

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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 70733 of 2013

(Arising out of Order-in-Original No. CCE/BBSR-I/07/2013 dated 18.03.2013 passed by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. Mideast Integrated Steels Limited : **Appellant**
Khurunti, Jajpur Road,
District: Jajpur – 755 026, Odisha

VERSUS

Commissioner of Central Excise, Customs and Service Tax : **Respondent**
Bhubaneswar-I Commissionerate,
C.R. Building, Rajaswa Vihar,
Bhubaneswar – 751 007, Odisha

APPEARANCE:

Shri Kishor K. Acharya, Advocate,
Shri Narendra Kr. Dash, Advocate
For the Appellant

Shri S.K. Jha, Authorized Representative,
For the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 77614 / 2025

DATE OF HEARING: 15.10.2025

DATE OF DECISION: 04.11.2025

ORDER: [PER SHRI R. MURALIDHAR]

The appellants are a 100 % EOU, engaged in the manufacture of Sponge Iron. The appellant company was searched by the Directorate General of Central Excise Intelligence (DGCEI), consequent upon which a Show Cause Notice dated 31.03.2012 was issued to the appellant by the Additional Director General, DGCEI, Kolkata for the period from 2005-06

to May 2009. The allegations were on the following two grounds:

(a) Demand of Rs.3,66,93,067/- on account of alleged clandestine removal of 2661.600 MT of Pig Iron from the Appellant's yard at Paradip Port, adjustment of 4000 MT of Pig Iron & 1000 MT of Pig Iron scrap and 2000 MT of Pig Iron scrap, from the Appellant's Daily stock as reported in ER-2 of December 2008 and February 2009 respectively

(b) Demand of Rs.5,59,84,382/- attributable to allegedly inadmissible CENVAT Credit availed by the appellant on the strength of invoices issued by its Head Office (an Input Service Distributor), before being registered as such, under Section 11A(1) / 11A(4) of the Act.

2. After due process, the Adjudicating Authority has confirmed the demand proposed in the SCN. Being aggrieved, the appellant is before the Tribunal.

3. The Ld. Counsel, appearing for the appellant, makes the following submissions in respect of the confirmed demand of Rs.3,66,93,067/- on account of alleged clandestine removal: -

- That the Appellant ran into rough weather before being operational. At the instance of the creditors, the Hon'ble Delhi High Court appointed an Official Liquidator. When the plant and other assets for the Appellant were in the possession of the Official Liquidator, the Hon'ble Court appointed an expert

Committee to commission the Appellant's plant, without handing over the operational control of the plant to the Appellant, whose role was limited only to provide necessary finance. The Appellant's plant started production in early 2005 under the superintendence of the expert Committee and the Official Liquidator.

- The position as above continued till 27.09.2011, when the appointment of the Official Liquidator was recalled by the Hon'ble Delhi High Court and the Official Liquidator was directed to hand back all records and assets of the Company to the Appellant.
- It is matter of record that during the relevant period i.e. 2005-06 to May 2009 for the present proceeding, the Appellant Company was going through high level of attrition and was run by all stop-gap officials, who were either unaware of Central Excise matters and/or other statutory record-keeping. They were only involved in macro level control from remote locations like Mumbai. However, there was only one employee in the Company namely, Shri Umesh Chandra Das, who was continuing with the Appellant since October 1995.
- Shri Das in his statement recorded on 17.02.2010 stated that "*I have taken charge of Central Excise matters very recently. Since then the production in our factory has not taken place. As such I am not aware of the records required to be maintained*" and that "*The person who has been dealing with*

accounts matter prior to me named Mr. Pratap Keshari Sahoo had made all such entries. So I cannot explain. He used to report to Mr. Bijay Gupta, GM (F&A)". But notwithstanding repeated request of the Appellant, said Shri Pratap Keshari Sahoo was never cross examined to ascertain the truth of the matter.

- In his statement recorded on 26.02.2010, Shri Bijay Gupta stated that he used to look after funds raising activities of the Company and he does not look after the day-to-day activities of the Appellant Company and categorically denied to have looked after the tax matter of the Company. Upon being asked about the shortage of 4000 MT sold in the Opening balance of Pig Iron in ER-2 of January 2009, he stated that *"Person who was looking after the accounts at plant called me and informed about the Stock status at plant. Pig Iron production at plant is on estimation basis, Pig Iron is not weighed at the time of production. Sales are 100% on weighment basis. They found the Stock shortage of 4000MT and accordingly adjusted in the statement in production figures, as the production is only on the estimation basis..... U. C. Das and Puspanjali are looking after the Indirect Tax matter currently.....Till today as per our records 3049.035MT of Stock is available at Paradip Port".*
- As regards the further adjustments of 3000MT in the ER-2 of December 2008 and

February 2009, none of the persons whose statements were recorded by the DGCEI could throw any light. Nonetheless, all above adjusted quantities of 4000MT, 1000MT & 2000MT of Pig Cheaps have already suffered the incidence of Central Excise duty at the time of removal thereof to the domestic market.

- It is also a matter of record that while the Dy. General Manager (Commercial), Shri Jaywant, stated that 3049.495 MT of Pig Iron could be lying beneath the ground bed level, Mrs. Puspanjanli Mishra, Manager (Finance & Systems), strongly denied that on the ground that the plot at Paradip Port has concrete base. Similarly, said Shri Jaywant applied to the jurisdictional Customs Authority for extension of time to export 3049.495MT of Pig Iron lying at the yard at Paradip Port, while as on that date there was Nil stock of Pig Iron at the said yard. Evidently, the left hand did not know what the right hand was doing.
- Upon a conjoint reading of the documents on record it is evident that record keeping of production / clearance / exports etc. was handled lackadaisically and irresponsibly by thoroughly unprofessional entities without realizing the consequential effect thereof, **though there is no evidence whatsoever to sustain the allegation of clandestine removal of Pig Iron by the Appellant Company, as alleged in the SCN.**

- Nonetheless, in the course of investigation, the Appellant vide their letter dated 12.04.2010 submitted a reconciliation statement clarifying that the Bond Register of the Appellant has not been maintained properly inasmuch as the cancellation of ARE-1 No.112/05 dated 29.11.2005 & ARE-1 No.150/05 dated 12.01.2006, which was cancelled, but no corresponding entries were made in the Bond Register. Similarly, on 29.03.2008, 490.470MT of Pig Iron was returned from the Port for reprocessing, but no corresponding credit was passed in the Bond Register. In the said letter, the Appellant pointed out further discrepancies in the maintenance of Bond Register to conclude that the shortage of 3049.495MT of Pig Iron, as alleged in the SCN, is not correct.
- Prior to issuance of the SCN, the Appellant vide its letter dated 23.03.2011 submitted a further reconciliation statement, which has been taken note of in paragraph 3.1.8 of the SCN (running page No.91 of the Paper book). The said Paragraph in the SCN also confirms that the returned quantity of 490.47MT of Pig Iron has been accounted in the Bond Register. But the impugned Order does not even refer to such reconciliations of the Appellant to rebut the availability of 3049.495MT of Pig Iron in the yard at Paradip Port, which indeed, is a misnomer.
- To be more specific, the DGCEI has never put on record any evidence of clandestine removal by the Appellant from its plant or

from the Railway siding or from the Paradip Port. There is no evidence of removal of Pig Iron / Scrap by whatever means of transport. There is no evidence of flow back of funds arising out of such alleged clandestine transaction. There is no admittance by any person of the alleged clandestine removal. There is no seizure of any quantity of the allegedly clandestinely removed goods either at the Railway siding/Paradip Port and/or *en route* to the purchaser thereof. The SCN does not name any purchaser of the clandestinely removed goods. Indeed, none of the conditions to establish clandestine removal of 3049.495MT of Pig Iron.

- Also, the Ld. Commissioner has referred to the statements of different persons in the impugned Order in a very cursory manner, by deliberately ignoring the relevant portions thereof. To the extent that the Appellant's reiteration to cross examine Shri Pratap Keshari Sahoo has not even discussed by the Ld. Commissioner. On that count also the impugned Order suffers from the infirmity of having violated natural justice.
- In the present proceeding the DGCEI recorded the statements of Shri Vaibhav Jaywant, AGM Commercial, Shri Umesh Chandra Das, Jr. Manager (F&A), Shri Bijay Gupta, G.M (Finance), Mrs. Puspanjali Mishra, Manager (Finance & Sys.) and one N. G. Banerjee, Director of the Appellant Company. The Appellant submits that none of the statements as above are reliable and

admissible inasmuch as, the mandatory procedure as stipulated in Section 9D of the Act, has not been complied with.

- He relies on the following case laws :
 - (a) *Continental Cement Company Vs UOI* [2014 (309) ELT 411]
 - (b) *Ambika Iron & Steel Pvt Ltd Vs CCE* [2022 (380) ELT 351]
 - (c) *Associated Cylinder Industries Ltd Vs CCE* [1990 (48) ELT 460 (Tri)]
 - (d) *Hi Tech Abrasives Ltd. versus Commissioner of C. Excise & Customs, Raipur* [2018 (362) E.L.T. 961 (Chhattisgarh)]
 - (e) *G. Tech Industries Vs. UOI* [2016 (339) E.L.T. 209 (P&H)]
 - (f) *Rashmi Cement Limited – Unit – I & II Vs. CCE, Haldia* [Final Order No.77290-77298 / 2025]

3.1. In respect of the confirmed demand of Rs.5,59,84,382/- on account of alleged non-admissibility of CENVAT Credit due to contravention of the ISD procedure, he makes the following submissions:

- ❖ The SCN alleges that the Appellant has availed inadmissible CENVAT Credit on the strength of ISD invoices raised by the Appellant's Head Office, before being registered as ISD on 23.01.2008 and that the method of

apportionment adopted for distribution of credit by the ISD was improper.

- ❖ The law with regard to the distribution of credit prior to being registered as ISD is fairly settled by now in favour of the Appellant. Nonetheless, in support of its claim the Appellant relies upon the decision of the Hon'ble Karnataka High Court in the case of ***Hinduja Global Solutions Ltd.*** reported at 2022 (61) GSTL 417 (Kar.) and that of the Hon'ble Madras High Court in the case of ***Pricol Ltd.*** reported at 2021 (48) GSTL 235 (Mad.). In that connection, the Appellant also relies upon the decision of the Hon'ble Tribunal in the case of ***Lona Industries Ltd.*** reported at 2016 (42) STR 362 (Tri.-Mumbai).
- ❖ With regard to second leg of the allegation about improper method of apportionment adopted by the Appellant, it is respectfully submitted that during the relevant period, the relevant Rule 7 of the CENVAT Credit Rules did not provide for any specific formula for apportionment and distribution of Input Service Credit by ISD. However, Rule 7 of the said Rules, as amended w.e.f. 17.03.2012 provided the conditions that the credit distributed does not exceed the amount of Service tax paid thereon, credit of Service tax attributable to manufacture of exempted goods/services shall not be distributed, credit service tax attributable to services used in a unit shall be distributed only to that unit and credit of service tax attributable to services used in more than one unit shall be distributed prorata on the basis of the turnover of the concern unit to the sum total

of turnover of all the units to which the service relates. Subsequently, the Board issued a Circular No.178/4/2014-S.T., dated 11.07.2014, for the first time, providing therein the more detailed formula for distribution of Input Service Credit. It is a settled law that, in the absence of any specific formula for distribution of input service credit during the relevant period, it was open for the ISD to choose a proper method for distribution of credit. Nonetheless, the formula adopted by the ISD for distribution of credit to the Appellant is well in accordance with the amended provisions of Rule 7 of the CENVAT Credit Rules and so also the Circular dated 11.07.2014 issued by the Board.

- ❖ The CENVAT Credit was taken during the period 2005 – 2008 and the same was properly recorded in the ER 2 Returns. Since they were already shown in the ER 2 Returns, it was for the Department to scrutinize the ER 2 Return and raise objection, if any, but it was not done in this case. Therefore, the issue raised for the first time by way of the present SCN on 31.03.2012, makes the entire demand time-barred.
- ❖ Accordingly, the demand of Rs.5,59,84,382/- is not sustainable in the eye of law.

4. The Ld. Authorized Representative appearing for the Revenue submits that the quantity shown by the appellant in their Daily Stock register as their finished goods stocks and the quantity shown as the stock available at the Paradeep Port, were found to be non-existent. Therefore, he submits that it is a clear case, wherein the goods were cleared without any documents on clandestine basis. Hence, he justifies the confirmed demand. He further states the appellant has passed on the CENVAT Credit from their Head Office prior to taking the ISD Registration in 2008; hence, the documents under which the CENVAT was taken are not proper documents in terms of Rule 9 of the CENVAT Credit Rules, 2004. In view of these submissions, he prays that the appeal may be dismissed.

5. Heard both the sides. Perused the Appeal papers and other documentary evidence relied upon by both the sides.

6. We find that the first issue pertains to the alleged clandestine removal of Sponge Iron. The appellant being an EOU were required to basically export their product and clear only a part of the goods in the DTA subject to fulfilment of conditions.

6.1. It would be important to go through the chronological factual details, leading to the present proceedings. The relevant details, as given by the appellant, are reproduced below:

September 1992 - The Appellant Company was incorporated as a 100% EOU for setting up the integrated steel plant with financial assistance from different sources, including the Banks. However, before commissioning of the plant, the Appellant ran into rough

- weather and number of creditors approached the Hon'ble High Court of Delhi, vide Company Petition No.337 of 1996 praying for winding up the Appellant's Company.
- 19.09.2002- As an interim measure, an official liquidator was appointed as the 'Provisional Liquidator', who remained in position of the assets of the Company, till further Order.
- 02.12. 2004 - The Hon'ble Delhi High Court appointed a committee comprising of two members namely Mr. Arvind Pandey, Ex-Chairman of SAIL and Mr. B. P. Singh, former CMD of Nilachal Ispat Nigam Ltd., who shall oversee the commission of the plant, without giving any control of the plant to the Appellant Company.
- 27.09.2011- Based upon the assurance of the Appellant company to deposit a lump sum amount (Rs.98,66,311/-), the Hon'ble High Court of Delhi in the said C.P No.337 directed that upon deposit of the said amount, the Order dated 19.09.2012, appointing Official Liquidator shall stand recalled and the Official Liquidator was directed to hand back all records and assets in its possession, if any to the Appellant Company.
- 17.02.2010- The Appellant Company was searched by the Directorate General of Central Excise Intelligence (DGCEI), consequent upon which a Show Cause Notice dated 31.03.2012 (Page- 55 to 156 of the Paper book) was issued to the Appellant by the Additional Director General, DGCEI, Kolkata (relevant period 2005-06 to May 2009).

6.2. The alleged clandestine removal has happened on account of removal of 2661.600 MT of Pig Iron from the Appellant's yard at Paradip Port, adjustment of 4000 MT of Pig Iron & 1000 MT of Pig Iron scrap and 2000 MT of Pig Iron scrap, from the Appellant's Daily stock as reported in ER-2 of December 2008 and February 2009. During this period and even subsequently till 27.09.2011, the effective control of the company was with the Official Liquidator of the company, running the show with stop-gap employees. Even Shri Umesh Chandra Das, who was employed right from 1995, in his recorded statement on 17.02.2010 has stated that the entries in the books were made by one Pratap Keshari Sahoo. From the records, we note that Revenue has not recorded any statement from the said Pratap Keshari Sahoo.

6.3. In his statement recorded on 26.02.2010, Shri Bijay Gupta stated that *"Person who was looking after the accounts at plant called me and informed about the Stock status at plant. Pig Iron production at plant is on estimation basis, Pig Iron is not weighed at the time of production. Sales are 100% on weightment basis. They found the Stock shortage of 4000MT and accordingly adjusted in the statement in production figures, as the production is only on the estimation basis..... U. C. Das and Puspanjali are looking after the Indirect Tax matter currently.....Till today as per our records 3049.035MT of Stock is available at Paradip Port"*.

6.4. Dy. General Manager (Commercial), Shri Jaywant, in his recorded statement has stated that 3049.495 MT of Pig Iron could be lying beneath the ground bed level.

6.5. Mrs. Puspanjanli Mishra, Manager (Finance & Systems), strongly denied that on the ground that the plot at Paradip Port has concrete base.

6.6. Shri Jayawant has stated that they have applied to the jurisdictional Customs Authority for extension of time to export 3049.495 MT of Pig Iron lying at the yard at Paradip Port, while as on that date there was Nil stock of Pig Iron at the said yard.

7. Thus, we find that the recorded statements are contradicting each so far as the facts are concerned. No comprehensive conclusion can be arrived at to know who was actually responsible for upkeep of the books and whose statement can be taken as correct. We find that in spite of seeking cross-examination, the request was not considered by the Adjudicating authority.

7.1. As a matter of fact, the cross-examination comes subsequently. First of all, the person recording the statement has to affirm before the Adjudicating authority that the same has been given by him with his free will without any force or coercion. Thereafter the same can be admitted as evidence. Only after this, the cross-examination is required to be given, if sought by any of the noticees. In the present case, we find that this basic procedure to be followed in terms of Section 9D of CEA 1944, has not been followed.

7.2. The Hon'ble Punjab and Haryana High Court in the case of **G. Tech Industries Vs. UOI [2016 (339) E.L.T. 209 (P&H)]**, has held as under: -

"16. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

18. It is only, therefore,-

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

19. Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

7.3. The Tribunal, Delhi in Excise Appeal No. 51148 of 2020 in the case of ***Surya Wires Pvt. Ltd. Vs Principal Commissioner, CGST, Raipur, vide Final Order Nos. 50453-50454/2025 dated 01.04.2025***, has considered the issue of Section 9D procedure in detail and has held as under: -

"12. A perusal of the impugned order shows that it is based primarily on the statements of Harsh Agrawal, Director of the appellant, Narendra Kumar Rathod, security guard of the appellant, Satyanand Soj, security-in-charge of the appellant and Ishwar Prasad Verma, loading-in-charge of the appellant. These statements were recorded by the Officer under section 14 of the Central Excise Act.

13. The first and foremost issue that arises for consideration is whether such statements could have been considered as relevant and relied upon without following the procedure contemplated in section 9D of the Central Excise Act relating to relevancy of statements under certain circumstances.

14. The statement of witnesses are recorded under section 14 of the Central Excise Act and section 9D of the Central Excise Act deals with relevancy of these statements under certain circumstances.

15. The statement of witnesses are recorded under section 108 of the Customs Act, 1962 and section 138B of the Customs Act deals with relevancy of statements under certain circumstances.

.....

21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

22. It would now be appropriate to examine certain decisions interpreting section 9D of the Central Excise Act and section 138B of the Customs Act. 23. In *Ambika International vs. Union of India*²⁴ decided

on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that if none of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority.

....

24. The Punjab and Haryana High Court in *Jindal Drugs* that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 138B(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.

25. In *Hi Tech Abrasives Ltd. vs. Commissioner of C. Ex. & Cus., Raipur* decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine

removal of goods without payment of duty and for this purpose reliance was placed on the statement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in Ambika International.

26. In Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd.²⁶ decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 138B of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 138B(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant.

....

28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two

sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.

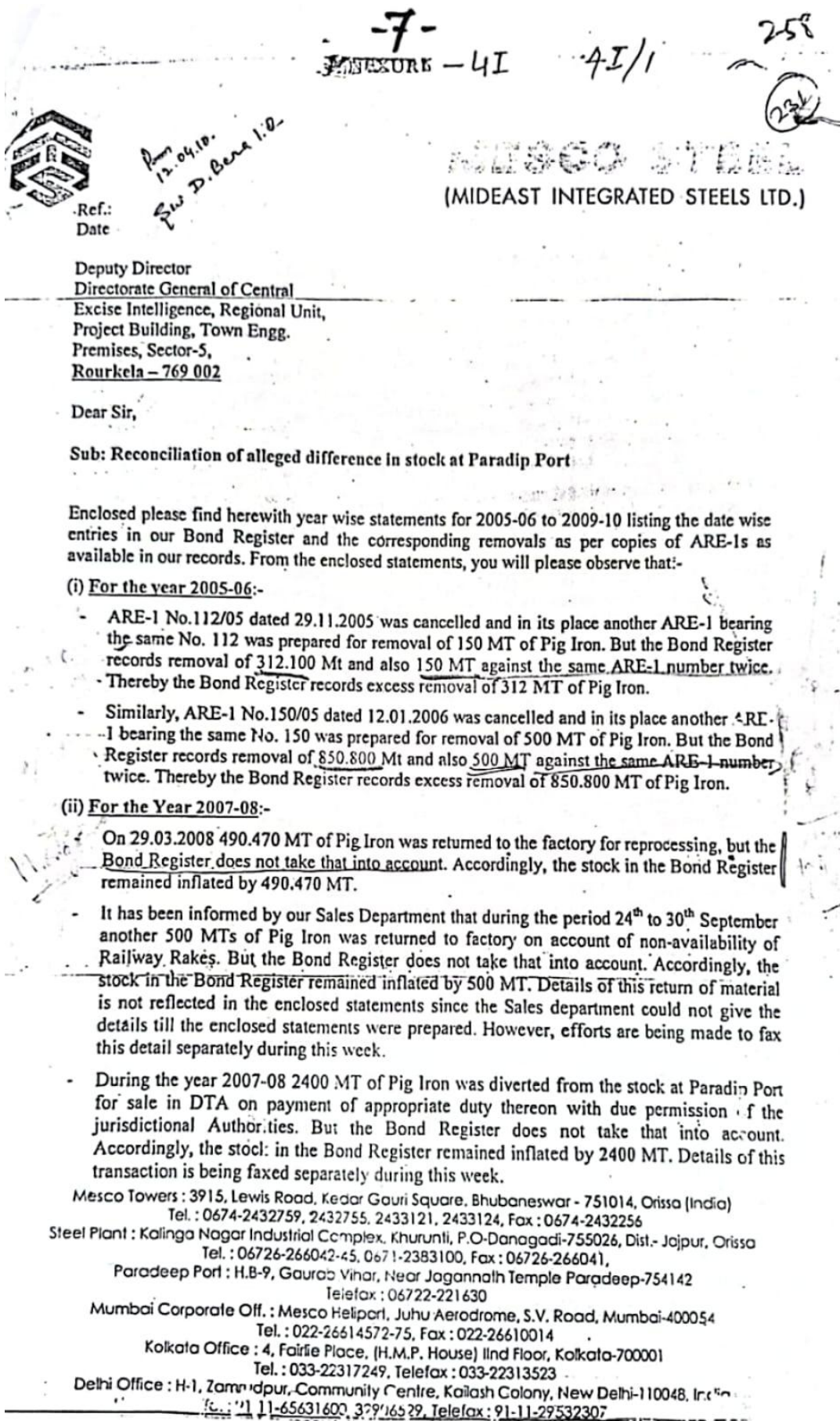
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34. The confirmation of demand of central excise duty to the extent of Rs. 3,04,24,623/- is based on the statements of persons who were not examined by the department before the adjudicating authority. This examination was absolutely necessary in terms of the provisions of section 9D of the Central Excise Act. In the absence of examination of such persons before the adjudicating authority and in the absence of admission of such statements in evidence, such statements would not be relevant. For the reasons stated above, the said demand would have to be set aside."

7.4. We find that the non-following of procedure under Section 9D in the present case, before admitting the contradicting recorded statements as evidence, on its own proves fatal to the case of the Revenue in respect of the allegation of clandestine removal.

8. We also had a look at the factual details brought in by both the sides. We find that the appellant has provided the Reconciliation statement towards alleged difference in the stock found at Paradip Port. For this, they have submitted their letter dated 12.04.2010 explaining reason for non-tallying of the figures and the mistakes committed in the Bond Register. They have also explained that part of the goods sent to Paradip Port were cleared to DTA with due permission

from the authorities. The copy of this letter is reproduced below:





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(230)

MIDEAST INTEGRATED STEELS LTD.
(MIDEAST INTEGRATED STEELS LTD.)

=2=

These discrepancies work out to inflated stock in our Bond Register by 4,553.270 MT. This prima facie proves that the stock appearing in our Bond Register is NOT CORRECTLY MAINTAINED and therefore the said stock of Pig Iron in our Bond Register cannot be the basis to draw any adverse inference against us. In fact we could not complete the process of reconciliation on account of non-availability of the office Copies of the ARE-1s, some of which are apparently misplaced or have been seized by you. We are in the process of contacting our jurisdictional Divisional Office at Balasore to obtain Xerox copies of the ARE-1s which we had submitted to them as pro of exports. We also request you to please allow us to take the photocopies of the ARE-1s seized by you during search of our factory on 17.02.2010. On receipt of the ARE-1s, we assure you that the entire shortage of 3049.495 MTs of Pig Iron alleged to have been found short in our 'Plot' at Paradip Port will be duly reconciled.

We wish to reiterate that, we do not resort to any kind fraudulent practices and we never have any intention to evade payment of duty. Moreover, we are a 100% EOU and all our removals are under physical control of the Department. The discrepancy, if any, as has been pointed by you are purely on account of inadvertent error of oversight and/or erroneous accounting by the concerned employee maintaining the Bond Register. Kindly appreciate that the alleged discrepancy in stock to the extent of 3049.495MT is fictitious and far from truth.

As regards the error in availing apportioned input service credit, we are working out our eligibility correctly and we shall reverse the excess credit, if any found to have been availed and utilized by us, with interest thereon.

Thanking you

You Sincerely,

For M/s Mideast Integrated Steels Ltd.

For MIDEAST INTEGRATED STEELS LTD.

Authorized Signatory

Authorized Signatory

• Mesco Towers : 3915, Lewis Road, Kedar Gaur Square, Bhubaneswar - 751014, Orissa (India)
Tel. : 0674-2432759, 2432755, 2433121, 2433124, Fax : 0674-2432256
Steel Plant : Kalinga Nagar Industrial Complex, Khuntli, P.O.-Danagadi-755026, Dist.- Jajpur, Orissa
Tel. : 06726-266042-45, 0671-2353100, Fax : 06726-266041,
Paradeep Port : H.B-9, Gaurab Vihar, Near Jagannath Temple Paradeep-754142
Telefax : 06722-221630
Mumbai Corporate Off. : Mesco Heliport, Juhu Aerodrome, S.V. Road, Mumbai-400054
Tel. : 022-26614572-75, Fax : 022-26610014
Kolkata Office : 4, Fairlie Place, (H.M.P. House) 11nd Floor, Kolkata-700001
Tel. : 033-22317249, Telefax : 033-22313523
Delhi Office : H-1, Zamrudpur, Community Centre, Kailash Colony, New Delhi-110048, India
Tel. : 91-11-65631600, 32906529, Tel. Fax : 91-11-29532307
Website : www.mesco-steel.com

8.1. The appellants have also submitted another letter on 28.03.2011 showing the Reconciliation of the Running Bond account. The same is extracted below:



MISL/BBSR-11/DGCEI/267

To
The Deputy Director,
Directorate General of Central Excise Intelligence,
Rourkela Regional Unit
ROURKELA.

Dear Sir,

Sub.: Reconciliation of Running Bond Account

Since your officers pointed out the discrepancy between the physical stock of Pig Iron at our yard in Paradip Port and the stock thereof appearing in our Running Bond account, we examined our records toothcomb and found the following inadvertent error of omissions:-

Financial Year	O.B at Paradip Port	Quantity removed to Paradip Port as per Bond Register (MT)	Quantity Exported (MT)	Quantity returned from Sukinda Rly. Siding (MT)	Quantity of Dust included in the Material returned (MT)	Net quantity returned to Plant	Quantity returned from Paradip Port (MT)	Total	C.B at Port
1	2	3	4	5	6	7	8	10	11
2005-07	5,062.58	91,033.69	75,073.00	836.66	83.67	52.99	387.895	1,140.89	19,882.38
2007-08	19,882.38	62,506.01	80,455.19	1,581.90	158.19	1,423.71	490.47	1,914.18	19.02
2008-09	19.02	20,665.88	20,200.00	538.02	53.80	484.22	0.00	484.22	0.68

1. D-3 Intimation was submitted to the Jurisdictional range office for 387.895 qty MT
2. Material (Pig Iron dust, chips including earth dust) returned to factory from Sukinda Railway station. Pig Iron dust and chips arise due to Machine loading inside Plant and unloading the same at Sukinda railway siding. To avoid exportation of such Pig chips/ dust, Pig Iron bricks are manually loaded onto the wagons at the railway siding. After Pig Iron bricks are loaded onto the wagon, the non-exportable Pig dust and chips remains in the railway siding, which later on are machine-loaded onto trucks for being return to factory for reprocessing.
3. In the course of machine loading of Pig chips/dust substantial quantity (about 10% as has been physically observed by us) of earth dust/ mud get loaded onto the trucks along with the Pig chips/dust.

From the above statement it may please be observed that, the physical stock at Paradip Port as appearing in our bond register is not correct in as much as the material returned to factory from Sukinda railway siding / Paradip port has not been accounted for therein. Upon adjustment of the material returned to factory as shown in column No.5 to 8 of the above table, it may be observed that there would be no stock available at Paradip Port and thus the shortage of stock at Paradip Port as pointed out by you is fully reconciled.

Thank You
Yours faithfully
For Mideast Integrated Steels Ltd.

Authorised Signatory



Mesco Towers : 3915, Lewis Road, Near Gauri Square, Bhubaneswar - 751014, Orissa (India)
Tel. : 0674-2432759, 2432755, 2433121, 2433124, Fax : 0674-2432256
Steel Plant : Kalinga Nagar Industrial Complex, Khurunti, P.O.-Danagad-755026, Dist.- Jajpur, Orissa
Tel. : 06726-266042-45, 0671-2383100, Fax : 06726-266041,
Paradeep Port : H.B-9, Gaurab Vihar, Near Jagannath Temple Paradeep-754142
Telefax : 06722-221630
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Tel. : 033-22317249, Telefax : 033-22313523
Delhi Office : H-1, Zomrudpur, Community Centre, Kailash Colony, New Delhi-110048, India
Tel. : 91-11-5631600, 3290529, Telefax : 91-11-5632307

8.2. From the above letter, we find that the appellant has offered explanation for the purported shortage and consequent allegation of removal of the same without payment of Excise Duty.

8.3. The above documents clarify that the non-availability of the finished goods as per the records, is more likely on account of non-proper recording of the details rather than clearing of the same clandestinely without payment of Excise Duty. It is also to be kept in mind that the Management at that point of time was with the appointed Official Liquidator. As to whether such clandestine removal can be made right under the nose of the Official Liquidator is very much in question.

8.4. We also note that except for a bland allegation that the goods have been cleared clandestinely, no corroborative evidence has been brought in by the Revenue, in the form of the purported buyers of the goods in cash, movement of vehicles, private records about cash transactions, any statement from the purported buyers.

8.5. The Chhattisgarh High Court in ***Hi Tech Abrasives versus Commissioner of C. Excise & Customs, Raipur [2018 (362) E.L.T. 961 (Chhattisgarh)]***, has held as under :

"12.2What, amongst other things, could be relevant consideration of clandestine removal, was discussed as below :

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be

discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*
- (vii) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like –*
 - (a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.*
 - (b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.*
 - (c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.*
 - (d) Quantity of the packing material used.*
 - (e) The total number of the employees employed and the payment made to them.*

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations in cash or kind have been paid by the noticee, such statements are must.

- (f) Ostensible discrepancy in the stock of raw materials and the finished product.*

(g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. Different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc. These documents ought to have been collected by the respondent department, if at all, they are interested in collector of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K. Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the Tribunals but the respondents-departments are turning deaf-ear to. In this case, they are also turning deaf-ear to their own circular dated 26-6-2014 (Annexure-3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K. Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive.

The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal"

[Emphasis supplied]

8.6. The Hon'ble Allahabad High Court in the case of ***Continental Cement Company Vs Union Of India [2014 (309) E.L.T. 411 (All.)]***, has held as under:-

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out."

[Emphasis supplied]

8.7. We find that the High Courts have been consistently holding the allegation of clandestine removal is a serious charge and the same must be supported by proper corroborative evidence, as is clear from the list of issues to be addressed given in these judgements. In the present case, the Revenue has made no effort to gather any corroborative evidence whatsoever. Therefore, we find that the ratio of the cited case laws are squarely applicable.

9. In view of our foregoing observations, we set aside the confirmed demand of Rs.3,66,93,067/- wherein the Revenue had taken the ground of clandestine removal.

10. Now we take up the second portion of the demand amounting to Rs.5,59,84,382/-, on account of the CENVAT Credit being passed on to the factory by the Head Office even before obtaining the Service Tax Registration in 2008 for ISD operations.

10.1. Admittedly, the appellant has only one unit engaged in the manufacture of the finished goods. For the services rendered, the appellant was paying the Service Tax to the service providers. Since only one manufacturing unit was in existence, they have passed on the CENVAT Credit to that unit. This is not a case, where the appellant was operating under multiple units, requiring them to follow procedure to pass on only the proportionate credit. It is also not the case of the Revenue that the services in question were not utilized by the appellant or the Invoices of the service providers is not in order. Therefore, the issue is more in the nature of procedural error on the part of the appellant, who should have obtained the ISD while passing on the CENVAT Credit to their manufacturing unit.

10.2. We find that this issue is no more *res integra*. The Hon'ble Karnataka High Court in the case of ***Commissioner of C. Ex., S.T. & Cus., Bengaluru Versus Hinduja Global Solutions Ltd. [2022 (61) G.S.T.L. 417 (Kar.)]***, has held as under: -

"8. The dispute involved herein is no more res integra in view of the judgment of the Hon'ble High Court of Gujarat in the case Dashion Ltd., supra which has been accepted by the Department in terms of the Circular dated 16-2-2018. The relevant paragraphs of the judgment of Dashion Ltd., supra is quoted hereunder for ready reference :

"7. The second objection of the Revenue as noted was with respect of non-registration of the unit as input service distributor. It is true that the Government had framed Rules of 2005 for registration of input service distributors, who would have to make application to the jurisdictional Superintendent of Central Excise in terms of Rule 3 thereof. Sub-rule (2) of Rule 3 further required any provider of taxable service whose aggregate value of taxable service exceeds certain limit to make an application for registration within the time prescribed. However, there is nothing in the said Rules of 2005 or in the Rules of 2004 which would automatically and without any additional reasons disentitle an input service distributor from availing Cenvat credit unless and until such registration was applied and granted. It was in this background that the Tribunal viewed the requirement as curable. Particularly when it was found that full records were maintained and the irregularity, if at all, was procedural and when it was further found that the records were available for the Revenue to verify the correctness, the Tribunal, in our opinion, rightly did not disentitle the assessee from the entire Cenvat credit availed for payment of duty. Question No. 1 therefore shall have to be answered in favour of the respondent and against the assessee."

9. Considering this judgment, the Department in the Circular dated 16-2-2018, has observed thus :

Decision of the Hon'ble High Court of "2.(a) Gujarat dated 8-1-2016 in the matter of Commissioner of Central Excise v. Dashion Ltd. in Tax Appeal No. 415 of 2013

& 662 of 2014 [2016-TIOL-111-HC-AHM-ST = [2016 \(41\) S.T.R. 884](#) (Guj.)]

Decision of the Hon'ble High Court of (b) Rajasthan dated 8-2-2016 in the matter of Commissioner, Central Excise Commissionerate, Jaipur v. National Engineering Industries Ltd. - CEA No. 3/2016 [2016-TIOL-922-HC-RAJ-CX = [2016 \(42\) S.T.R. 945](#) (Raj.)].

2.1 Department has accepted the judgments where the Hon'ble High Courts dismissed the Department's appeal inter alia holding that substantial benefit cannot be denied because of procedural irregularity.

2.2 In the case of Dashion Ltd., the assessee was engaged in manufacture of water treatment plant and other connected items and was availing benefit of Cenvat credit on the duty paid on inputs, capital goods and input services as permissible under Cenvat Credit Rules, 2004. The assessee had five manufacturing units and had its registered office at Vatva, Ahmedabad. The assessee was also providing several taxable services such as erection and commissioning, repairing and maintenance of water treatment plant, etc.

2.3 The revenue authorities, during scrutiny of the records of the assessee, noticed that it was availing the credit of service tax paid for various services by one unit for the purpose of clearance of other unit. After gathering details from the assessee, the adjudicating authority issued show cause notice calling upon the assessee as to why the Cenvat credit of service tax on input service should not be recovered with interest and penalties. In the show cause notice itself, the adjudicating authority had referred to sub-rule (3) of Rule 15 of the Rules of 2004 as basis for such proposal. Two primary objections of the Department were that the assessee had not registered itself under the Service Tax (Registration of Special Category of Persons) Rules, 2005 and that the tax credit from one unit was utilized for discharging tax liability of another unit instead of pro rata distribution amongst different units. The adjudicating authority confirmed the duty demands with interest and penalties.

2.4 Therefore, the points of law examined were that the assessee had utilized credit from one unit for the purpose of duty liability of its other unit without pro rata distribution by the input service distributor and further the assessee had not registered itself under the Service Tax (Registration of Special Category of Persons) Rules, 2005.

2.5 Hon'ble High Court dismissed the department's appeal holding that such view was not sustainable as there was no previous restriction of this nature under Rule 7 of the Cenvat Credit Rules, 2004. Further non-registration of ISD is only a procedural irregularity for which substantial benefit of Cenvat credit cannot be denied when all the necessary records have been maintained by the respondent."

10. The Hon'ble High Court of Madras referring to the judgment of Dashion Ltd., supra, in M/s. Pricol Ltd., supra has held thus :

The above decision has been accepted by the Central Board of "4. Excise and Customs, vide Circular dated 16-2-2018. Therefore, the above questions have to be decided against the Revenue and accordingly, decided so."

11. In view of the aforesaid, it is clear that the Cenvat credit claimed by the respondent-assessee on the basis of the Invoices/Debit notes issued by the head office for the months of March, July and August, 2006 prior to its registration as ISD on 21-9-2006 being procedural irregularity and the view of the Hon'ble High Court of Gujarat being accepted by the Department, input tax credit cannot be denied. Accordingly, substantial questions of law are answered in favour of the assessee and against the Revenue."

[Emphasis supplied]

10.3. The Hon'ble Madras High Court in the case of **Commissioner of Central Excise, Coimbatore Versus Pricol Ltd. [2021 (48) G.S.T.L. 235 (Mad.)]**, has held as under: -

"2. The appeal was admitted on 6-10-2017, on the following substantial questions of law :-

Whether the Tribunal is correct in allowing

"(1) the Cenvat credit availed and distributed by the respondent prior to getting registered as an Input Service Distributor under the Act;

3. So far as the first and second substantial questions of law are concerned, the issue has already been decided in the case of Commissioner of Central Excise v. Dashion Ltd. [[2016 \(41\) S.T.R. 884](#) (Guj.)] wherein, the Court held as follows :-

The second objection of the Revenue as "7. noted was with respect of non-registration of the unit as input service distributor. It is true that the Government had framed Rules of 2005 for registration of input service distributors, who would have to make application to the jurisdictional Superintendent of Central Excise in terms of Rule 3 thereof. Sub-rule (2) of Rule 3 further required any provider of taxable service whose aggregate value of taxable service exceeds certain limit to make an application for registration within the time prescribed. However, there is nothing in the said Rules of 2005 or in the Rules of 2004 which would automatically and without any additional reasons disentitle an input service distributor from availing Cenvat credit unless and until such registration was applied and granted. It was in this background that the Tribunal viewed the requirement as curable. Particularly when it was found that full records were maintained and the irregularity, if at all, was procedural and when it was further found that the records were available for the Revenue to verify the correctness, the Tribunal, in our opinion, rightly did not disentitle the assessee from the entire Cenvat credit availed for payment of duty. Question No. 1 therefore shall have to be answered in favour of the respondent and against the assessee."

4. The above decision has been accepted by the Central Board of Excise and Customs, vide Circular dated 16-2-2018. Therefore, the above questions have to be decided against the Revenue and accordingly, decided so."

[Emphasis supplied]

10.4. In the present case, the appellant availed the CENVAT Credit of input services distributed to its Head Office prior to their registration. The fact of their availing the CENVAT Credit is also recorded in the Returns filed with the jurisdictional authorities. Therefore, we find that the ratio laid down in the cited case laws are squarely applicable.

11. Accordingly, we set aside the demand of Rs.5,59,84,382/- which was confirmed on the allegation of irregular availment of CENVAT Credit, and allow the appeal.

12. As a result, the impugned order is set aside in toto. The Appeal is allowed. The appellant would be eligible for consequential relief, if any, as per law.

(Order pronounced in the open court on **04.11.2025**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd