sehgal, learned counsel for the revenue and perused the record. However, we find no force in the contention raised by him. The Tribunal has recorded a finding of fact that the inputs supplied by the respondent were duly received by the manufacturers and were used in the goods manufactured, which were cleared on payment of duty. The Tribunal also found that the Department has not been able to prove that any other alternative raw material was received and used in the final products. The Tribunal also held that the findings of the Commissioner (Appeals) in favour of the respondent were not challenged by the Departmental Representative before the Tribunal. The Tribunal has also noted that the findings of

the Commissioner clearly established that RT-12 returns have been assessed finally by the Range Officer which contains all the documents including the invoices under dispute on the basis of which the Modvat Credit has been availed and utilised and that payments for the purchase of the inputs have been made through cheque/demand draft.

6. *Thus, there is no merit in the appeal as no question of law, much less substantial, arises from the order of the Tribunal wherein pure findings of fact have been recorded in favour of the respondent."*

Which has been affirmed by the Hon'ble Apex Court as reported (supra).

22. Further in the case of Neepaz Steels Ltd. (supra), the Hon'ble Punjab & Haryana High Court has observed as under :-

"8. *We have heard Mr. Aman Chaudhary, learned counsel for the revenue-appellant. However, we find no force in the contentions raised by him. The Tribunal has recorded a finding of fact that the inputs supplied by the respondents were duly received by the manufacturers and the same were used in the goods manufactured, which were cleared on payment of duty. The Tribunal also found that the Department has not been able to prove that any other alternative raw material was received and used in the final products. The Tribunal also held that the findings of the Commissioner (Appeals) in favour of the respondents were not challenged by the Department Representative before the Tribunal. The Tribunal has also noted that the findings of the Commissioner clearly established that the RT-12 returns have been assessed finally by the Range Officer which contains all the documents including the invoices under dispute on the basis of which the Modvat Credit has been availed and utilised and that payments for the purchase of the inputs have been made through cheque/demand draft.*

9. *Thus, there is no merit in these appeals as no question of law, much less substantial, arises from the order of the Tribunal wherein pure findings of fact have been recorded in favour of the respondents"*

23. In view of this, we hold that the Cenvat credit cannot be denied to the appellant in the facts and circumstances of the case, but cenvat credit on 9 consignments admitted by the assessee is denied.

(d) Demand of Rs.6,48,48,644/- on account of input output ratio.

24. We find that demands sought to be confirmed against the assessee on the basis of input output norm in terms of the earlier Financial Year i.e. 2004-05 and 2005-06 for the subsequent financial years as for the earlier input output ratio was 1.5:1 whereas it was increased to 1.59:1, 1.6:1 and so on.

25. We find that –

(i) There is no statutory obligation under the Central Excise Act, 1944 and the Rules framed thereunder to maintain standard norms of production in respect of an assessee liable to pay Central Excise duty under Section 3 of the said Act.

(ii) There is nothing on record that the assesses herein have ever declared input-output ratio to the Central Excise authority during the material period.

(iii) In the SCN, input-output ratio of 1.50:1 has been arrived at for the period 2004-05, based on quantities of Iron Ore consumed and sponge iron produced as per balance sheet and in conformities with ER-6 Returns for the material period.

(iv) The same ratio alleged to have been maintained during 2005-06, which has been computed on the basis of production log sheets maintained by the JBIL Unit 1.

(v) Further during 2004-05, Balance Sheet figures for the whole year of 2004-05 were taken into account to arrive at the input-output ratio, and compilation of figures recorded in Production Log Sheets, during the period 2005-06 was done to work out the input-output ratio i.e. 1.50:1, the same as in 2004-05.

(vi) For the subsequent years, i.e. 2006-07, 2007-08, 2008-09 & 2009-10 and also prior to that i.e. 2004-05 and 2005-06, to arrive at the input-output ratio, balance sheet, production report/production log sheet, DSA, Form-IV register, ER-1/ER-4/ER-5/ER-6 returns have been relied upon and what have been relied upon for the years 2004-05 and 2005-06, cannot be discarded for the subsequent years.

(vii) Admittedly, input-output ratio during the subsequent years has been calculated, showing departure from earlier ratio of 1.50:1 on the basis of compilation of Production Log Sheets, which have been relied upon to arrive at such ratio for 2005-06.

(viii) Since no other document could be placed on record to show that during the material period of demand, input-output ratio of 1.50:1 was maintained by the assessees, ratio maintained for the year 2004-05 and 2005-06 cannot be straightaway applied during the material period, more so, when Central Excise law does not call for standard norms of production, and there is no declared input-output ratio during the entire disputed period as well.

(ix) Further, we found that while computing the input-output ratio of 1.50:1, figures recorded in respect of assessee No.1 during the period of 2004-05 and 2005-06 recorded have been taken into account. The assessee No.1 and assessee No.2 are two distinctly separate units, and also separately registered. It is not on record that in order to calculate the input-output ratio, Iron Ore consumed and sponge iron produced by the assessee No.2 during the year 2004-05 and 2005-06, as considered in case of assessee No.1, have all been considered.

(x) The assessee No.2, being a separate legal entity, input-output ratio 1.50:1, as worked out on the basis of figures recorded in case of assessee No.1, cannot be made applicable to work out quantum of production of sponge iron during the material period of demand.

(xi) We find that while arriving at input-output ratio, certain statements obtained from various functionaries of the assessee companies have been relied upon. While framing the charges, it has been alleged in the impugned SCN that the input-output ratio was pre-fixed before feedment of raw materials, and production of final product i.e. Sponge Iron was being computed applying such pre-fixed input-output ratio on the quantity of iron ore consumed.

(xii) All such statements were recorded u/s 14 of the Central Excise Act, 1944 and none of the statements is found to have been retracted subsequently.

(xiii) We find that Shri R.N.Goel, General Manager of the assessee No.1, in his statement recorded on 05.12.2018 with reference to Question No.5 and stated that they have no specific norms of ratio for production of finished goods, like Sponge Iron, Pig Iron, Silico Manganese, Ferro Manganese etc. Against specific query, Shri Goel also categorically stated that production per kiln varies from 38 MT to 40 MT per day.

(xiv) Shri Niranjan Gourisara, General Manager, Unit-IV (assessee No.2) in his statement dated 05.12.2018, stated that production of Sponge Iron is recorded on the basis of total consumption of Iron Ore and Fe(T) contents of the Ore.

(xv) We find that deposition of Md.Yusuf, G.M. (operations), recorded on 23.06.2010 is most vital.

a) Against Question No.1 Md.Yusuf identified himself as the GM of both the units i.e., Unit I and Unit IV. He supervised day to day production of Sponge Iron, laboratory, raw material handling system and dispatch of Sponge Iron of the factory.

b) On answer to question no.8 wherein he was asked how they quantify the resultant output per feedment of raw materials viz. Iron Ore, he stated that they mainly depend upon the percentage of Fe(T), moisture, loss of

ignition, Tumbler index, laterite and porous contents. This percentage is obtained before feedment and on the basis of this they derive out production in weight.

- c) In response to question no.9 wherein he was asked if the raw material received was accompanied with test report of the mines indicating Fe(T) and whether Fe(T) content was used to derive at the production of sponge iron in weight, he accepted the test report of fe(T) content as given from the mines but stated that there may be variation in moisture.
- d) He was further asked in question no.10 if they kept any record regarding variation of moisture to which he replied that no such record is kept.
- e) In question no.11 he was asked if they maintain any production report to which he replied that production register is maintained at our control room from where they prepare the daily production log sheet which is then sent to the excise department.
- f) In the context of question, no 14 when asked how they ascertain the actual quantity weight of Sponge Iron obtained from the raw material he replied that they depend upon the Fe(T) contents in the raw material and the input/output ratio.
- g) In response to question no 15 he stated that whenever the management decided they take physical stock of sponge iron by weight or by volumetric measurement.

(xvii) We take note of the fact that the said input-output ratio cannot remain fixed due to variable factors prevailed in the character of all the constituent raw material, especially, that of Iron Ore, largely due to variation in Fe(T) of the Iron Ore. As Fe(T) content in the Iron Ore varies, standard norms cannot be achieved ad production of Iron Ore. As Fe(T) content in the Iron Ore varies, standard norms cannot be achieved and production of

Iron Ore worked out on the basis of such input-output ratio cannot be considered as actual production but estimated one.

(xviii) Further, the different factors which attribute to productivity are the Fe content about 65%, moisture, loss of ignition, tumbler index, laterite and porous contents of Iron Ore with minimum fines, standard fixed carbon content in coal without fines and foreign particles, good condition castables etc. and for that matter, yield widely varies even on day to day as well as kiln to kiln basis, is in conformity with the deposition of Md.Yusuf against question No.8.

26. Further, in the impugned order the Ld.Adjudicating authority also examined the above issue and did not rely on the earlier input output ratio to allege that same is to be maintained by the assessee in the subsequent years.

27. A similar view was taken by the Hon'ble Calcutta High Court judgement in the case of CCE, Kolkata-III v. Sai Sulphonate Pvt.Ltd. [2022 (380) E.L.T. 441 (Cal.)], wherein the Hon'ble High Court has observed as under:-

"5. *The assessee has filed appeal before the Tribunal challenging the said order and explained that their manufacturing activities as to how they were engaged in manufacture for themselves as well as they have been carrying on conversion job for another third party. After noting the facts the Tribunal held that LABSA and Spent Sulphuric Acid are of the same quality and the processing tank is also common in the factory as it is not possible to manufacture goods separately. Further, the Tribunal analysed the total consumption of LAB and Sulphuric Acid during the material period and took note of the ratio adopted and on facts held that there is hardly any difference between the ratio adopted for their own manufacture and conversion job. Further, the Tribunal noted that the department has not made any allegation that assessee procured excess quantity of LAB to manufacture excess quantity of Acid Slurry or LABSA 90%, nor the department has produced any evidence or referred to any material to show how excess amounts of LAB has been brought into the factory and how the same*

were removed after being manufactured into LABSA. Thus, the Tribunal concluded that without any evidence on record the allegation of clandestine removal cannot be made.

6. *In our considered view, the Tribunal rightly granted the relief to the assessee as allegation of clandestine removal is a very serious charge and the onus of establishing the same is first on the department and upon the onus being discharged in the manner common to law, then and then only the burden of proof shifts to the assessee. In the instant case, admittedly there was no material on record establishing the charge of clandestine removal and such charge was made against the assessee by way of an inference taking note of the ratio adopted in the manufacturing process.*

7. *Thus, we are of the considered view that the entire issue involved in this appeal is factual and no question of law as suggested by the Revenue arises for consideration in this appeal. Accordingly, the appeal fails and is dismissed."*

Therefore we hold that the Ld.Adjudicating authority has rightly dropped the demand on the basis of input output ratio.

In the peculiar facts and circumstances of the case, we hold that no penalty is imposable on the assessee, therefore, we pass the following order.

- (a) We confirm the demand on clearance of melting scrap of Rs.1,62,697/- as not contested by the assessee. We also deny the Cenvat Credit to the appellant on 9 invoices as mentioned in Annexure 'O' of page 16 of this order hereinabove.
- (b) We set aside the demand of duty of Rs.10,82,271/- on account of shortage of finished goods.
- (c) We uphold the impugned order dropping the demand of duty from the assessee by the adjudicating authority to the tune of Rs.6,48,50,644/- and
- (d) no penalty is imposable on the assessee.

All the appeals are disposed of as above in the above terms.

(Order pronounced in the open court on 4th July, 2023.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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