

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Excise Appeal No.529 of 2010

(Arising out of Order-in-Original No.24/Commr./CE/Kol.V/Adjn./2010 dated 31.03.2010 passed by Commissioner of Central Excise, Kolkata V)

M/s Allied Resins and Chemicals Limited

(Budge Budge Trunk Road, 24 Parganas (South), Kolkata-700141)

Appellant

VERSUS

Commissioner of Central Excise, Kolkata V

(180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Respondent

WITH

Excise Appeal No.528 of 2010

(Arising out of Order-in-Original No.24/Commr./CE/Kol.V/Adjn./2010 dated 31.03.2010 passed by Commissioner of Central Excise, Kolkata V)

Asim Das, General Manager of M/s Allied Resins and Chemicals Limited

(Budge Budge Trunk Road, 24 Parganas (South), Kolkata-700141)

Appellant

VERSUS

Commissioner of Central Excise, Kolkata V

(180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Respondent

APPERANCE :

S/Shri Sanjay Bhowmik & Indranil Banerjee, Advocates for the Appellant
S/Shri P.K.Ghosh & S.K.Dikshit, Authorized Representatives for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO.77794-77795/2024

DATE OF HEARING : 21 NOVEMBER 2024

DATE OF PRONOUNCEMENT : 09 DECEMBER 2024

Per Ashok Jindal :

The appellants are in appeals against the impugned order wherein the demand of Rs.3,14,66,034/- of Central Excise duty along with interest was confirmed and equivalent amount of penalty on the first appellant and penalty of Rs.1.00 Lakh on the co-appellant, were also imposed.

2.1 The facts of the case are that the appellant is engaged in the business of manufacture of formaldehyde, various grades of formaldehyde resin powders such as, SBPF-401G, SBPF-401M, SBPF-405T, SBPF-20, SBPF-20M etc., various grades of liquid urea formaldehyde resin such as strong bond M1, M2, M3 and M4 and various grades of free flowing dried urea formaldehyde resin powder such as, Strong Bond P-101G, Strong Bond P-102P, Strong Bond P-105E and Strong Bond P-202G falling under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985, at its factory at Rampur in South 24 Parganas District.

2.2 The appellant's sister concern, Aarem Chemicals Private Limited set up its manufacturing facilities in June, 2007 at Rampur adjoining the factory of the appellant, manufactured various grades of free flowing dried urea formaldehyde resin powder by using the liquid resin manufactured by the appellant. The liquid resin required by the Aarem Chemicals for the manufacture of resin powder was purchased by it from the appellant. The appellant supplied the liquid resin through pipeline by it from the appellant. The appellant supplied the liquid resin through pipeline directly from its factory to Aarem Chemical's factory.

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2.3 Aarem Chemicals obtained central excise registration on November 5, 2007 and started production from December, 2007. Prior to Aarem Chemical obtaining central excise registration and also thereafter, the appellant used the Aarem Chemical's manufacturing facilities to manufacture resin powder from the liquid resin manufactured by it in its adjoining factory. The appellant duly accounted for the resin powder so manufactured in its central excise records and paid duty thereon.

2.4 In manufacturing of its final product, the main inputs are Hydrated Phenol, Phenol, Methanol etc.. The said inputs are mostly imported from foreign countries.

2.5 The said inputs are highly flammable liquid. The appellant had storage tank, which were allowed as "Customs Bonded Tanks" under the relevant provisions of the Customs Act. Licences were issued to the appellant by the Customs authorities for storage of the said inputs in the said tanks.

2.6 All imports of the said inputs were made by Aarem Chemicals. In respect of the said imports, Aarem Chemicals applied before the Customs authorities for permission for warehousing of the said imported inputs in Customs Bonded Storage Tanks of the appellant and the said permission was duly granted by the Deputy Commissioner of Customs, Import Bond Department, Kolkata.

2.7 Aarem Chemicals was granted permission/clearance of the West Bengal Pollution Control Board for import of the said inputs as per the provisions of the Manufacture, Storage and Import of Hazardous

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Chemicals Rules, 1989 and one of the specific conditions of the said clearance was that the imported inputs would be sold to the appellant for use in its factory at Rampur. In the application for import clearance filed by Aarem Chemicals it was clearly stated that the said imports are for sale to the end user and the name and address of the appellant's name was mentioned as the end user.

2.8 In accordance with the provisions of the Calcutta Port Trust Rules, 1994, the Port Trust authorities granted permission for unloading of the said imported inputs into licenced storage tanks of the appellant through pipelines and subject to strict compliance of all relevant rules/regulations including observance of safety measures as mentioned in detail in the permission letters. For storage of the said imported inputs in the appellant's Custom Bonded Storage Tanks, bills of entry for warehousing were filled by the Aarem Chemicals at the time of unloading from the vessel. In view of the said inputs being hazardous chemicals and a high flammable liquid, it used to be cleared from the said customs bonded storage tank to the appellant's factory strictly as per the requirements at the factory. For such clearance, in accordance with the provisions of the Customs Act, Bills of entry for ex-bond clearance for home consumption for the required quantity were filled by the Aarem Chemicals and in the bills of entry in accordance with the Circular No.179/13/96-CX dated February 29, 1996 issued by the Government of India, Ministry of Finance, the Aarem Chemicals made endorsement in favour of the appellant.

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2.9 The said bills of entry for ex-bond clearance for home consumption were duly assessed by the proper Customs Officers and the duties assessed were thereafter duly paid. After the duties were paid, the quantity covered by the respective bills of entry for ex-bond clearance for home consumption were unloaded into tankers from the said Customs Bonded Storage Tanks through pipelines and these tankers carried the goods to the appellant's factory and were unloaded into the tanks in the factory and were then utilised at the factory in manufacture of final products. As stated above, on each bill of entry endorsement about transfer of the entire quantity to the appellant was duly made by the Aarem Chemicals and each such bills of entry were also duly signed by the Customs Authorities. This procedure was being followed by Aarem Chemicals and the appellant strictly in accordance with the said circular.

2.10 At the appellant's factory, cenvat credit was availed of the Additional Customs duty levied under Section 3 of the Customs Tariff Act, 1975. The said credit was taken on the basis of the bills of entry for ex-bond clearance for home consumption mentioned above which were duly endorsed in the appellant's favour in accordance with the said circular when the goods were still lying in the Customs Bonded Storage Tanks of the Appellant.

2.11 From the appellant's Rampur factory Strong Bond M1, M2 and M3, Urea Formaldehyde, being resin manufactured from the said inputs, were transferred to its other units. The appellant at the time of clearance of the said goods from the Rampur factory calculated the duty as per cost construction method as certified by its Chartered

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Accountant. The said units used the goods sent by the Rampur factory as their inputs and also took cenvat credit on the amount of duty paid by the Rampur unit at the time of clearance. The Revenue all along accepted the same and never raised any dispute in respect of the same. Along with the said inputs, the appellant also manufactured from the formaldehyde received other varieties of urea formaldehyde and cleared the same upon payment of duty. They were also valued on cost construction method as certified by the Chartered Accountant and duty was paid accordingly on the said valuation.

2.12 On May 05, 2008, central excise officers sought to conduct stock verification at the appellant's factory. In course of verification the officers found that there was shortage of 158056.95 kgs of formaldehyde (55%), 30005 kgs of strong bond P-101G, 38545 kgs of SBPF-401G and 21985 kgs of SBPF-402P as compared to the stock entered in the Daily Stock Account. The officers also found that Aarem Chemical had stored 1,55,050 kgs of Strong Bond P-101 G in old and used bags, some of which bore the marks the appellant. The appellant states that the said 1,55,050 kgs were packed in old and used bags, some of which bore the marks of the appellant had been borrowed from the appellant by Aarem Chemicals because its vendor failed to supply its requisition for the bags in time. The product being such that it cannot be kept in unpacked condition, Aarem Chemicals had no other alternative but to pack the product in old and used bags including bags borrowed from the appellant and carrying its markings. The said quantity of 1,55,050 kgs of Strong Bond 101G was seized and is subject

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matter of a separate show cause notice dated November 4, 2008, issued to Aarem Chemicals, which has since been adjudicated.

2.13 On 05.11.2007 the afore-mentioned Aarem Chemicals Pvt. Ltd. obtained central excise registration and both the appellant and the aforesaid sister concern had units at Rampur, Budge Budge Trunk Road and at Hide Road. In 2011 the appellant was merged into Aarem Chemicals Pvt. Ltd through a reverse merger process.

2.14 During the period 2004-05 to 2008-09, the appellant had been engaged in the business of manufacture of formaldehyde, various grades of resin powders, various grades of liquid urea formaldehyde resin including urea formaldehyde resin intermediates such as strong bond M1, strong bond M2, strong bond M3 etc. as also various grades of dried urea formaldehyde resins powder at its aforesaid factory at Rampur. Strong bond M1, strong bond M2 and strong bond M3 used to be frequently stock transferred to the appellant's Hide Road premises and also sold to the aforesaid sister concern, Aarem Chemicals Pvt. Ltd. for further processing. In view of the fact that the appellant's facilities at its Rampur unit were inadequate and Strong bonds M1, M2 and M3 had limited shelf-life, it had no alternative but to arrange for stock transfer and/or sale to its sister concern, as required.

2.15 The appellant's plant and machinery at its Rampur unit were connected to that of Aarem Chemicals Pvt. Ltd. through pipelines and the entire facility was an integrated facility. Aarem Chemicals Pvt. Ltd. used to manufacture various grades of free-flowing dried urea formaldehyde resin powder by using the liquid resin manufactured by

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the appellant. Prior to Aarem Chemicals Pvt. Ltd. obtaining central excise registration and also thereafter, the appellant used its sister concern's facilities to manufacture resin powder, which was both convenient and cost effective. It is pertinent to mention that the main inputs being Hydrated Phenol, Phenol etc. used to be imported by the said Aarem Chemicals Pvt. Ltd. for sale to the present appellant for further use in manufacture, the detailed process of utilization whereof has been stated. The appellant duly accounted for the resin powder so manufactured in its central excise records and discharged the appropriate duty.

2.16 On 05.05.2008 and 06.05.2008, a team of central excise officers conducted stock verification at the premises of Aarem Chemicals Pvt. Ltd., Rampur and at the appellant's premises at Rampur. Several records were examined and statements were taken from the staff concerned and on completion of investigations, show cause proceedings were initiated against both the companies. The proceedings against Aarem Chemicals Pvt. Ltd. culminated in an Order-in-Original dated 12.03.2010, wherein all the proposed demands of central excise duty, interest and penalties were confirmed. Aggrieved by the said order, the Aarem Chemicals Pvt. Ltd. filed an appeal before this Tribunal bearing Excise Appeal No. 445 of 2010, which has since been decided by a final order dated 11.12.2023 by setting aside the purported demands, except demands of central excise duty to the tune of Rs.3,02,176/- and Rs.1,50,540/-.

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2.17 As against the present appellant, demands were raised vide a show cause notice dated 04.05.2009. Under cover of its letter dated 21.01.2010 the appellant, inter alia, denied and disputed all the allegations. However, the Commissioner of Central Excise confirmed the demands of central excise duty aggregating to Rs. 3,14,66,034/- under Section 11A together with interest under Section 11AB of the Central Excise Act, 1944 and equivalent penalty under Section 11AC thereof read with Rule 25 of the Central Excise Rules, 2002 and Rule 15(2) of the Cenvat Credit Rules, 2004 while passing the impugned Order-in-Original dated 31.03.2010.

2.18 Against the said order, the appellants are before us.

3. The Id.Counsel for the appellants submits that urea formaldehyde resin intermediates such as strong bond M1, strong bond M2 and strong bond M3 had not been sold to any third party but partly stock transferred to the appellant's Hide Road unit and the rest sold to its sister unit since the said intermediates had very short span of life and required further processing. The appellant had acted on the basis of costing certificates prepared by its Chartered Accountant, though not on CAS-4 method, while the Department had sought to dispute the input costs for Formaldehyde and Melamine and the conversion cost adopted for M3.

3.1 He further submits that before confirming the impugned demands the Commissioner failed to appreciate that the provisions of Rule 8 of the Valuation Rules were inapplicable in a case of part stock transfer to own unit for captive consumption and part sale to the sister concern. In this regard, the appellant places reliance on the ratio in Indian Oil

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Corporation Ltd. v. CCE, Haldia, [2024] 160 taxmann.com 331 (Kolkata-CESTAT). Rule 11 of the Valuation Rules was applicable in the instant case.

3.2 Further, he submits that it cannot be denied that in a situation as the present one, whatever duty would have been paid by the appellant, credit thereof would have been available to the appellant's Hide Road unit and/or to Aarem Chemicals Pvt. Ltd. In the result, there would have been no revenue loss to the government. All final products manufactured out of Strong Bonds M1, M2 and M3 had been cleared on payment of duty by the appellant's Hide Road unit and/or Aarem Chemicals Pvt. Ltd. From the details worked out for duty demanded for 2004-05 to 2008-09, it is evident that the demand for Rs.1,94,02,717/- out of Rs.2,46,30,772/- fully relates to stock transfer.

3.3 Further, it is his submission that the Commissioner failed to hold that the costs of formaldehyde and melamine had been incorrectly proposed by the Department, inasmuch as their cost prices had kept fluctuating whereas, the figures in the balance sheets stated the price of closing stock which also included miscellaneous overheads. The appellant had rightly factored in the cost prices that had prevailed over the concerned period. In this behalf, kind reference is invited to the answer to question no.6 of Sri R.K.Vijay's statement dated 21.05.2008 and the answer to question no.13 of Smt. Usha Mehta's statement dated 16.03.2009.

3.4 Insofar as the price of Melamine was concerned, he submits that though the Department had purported to take Balance Sheet figures

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which, in its opinion, represented the appropriate values, it was demonstrable that such figures were actually lesser than the 'rate/kg' adopted by the appellant for some of the financial years in question i.e. Department always considered the higher figures without justification.

3.5 He further submits that the decrease in conversion cost for strong bond M3 was attributable to market forces resulting from BIFR proceedings. As such, the appellant had never acted with malafide intention. Similarly, no fault could have been found with the valuation method adopted by the appellant while paying Central Excise duty on sale to the sister concern. Demand on account of such sales for Rs.52,28,055/- out of Rs.2,46,30,772/- is unsustainable.

3.6 It is his further contention that the longer period of limitation could not have been invoked in a situation of revenue neutrality nor demand sustained as per the principles laid down in the following decisions –

- (i) Nirlon Ltd. vs. CCE, 2015 (320) ELT 22 (SC)
- (ii) Mahindra & Mahindra Ltd. v. CCE, 2019 (368) ELT 105 (Tri-Mumbai) - appeal dismissed thereagainst in CCE v. Mahindra & Mahindra Ltd., 2019 (368) ELT A41 (SC)
- (iii) Anglo French Textile v. CCE, 2018 (360) ELT 1016 (Tri-Chennai) - appeal dismissed thereagainst in CCE v. Anglo French Textile, 2018 (360) ELT A301 (SC).

3.7 In respect of duty demand of Rs.1,15,616/-, he submits that it had made payment of the full amount to the concerned suppliers of

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Methanol and rightly claimed Cenvat credit of duties shown in the invoices/bills of entry. Short receipt of the quantities was wholly attributable to evaporation loss/handling loss, given that methanol was a highly volatile substance. In the cases, short receipt is very minimum being about 0.5%. The Commissioner erred by holding against the appellant by mis-interpreting Rule 3(5) of the Cenvat Credit Rules read with Rule 9(5) thereof. The appellant's contentions are fully supported by the decisions of HPCL v. CCE, 2014 (307) ELT 919 (Tri-Mumbai) and HCL v. CCE, 2020-TIOL-772-CESTAT-DEL.

3.8 In respect of duty demand of Rs.2,50,647/-, he submits that both Xtrazyme Hatchery and Enzyme Extra Clean Pond had been used for research and development purposes in order to enhance the quality of Urea Formaldehyde liquid resins. The said use clearly fell within the framework of Rule 2(k) read with Rule 3 of the Cenvat Credit Rules and the Commissioner erred by disallowing the impugned credit of Rs.2,50,647/-. The issue in dispute stands settled in favour of the assesseees in the following decisions relating to credit on inputs meant for R&D/quality control –

- (i) Tata Engineering & Locomotive Co. Ltd. v. CCE, 2010 (256) ELT 56 (Bom);
- (ii) Sudarshan Chemicals Inds. Ltd. v. CCE, 2010 (262) 974 (Tri-Mumbai)

3.9 In respect of duty demand of Rs.14,86,640/-, he submits that the Commissioner failed to acknowledge that the consignments of methanol, melamine and phenol had been procured by the consignee

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i.e. appellant's sister unit, Aarem Chemicals Pvt. Ltd. and the concerned invoices had been duly endorsed by the said consignee in the appellant's favour. The instant appellant, in turn, manufactured liquid resins and transferred the same to Aarem Chemicals Pvt. Ltd. for further production of powdered resin on payment of duty.

3.10 Further, he submits that the legal issue arising for consideration has been decided in the appellant-assessee's own case being Appeal Nos. E/83/2009 and E/84/2009, wherein this Hon'ble Tribunal was pleased to hold in its final order dated 29.01.2020 that Cenvat availed on the basis of endorsed bills of entry cannot be denied. It has also been held in Uni Cast Pvt. Ltd. v. CCE, 2016 (331) ELT 369 (All) that credit cannot be denied when availed on the strength of an endorsed invoice, when genuineness of the transaction stands established and the inputs have suffered duty.

3.11 Insofar as the allegation relating to incorrect availment of credit on xerox copy of bill of entry no.334545 is concerned, the appellant states that it had correctly availed credit on the strength of the original bill of entry but subsequently, the same had been misplaced. Apart from that, in the SCN there was no allegation that the goods covered by the bill of entry no. 334545 were not received by the appellant in its factory and/or were not used the same by it in or in relation to manufacture of the final product. In such circumstances, there is no warrant to dispute the availment of credit, as held in Commissioner of C.Ex., Vapi v. Mehta HWA FUH Plastics Pvt. Ltd., 2012 (285) ELT 253 (Tri-Ahmd).

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3.12 In respect of duty demand of Rs.34,88,103/- and as regards the denial of cenvat availed on the basis of 19 endorsed invoices and 1 endorsed bill of entry, the Commissioner failed to appreciate that phenol and methanol used to be purchased/imported by Aarem Chemicals Pvt. Ltd. and endorsed to the present appellant for the purpose of manufacturing liquid resin. Thus, there can be no revenue loss. Even otherwise, it cannot be stated that an endorsed invoice or an endorsed bill of entry is not a specified document within the meaning of Rule 9(1) of the Cenvat Credit Rules. This issue is also covered by the appellant's own case being Appeal Nos. E/83/2009 and E/84/2009 (supra).

3.13 As regards the duty demand of Rs.14,04,491/- and in so far as the aggregate demand on formaldehyde, SBP - 101G, SBPF - 401G and SBP 402P is concerned, he submits that the Commissioner failed to appreciate that the process of physical stock verification purportedly conducted on 06.05.2008 was faulty and/or otherwise unreliable. No reasonable person would have completed weighment of large quantities of resin liquid and powder accurately within a short span of time as had been done in the instant case. Surprisingly, panchnama and weighment slips are also not relied upon documents to the SCN and it has been consistently held that unless it stands proven that stock taking has been conducted properly and in a scientific manner, duly supported by

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weightment slips etc., the allegation of shortage cannot stand. In this behalf, the appellant relies on the principles laid down in Scan Sponge Iron Ltd. v. CCE, 2022-TIOL-817-CESTAT-KOL (and the final order No. 75907-75910/2023 dated 04.07.2023 passed by this Hon'ble Tribunal in M/s Jai Balaji Industries Ltd. v. CCE, Bolpur (Excise Appeal No. 158 of 2012 &Ors.). There remains no basis to allege clandestine removal.

3.14 He further submits that the charge of non-accounting of finished goods vis-à-vis shortages detected was refuted by Sri Asim Das while giving his statement dated 15.12.2008

3.15 It is his further submission that without prejudice and assuming the purported figures determined by the revenue as correct, the appellant states that the shortage in respect of formaldehyde is attributable to the fact that the appellant's books had not been updated as on 03.05.2008 and the Department had not considered the quantity issued for captive consumption. The shortage in respect of SBP - 101G is explained by the fact that about 155 MTs of the said goods had been seized by the Department which were found in the factory of Aarem Chemicals Pvt. Ltd. but in bags bearing a mark of the present appellant. The disputed 30 MT lay in those bags.

3.16 As regards shortages of SBPF - 401G and SBP - 402P, he submits that the Department failed to appreciate that a total of 55 MTs had been issued for captive production of different grades of PF resin, while 228.535 MT of 401G and PF - 402P had been found recorded in the appellant's books and the stock physically found was 168 MT. The

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resultant difference was 60.535 MT, whereas 55 MT had been issued for captive consumption. The final difference is of a negligible quantity of 5.53 MT which, inter alia, is explainable with reference to difference in weighment, accounting anomaly, production loss etc.

3.17 It is trite law that the onus to establish clandestine removal with cogent evidences lies on the Department, as held by the Hon'ble Calcutta High Court in CCE v. Sai Sulphonate Pvt. Ltd., 2022 (380) ELT 441 (Cal). In the present case, there is no evidence on record to sustain the charge of clandestine removal.

3.18 In relation to invocation of longer period of limitation, it is submitted that the SCN and consequently the demand confirmed by the impugned order are barred by limitation. In the SCN, while invoking the period of limitation as per the provisions of the proviso to section 11A(1) of the Act, there was no allegations that the appellant had "willfully" suppressed any fact with intent to evade payment of duty, a sine qua non for invoking the proviso to section 11A(1) of the Act. By the following decision this position of law is now settled –

- (i) Cosmic Die Chemicals vs. CCE, 1995 ELT 721 (SC).
- (ii) Unreported decision of the Hon'ble Calcutta High Court dated 18.03.2019 in CCE vs. Andrew Yule Co. Ltd., APO no. 525 of 2017 in WP no. 1545 of 2008.

He also submits that the Revenue has failed to establish any suppression of facts on the part of the appellants.

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3.19 He, further submits that when the principal demand is bad, there arises no question of demanding interest under Section 11AB of the Act. Further, no case has been made out warranting imposition of any penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 and Rule 15(2) of the Cenvat Credit Rules. The appellant always acted bonafide and discharged its functions dutifully. Moreover, imposition of penalty under rule 25 by the impugned order is beyond the scope of SCN since there was no such proposal in the said notice.

3.20 It is his further submission that the Commissioner, in the impugned order, wrongly imposed penalty of Rs. 1 lakh on Sri Asim Das under rule 26 of the Rules. When no demand and/or penalty survived on the company, question of imposition of penalty on Asim Das does not arise. Moreover there was no proposal in the SCN to impose penalty under rule 26, the imposition of penalty under the said rule was made beyond the scope of SCN. As a matter of fact the said notice has proposed personal penalty under section 9(1) of the Act, which has no application whatsoever in the case of an employee of the company. The imposition of penalty upon Asim Das is therefore ex facie illegal and bad in law.

3.21 Finally, he prayed that the impugned demands be set aside after allowing the appeals with consequential reliefs.

4. The Id.A.R. for the Revenue has reiterated the findings of the impugned order.

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5. Heard both sides and considered the submissions. We have gone through the records placed before us and found that the demand has been raised against the appellants on various counts.

6. A demand of Rs.89,855/-, has been confirmed on account of removal of waste and scrap generated from the capital goods and no reversal of Cenvat credit was done. The said demand has been conceded by the appellants, therefore, the same is payable by the appellants along with interest.

7. A major demand of Rs.2,46,30,772/- has been confirmed alleging under valuation for the period 2004-2005 and 2008-2009, out of which Rs.1,94,02,717/- relates to stock transfer to their own unit and remaining amount of Rs.52,28,055/- pertains to sale to sister unit, M/s Aarem Chemicals Private Limited.

8. The Revenue is disputing the value adopted by the appellant as of the goods are cleared to sister unit, it is to be valued in terms of 8 of the Valuation Rules i.e. as per CAS-4 method (cost + 10% of profit). In this case, the costing Certificate has been issued by the Chartered Accountant, the CAS-4 value was not available and the appellant paid the duty thereon. The appellant has disputed that the duty has been demanded in terms of Rule 8 of the Valuation Rules, which is not applicable to the facts and circumstances as the goods were sent to their own unit in relation to stock transfer and a part in relation to sale to their sister concern. To support his contention, he relies on the

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Tribunal's decision in the case of Indian Oil Corporation Limited (supra), wherein this Tribunal has held as under :

"5. We observe that SRGO manufactured by IOCL Haldia refinery has not been sold to any independent buyers. In fact the Appellant stated that it is not a marketable product and no duty is payable. However, they have agreed to pay duty only to avoid litigation as the entire exercise is revenue neutral. They stated that rule 8 of the Valuation Rules is not applicable in their case as all the SRGO/DHDS manufactured were not captively consumed in their factory at Haldia. Part of the SRGO/DHDS manufactured at Haldia Refinery were consumed captively for manufacture of HSD and the remaining were cleared to their sister unit at Barauni. They stated that it was not possible to work out the cost of the product in petroleum industry, accordingly the assessable value has been arrived at by adopting the methods as mentioned in Para 5.6 of the Order-in-Original dated 11-10-2012, which is reproduced below :

5.6 The assessee have computed the assessable value of SRGO in the following manner.

(a) Realisation of Finished Product at Destination Refinery.

(b) Less Operation cost of DHDS at Destination Refinery.

(c) Less: Transportation cost from Haldia to Destination Refinery.

(d) Less Transportation loss

(e) Less: 5% margin on net amount

6. The Appellant stated that whatever duty paid by their Haldia Unit will be availed as credit for their Barauni unit and hence the entire exercise is revenue neutral and there is no loss of revenue

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to the exchequer. We find merit in the argument of revenue neutrality by the Appellants. The duty paid by the refinery at Haldia is available as credit to the unit in Barauni.

7. Revenue has cited Board's Circular No. 643/34/2002-CX dated 1-7-2002. Rule 11 will be applicable only when it is not possible to arrive at the valuation on the basis of any of the rules from rule 4 to rule 100 of the Valuation Rules 2000. In this case the rule 8 is the appropriate method for determining the value of captively consumed SRGO/DHDS. The Revenue contended that the Appellant has not adopted this method and hence the valuation adopted by them is inappropriate.

8. We find that Valuation is to be done as per Rule 8 of the Valuation Rules when the entire goods are captively consumed and there is no other method of sales involved. In this case we find that the Appellant has partly consumed the goods captively and partly cleared the same to their sister unit. The above Circular does not visualize this situation. For captive consumption Rule 8 would be applicable and for sale to their sister unit Rule 9 of the Valuation Rule 2000 would be applicable. Since none of the Valuation Rules from Rule 4 to 10A covers the above said situation, the Appellant stated that they have adopted Rule 11 Best Judgement Method. Rule 11 is adopted when the situation is not covered by any of the other methods of valuation prescribed from Rule 4 to 10A. We find that the method of valuation adopted by the Appellant under Rule 11 of the Valuation Rules is the appropriate method in this case because the situation of part sale to related person and part captive consumption is not covered by any of the other Rules in the Valuation Rules 2000. Even if CAS-4 is arrived at and the goods are valued as per Rule 8 of the Valuation Rules, there is no loss of revenue because of the duty paid will be available as credit and the entire exercise would be revenue neutral. In support of their argument on revenue neutrality the Appellant cited the following decisions:

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(1) *CCE, Pune v. Coco-Cola India (P) Ltd. 2007 (213) ELT 490 (SC)*

(ii) *CCE&C, Vadodara II v. Indeos ABS Ltd. 2010 (254) ELT 628 (Guj.), which is affirmed by the Hon'ble Supreme Court Commissioner v. Indeos ABS Ltd. 2011 (267) ELT A155 (S.C)."*

We do agree with the contentions of the Id.Counsel for the appellant as the appellant is clearing the goods for sale to their sister unit and clearing a some part of the goods for captive consumption to their own unit for stock transfer. Therefore, the decision in the case of IOCL (supra) is squarely applicable to the facts and circumstances of the case and the duty cannot be demanded in terms of Rule 8 of the Valuation Rules, accordingly, the demand of Rs.1,94,02,717/- is not sustainable. Moreover, it is a situation of revenue neutrality.

9. We, further take note of the fact that the value of Formaldehyde and Melamine has been taken incorrectly by the Department as the cost prices which kept fluctuated and the Department took the balance sheet figures, which included miscellaneous overhead, but the Adjudicating Authority has taken the balance sheet figures, which does not represent appropriate value, the said figures are much lesser than the actual figures adopted by the appellant for some of the financial years in question and the Revenue has taken the higher figures shown in the balance sheet for whole of the period and there was a decrease in conversion cost for strong bond M-3 due to market forces as BIFR proceedings are going against the appellants. In that circumstances, the goods were sold on price justified by the Chartered Accountant on the basis of the records and the prices taken by the Adjudicating

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Authority without going any justification on higher figures found during the year, are not sustainable.

10. We further take note of the fact that whatever duty has been paid by the appellant, the same is available as cenvat credit to their sister unit. In that circumstances, it is a situation of revenue neutrality. Therefore, the demand is not sustainable as no malafide intention can be alleged against the appellant. Therefore, we hold that the demand of Rs.52,28,055/- is also not sustainable.

11. With regard to demand of Rs.1,15,616/- confirmed alleging that the appellant has short receipt of methanol and have taken cenvat credit on quantity shown in the invoices. The appellant has submitted that the methanol is highly inflammable items and short receipt of the quantities was wholly attributable to evaporation loss/handling loss and short receipt of the quantities was attributable to only 0.5%, so it cannot be said that the appellant has short receipt of methanol. The said issue has been examined by this Tribunal in the case of Hindustan Petroleum Corporation Limited (supra), wherein this Tribunal has held as under :

"8. There is no doubt that the Lube Base Oil are being transported through pipeline. If any goods are transported through pipeline or by other means of transports, if they are not solid, there is every chance of loss of quantity of the goods by way of evaporation. Therefore, as held by the Hon'ble High Court of Bombay in the appellant's own case (supra) transit loss can be allowed. I also find that in this case the transit loss is varying between 0.01 and 0.72% which is admissible in the facts and circumstances of the case. Therefore, I hold that there may be variation in the transportation of the quantity of the goods

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accordingly, transit loss is allowable. Hence, I hold that the appellant is entitled for input credit as shown in the invoices. Accordingly, the impugned order is set aside and the appeal and stay application are allowed with consequential relief, if any.

Therefore, the demand confirmed in the impugned order amounting to Rs.1,15,616/- is also not sustainable and hence, set aside.

12. In respect of demand of Rs.2,50,647/-, it is contention of the appellant that both the raw materials, Xtrazyme Hatchery and Enzyme Extra Clean Pond, have been used for research and development purposes and the cenvat credit sought to be denied on the ground that this input has been used for manufacture of final product, hence do not qualify as input in terms of Rule 2 (k) of the Cenvat Credit Rules, 2004. We find that this input has been received by the appellant for research and development purposes in their factory itself. The research and development activity is also a part of the manufacturing activity, therefore, it cannot be said that the said input has not been used for manufacture of their final product as held by this Tribunal in the case of Sudarshan Chemicals Industries Limited (supra), wherein this Tribunal has observed as under :

"9. *After careful examination of the facts of the case, I find that the manufacturing activity of the appellant is as such that the input procured by the appellant is first to be tested and then they have to be taken into the manufacturing process. Moreover, if some variations found with regard to the quality of input, it is to be retested as per required composition. In that situation, the manufacturing activity explained by the learned Advocate in the facts and circumstances in this case, the testing in the R&D*

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Section is being done for manufacturing of final product. If these tests have not been taken over by the appellant at the various stages the final product will not be produced. In that situation, I find that in this case the testing done in R & D section as stated by the appellant is an integral part of the manufacture of final product. The case cited by the learned Advocate and the arguments of the learned DR both are of the view that if any input which is being used in or in relation to the manufacture of final product are entitled for CENVAT credit. In this case these tests are required to manufacture the final product. Accordingly, the appellants are entitled for CENVAT credit availed on such inputs which went for testing and analysis to manufacture the final product. The CENVAT credit on capital goods used in R & D section is also entitled as the same has been used in or in relation to the manufacture of the final product."

Therefore, we hold that the Cenvat Credit of Rs.2,50,647/- cannot be denied to the appellant. Accordingly, the demand confirmed against the appellant is set aside.

13. With regard to confirmation of demands of Rs.14,86,640/- and Rs.34,88,013/- sought to be confirmed by way of impugned order by disallowing the cenvat credit, which was taken on the basis of endorsed invoices/Xerox copies/endorsed bills of entry. We find that the appellant's sister unit, M/s Aarem Chemicals Private Limited has imported the goods and endorsed the bills of entry and issued invoices in favour of the appellant and the appellant has taken the cenvat credit thereon. We find that the similar issue came up before the Hon'ble Allahabad High Court in the case of Uni Cast Private Limited (supra), wherein the Hon'ble High Court has observed as under :

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"21. From the aforesaid, it is clear that credit would be given on an invoice bill, which indicates payment of duty on such inputs. In the instant case, the invoice bill was produced, which evidenced payment of excise duty on the inputs received by the applicant. The said bill was endorsed by the manufacturer. The mere fact that the certificate issued by the manufacturer did not give the details of payment of duty was immaterial. The amended Rules provided payment of duty and inputs to be indicated in the invoice, which existed as per the invoice supplied by the supplier. The fact that the invoice did not indicate the name of the appellant was only a procedural lapse, which was rectified by the endorsement made by the manufacturer in favour of the applicant. Such endorsement made cannot make the document invalid and, consequently, we are of the opinion that endorsement made by the manufacturer in favour of the applicant on the bills raised by the supplier does not make the invoice invalid and the applicant is entitled to avail Modvat credit."

Further, in the appellant's own case, this Tribunal has come to examine the issue and observed as under :

"We find that the issue is no more res integra and have decided by the various Benches of the Tribunal and also Hon'ble High Courts and the Hon'ble Supreme Court. The decision of this Bench of the Tribunal in Tata Iron & Steel Ltd. vs. CCE, JSR. (supra) as relied upon by the learned Authorized Representative has been distinguished by the Hon'ble High Court of Bombay in the case of Marmagoa Steel Ltd. vs. Union of India (supra). The relevant paragraphs of the judgement of the Hon'ble Supreme Court in the case of Union of India vs. Marmagoa Steel Ltd. are reproduced:-

"10. On reading Rule 52A the position which emerges broadly is that the said Rule refers to eligibility for claiming MODVAT Credit, whereas Rule 57G refers to procedure to be observed by the

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manufacturer for taking credit for the duty paid on the inputs received by him. A bare reading of Rule 52A shows that no excisable goods shall be delivered from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorised agent. Rule 52A, therefore, applies to a situation where goods are cleared from a factory or a warehouse to the place of assessee. For such a situation the proviso in Rule 57G stipulates that no credit shall be taken unless the inputs are received in the factory under the cover of an invoice issued under Rule 52A. However, that situation does not arise in this case for the simple reasons that the importer M/s. Essar Gujarat Limited had loaned the goods to the assessee (which transaction is not doubted in the show cause notice). Further the goods were transferred directly by the importer to the Unit of the assessee from the Port. Therefore, the goods never went to the manufacturing Unit of M/s. Essar Gujarat Limited. For such a situation the proviso to sub-rule (2) of Rule 57G states that the relevant document indicating payment of duty would be Bill of Entry.

11. Now in the present case, as far as Bills of Entry dated 30th May, 1994 and 31st May, 1994 are concerned, Bills of Entry were produced by the assessee which indicate that M/s. Essar Gujarat Limited had paid duty at the time of import and, therefore, the assessee was Excise Appeal Nos.83 & 84 of 2009 7 entitled to take MODVAT Credit for the duty paid on the imported goods. However, when we come to the 3rd Bill of Entry dated 6th June, 1994, only the above Certificate at Page No. 42 of the Paper Book was relied upon and the triplicate copy of the Bill of Entry was not produced. In the circumstances, in our view, the respondent had wrongly availed of MODVAT Credit of Rs. 1,78,582/- on the quantity of 212.659 MT scrap referred to in the above Chart.

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12. In the circumstances, the Civil Appeal filed by the Department to that extent succeeds. The appeal is partly allowed with no order as to costs."

Further, this issue has been examined by this Tribunal in the case of Mehta HWA FUH Plastics Private Limited (supra), wherein this Tribunal has held as under :

"6. Before I proceed further, it would be appropriate to consider the decisions relied upon by the Id. AR in his submissions. In the case of Marmagoa Steel Ltd., Hon'ble Supreme Court held that credit is not admissible since in that case the bill of entry was in the name of M/s. Essar Gujarat Ltd. and the Hon'ble Court allowed the credit where original copies of duplicate bills of entry were produced which had been endorsed in favour of the respondents therein and in respect of one bill of entry, the triplicate copy of bill of entry was not available and the respondent had produced a certificate from the Superintendent of Central Excise, in-charge of the Range in whose jurisdiction M/s. Essar Gujarat Ltd. was situated. Needless to say this cannot be compared with a situation where the verification is taken up after four and a half years of the event and the assessee claims misplacement of original documents but submits all supporting documents which clearly show that the goods have been received. Further, it has to be noted that bills of entry were in the name of the respondent only and a certificate from Deputy Commissioner, Customs, has been produced. As regards the decision in the case of S.K. Foils Ltd., credit was proposed to be availed on the basis of carbon copy of the challan and respondent had made a statement that original challans were not being issued by the supplier which was found contrary to the facts. Therefore this decision is also not applicable. As regards the decision in M/s. Survoday Blending Pvt. Ltd., the bill of entry was dated 10-2-2005 whereas the credit was taken on 14-4-2006. In that case

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the Tribunal took the view that if the copy of the original bill of entry was available with them at the time when credit was taken and there was no explanation why it was misplaced subsequently. The original bill of entry in that case was available in 2005 till 14-4-2006 for more than a year and thereafter it got misplaced. These peculiar facts were taken note of to disallow the credit. In this case Commissioner has not simply allowed the credit but has relied upon the decision of the Tribunal in the case of Steelco Gujarat Ltd. - [2009 \(242\) E.L.T. 229](#) (Tri.-Ahmd.) and distinguished the decision of the Larger Bench in the case of Avis Electronics Pvt. Ltd. - [2000 \(117\) E.L.T. 571](#) (Tri.-LB). Further, he has also relied upon the decision of Hon'ble High Court of Bombay in the case of Marmagoa Steel Ltd. - [2005 \(192\) E.L.T. 82](#) (Bom.), Simplex Mills Co. Ltd. - 2007 (81) RLT 331 (Bom.) wherein it was held that credit is admissible on the basis of endorsed copies of invoice if inputs have been received and used. He has also relied upon the decision of Hon'ble High Court of Madhya Pradesh in the case of Kataria Wires Ltd. - [2009 \(241\) E.L.T. 31](#) (M.P.) wherein it was held that the credit is admissible on the basis of certified copy of invoices. In view of the detailed order passed by the Id. Commissioner which has taken note of several decisions while coming to the conclusion and which has also come to the conclusion that goods have been received and used in the manufacture and duty has been paid, I find that there is nothing legally or factually wrong with the impugned order. Accordingly, appeal filed by the Revenue has no merits and is rejected."

As it is not disputed by the Revenue that the appellant has not received the goods against the endorsed Bills of Entry/Xerox copies of the Bills of Entry/endorsed Invoices and the same has been used in the manufacture of final product and there is no allegation of diversion of the said goods pertaining in the above documents, relying on the above

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decisions, we hold that the cenvat credit cannot be denied to the appellant, therefore, we hold that the appellant is entitled to take the cenvat credit of Rs.14,86,640/- and Rs.34,88,013/- on the basis of endorsed Bills of entry/endorsed invoices/Xerox copies of Bills of Entry.

14. A demand of Rs.14,04,491/- was confirmed against the appellant on account of shortages of finished goods found during the course of physical stock verification. We find that method of stock verification has been disputed by the appellant as stock verification, was not done physically, it was done on estimation basis by dip method and no Panchnama or weighment slips has been prepared to show the physical stock taking by the investigating team and in such a short span of time, stock verification of huge quantity is not possible. In that circumstances, the allegation of shortage of finished goods is not sustainable. It is also found that during the course of investigation, certain updation of books of accounts were also not considered as 158 MTs Formaldehyde is attributable to non-updation of books of accounts on the date of physical stock taking, as a result thereof, the quantity issued for captive consumption being 155 MTs could not be considered by the Department. With regards to 30 MTs of SBP 101G which was found short, was the part of 155 MTs seized by the investigating team in the factory of M/s Aarem Chemicals Private Limited, which has been found packed in bags bearing the appellant's name. Further, the total quantity of 38.545 MTs of SBPF 401G and 21.985 MT of SBP 402P would be 60.535 MTs, out of which, 55 MTs has been captively consumed in the production of various grades of PF resin, therefore, the shortage is very negligible and the method adopted for weighment of

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the stock is also not proper. In that circumstances, the allegation of shortages of the finished goods is not sustainable in the absence of any corroborative evidence brought on record by the Revenue i.e. how much clearances were made and what is the method of transportation and what are the mode of the recipient of the goods ? In that circumstances, the demand of Rs.14,04,491/- is not sustainable.

15. As the demand of duty is not sustainable against the appellant, no penalty is imposable on the appellants.

16. In view of this, we pass the following orders :

(i) Demand of Rs.89,855/- conceded by the appellant, is confirmed and the same is payable along with interest ;

(ii) Rest of the demand confirmed by way of impugned order is set aside.

(iii) No penalties are imposable on the appellants.

17. In view of the above terms, both the appeals are disposed off.

(Pronounced in the open court on **09.12.2024**)

(Ashok Jindal)
Member (Judicial)

(Rajeev Tandon)
Member (Technical)

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