

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL Nos. E/357/2009,85606/2016

(Arising out of Orders-in-Appeal No. AH/66/M-II/2009 dated 20.2.2009 and No. CD/809/M-II/2015 dated 3.7.2015 passed by Commissioner of Central Excise (Appeals), Mumbai-III/II)

Standard Drums & Barrels Mfg Co.

Appellant

Vs.

Commissioner of Central Excise, Mumbai-II

Respondent

Appearance:

Shri Gajendra Jain, Advocate, for appellant
Shri V.K. Agarwal, Additional Commissioner and Shri Sanjay Hasija, Superintendent (ARs), for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 24.4.2018

Date of Decision: 28.6.2018

ORDER No. **A/86853-86854/2018**

Per: Ramesh Nair

The brief facts of the case are that the appellant are engaged in the manufacture of Mild Steel Drums (M.S. Drums) and barrels for Hindustan Petroleum Corporation Ltd. (HPCL) and Bharat Petroleum Corporation Ltd. (BPCL) on job work basis for which HPCL and BPCL raised the purchase order. The appellant are entitle for receiving conversion charges

against such job work. HPCL and BPCL supplied the duty paid CRS sheets to the appellant, on which they have availed Cenvat credit on the duty paid on such CRS sheets. The appellant converted CRS sheets into MS Drums. They paid excise duty on the drums by valuing them as per the judgment of Ujagar Print i.e. on the value equal to cost of raw material plus job charges. The excise duty paid by the appellant on M.S. drums was availed as Cenvat credit by HPCL and BPCL. These drums were used by the HPCL and BPCL to pack and clear their dutiable product i.e. bitumen. In some purchase orders appellant purchased lid from the market and supplied them to HPCL for the month of March, 1999 and From April 2001 to March 2007 and to BPCL for the period From April, 2003 to May, 2007 and applied for provisional assessment since landed cost of CRS sheets and fabrication cost was not known to the appellant at the time of removal. Once the C.A. certificate issued by HPCL and BPCL, appellant filed final price list with the department for finalisation of provisional assessment, wherever final value computed by the appellant was higher than the provisional value adopted at the time of removal, Appellant paid the differential duty and interest. The Asstt. Commissioner finalised the provisional assessment for the clearance made during the period April 1997 to June 2007. As

per the said Order-in-Original, the differential duty payable was Rs. 53,53,028/-. However, the Commissioner vide Order-in-Original directed appellant to pay differential duty of Rs. 75,40,706/- along with interest. As per the order demand was confirmed on four counts:

- (a) Lid supplied with the MS Drums are essential parts of the drums therefore value of lid is includible in the value of drums supplied.
- (b) The outward transportation charges is includible in the assessable value as transportation is the responsibility of the appellant and charges are recoverable by way of debit note.
- (c) C.A. certificate do not specify anything in respect of duty on CRS Sheets, therefore value mentioned under the C.A. certificate has to be taken without deducting duty element.
- (d) Sale proceeds of scrap is required to be added to the assessable value.

Aggrieved by the said order-in-original dated 1-10-2007 appellant filed appeal before Commissioner (Appeals). Ld. Commissioner (Appeals) in the Order-in-Appeal dated 14-5-2008 held that Asstt. Commissioner has incorrectly confirmed the demand of Rs. 21,87,678 and there is no explanation in the order for the same. Ld.

Commissioner (Appeals) has further held that differential duty paid by the appellant post removal has not been disputed by the Asstt. Commissioner. The Ld. Commissioner(Appeals) accordingly remanded the matter back to the adjudicating authority to pass a fresh order. Being aggrieved by the said order in appeal dated 14-5-2008, appellant filed appeal challenging demand and the department also filed appeal before the CESTAT on the ground that Commissioner(Appeals) has no power to remand the matter. The CESTAT remanded the matter back to the Commissioner (Appeals) with direction to consider the matter a fresh. Ld. Commissioner (Appeals) in remand matter once again remanded the matter to the adjudicating authority vide order in appeal dated 22-09-2009 where he made following observations:

- (a) Lids supplied with the MS drums are essential part of the drums. Therefore, the value of lids is includible in the value of the drums supplied.
- (b) Proof of payment of duty on inputs and copy of document on the strength of which credit can be availed was not furnished. The appellants have not computed the amount admissible as credit. CA certificates do not specify whether cost of CRS Sheet includes duty element or not.

- (c) For the years that appellants have made profit, profit over and above fabrication charges is includible in the assessable value.
- (d) The outward transportation charges are not includible in the assessable value as transportation.
- (e) The contention of the appellants that the differential duty quantified on finalization of provisional assessment should be treated as cum-duty price and the reliance placed on the decision of the Apex court in the case of CCE Vs. Maruti Udyog-2002(141)ELT 3(SC) is not correct since the appellants were not charging a composite price and were showing the amount of duty separately.
- (f) The amount of duty paid in excess by the Appellants cannot be adjusted against the short payment of duty. In view of the decision of the Bombay High Court in the case of CCE Vs. Standard Drums and Barrel Manufacturing Co. – 2006 (199) ELT 590 (Bom.) wherein it was held that excess duty paid can be given back to the assessee only in accordance with Section 11B of the Act. Further, the Appellants were not able to prove that the duty incidence has not been passed on.

Against the aforesaid Order-in-Appeal dated 20.2.2009, the Appellants filed an appeal (E/357/2009) before the CESTAT along with stay application. At the time of hearing the stay application, the CESTAT found that the appeal filed by the Appellants is premature and the same is dismissed with liberty to file stay application fresh when the duty is quantified and demanded from the Appellants. As directed by the Commissioner (Appeals) in the Order-in-Appeal dated 22.9.2009, the Deputy Commissioner granted personal hearing, after 4 years, on 6.1.2014. The Deputy Commissioner simply relying on the observations given by the Commissioner (Appeals) confirmed the demand of Rs.2,31,30,925/- along with interest. It also held that the excess payment of Rs.12,80,876 cannot be adjusted and same would be available to the Appellants as refund governed by the provisions of Section 11B of the Central Excise Act, 1944. The Deputy Commissioner appropriated Rs.26,50,155 and interest of Rs.5,03,486. The Appellants contested the demand for differential duty computed by the Deputy Commissioner by way of filing an appeal before Commissioner (Appeals). The Commissioner (Appeals) vide order dated 3-7-2015 dismissed the appeal by upholding the Order-in-Original of the Deputy Commissioner. Against the aforesaid Order-in-Appeal dated 3.7.2015, the

Appellants filed an appeal (E/85606/2016) before the CESTAT.

2. Shri. Gajendra Jain, Ld. Counsel appearing for the appellant made the following detailed submissions:

The Adjudicating Authority has travelled beyond the direction of the Commissioner (Appeals) to the extent enhancement in cost of raw material. Therefore, demand on account of enhancement of cost of raw material is beyond the scope of remand order and not sustainable in law.

A.1 The Adjudicating Authority finalised the provisional assessment for the period from 1997-98 to 2006-07 vide Final Order dated 1.10.2007. The Adjudicating Authority finalised the assessment by taking cost of raw material and fabrication charges as provided by HPCL and BPCL. However, the Adjudicating Authority made following additions to determine the assessable value:

- i) Cost of Lids as per purchase order of BPCL and HPCL;
- ii) Value on inward transport and outward transportation;
- iii) Sale proceed of scrap; &
- iv) Profit Margin.

A.2 The aforesaid Order-in-Original dated 1.10.2007 confirmed the demand of Rs.75,40,706/-. The department has not challenged the aforesaid Order-in-

Original. Therefore, the department cannot challenge the cost of raw material and fabrication charges finalised in the aforesaid Order-in-Original dated 1.10.2007. The dispute in the present case should only be restricted to the aforesaid four elements mentioned supra.

A.3 Further, the Commissioner (Appeals) vide Order-in-Appeal dated 20.2.2009 has also not directed the Adjudicating Authority to re-quantify the cost of raw material and fabrication charges. Hence, the enhancement of cost of raw material by the adjudicating authority in the Order-in-Original dated 19.2.2014 is beyond the remand direction given by the Order-in-Appeal dated 20.2.2009 of the Commissioner (Appeals). Further, the department had never disputed the cost of raw material of steel drums as taken by the Appellants on the basis of certificate of BPCL and HPCL, at any stage of proceeding. Hence, the demand of duty of Rs.1,81,43,385/- on account of enhancement of cost of raw material is unsustainable in law on this ground itself.

Demand is not sustainable as the additions made to the assessable value of Drums in respect of cost of lids, profit element, sale proceeds of scrap and figures taken as cost as per CA certificate is incorrect.

B. The Appellant have correctly paid duty on the assessable value of the Drums sold. However, the Commissioner (Appeals) has confirmed the demand on the following items. The Appellants submit that the demand on the following items is incorrect on the following grounds:

Addition in respect of	Grounds for not including the same in the assessable value
(I) Different rates for unit cost of Drums, fabrication cost and lid cost.	The Appellants have paid duty on the assessable value which in turn is based on figures taken from CA certificates shared by HPCL & BPCL. The Deputy Commissioner in the Order-in-Original has adopted rates for unit cost of Drums, fabrication cost and lid cost which are different from those adopted by the appellants. However, the Order-in-Original does not give any reason for rejecting the figures mentioned in the CA certificates. Further, the Order-in-Original does not disclose the source or manner of calculating the figures adopted by him. The appellants have no clue whatsoever as to source of these figures taken by the Deputy Commissioner. The differential duty demanded on account of this reason alone amounts to Rs.30,46,874/- and Rs.1,50,96,511/- on clearances made to M/s. BPCL and M/s. HPCL respectively. The Revenue did not challenge the Order-in-Original dated 1.10.2007 for enhancement of cost of steel and fabrication charges. Hence, the department cannot, in remand

	proceeding, enhance the cost of steel and fabrication charges. The Appellants had challenged the Order-in-Original dated 1.10.2007. The Commissioner (Appeals) had not issued any notice for enhancement of demand. It is settled law that the assessee cannot be worse off by filing an appeal against an Order. Please refer: Su. Jewels Exim Pvt Limited Vs. UOI – 2010 (253) ELT 713 (Bom). Hence, the enhancement of demand on account of cost of steel and fabrication charges is baseless. Further, this addition is contrary to the remand direction of the Commissioner (Appeals). Hence, enhancement of demand on this count is not sustainable on this count alone.
(II) Cost of Lids	(a) The Appellants submit that they have already included cost of lid in the fabrication charges which is forming part of assessable value. This is evident from the illustrative purchase order of BPCL (<u>Annexure-1</u>) read with CA certificate of BPCL (<u>Annexure-2</u>) for the year 2002-03. Hence, the demand on account of lid cost is clearly duplication and not sustainable. (b) The Appellants submit that they have procured the lids from the market and cleared them along with the Drums manufactured by them. The activity undertaken by the Appellants in respect of the lids is in the nature of trading. (c) Without prejudice to the above, the Appellants submit that the lids are not essential parts of the drum

	manufactured and sold by the Appellants. It is evidenced by the fact that the appellants have sold the MS drums on a standalone basis i.e. without lids, in the past. The appellants would not be in a position to clear only MS drums if the lids were an essential part of the MS Drums. (d) For above submission, the Appellants place reliance on the following judgements: (i) Bombay Tubes & Containers Vs. CCE 2000 (122) ELT 388 (T) (ii) A.Z. Metal Industries Vs. CCE 1992 (62) ELT 724 (T).
(III) Profit Element	Undisputedly, the fabrication charges are included in the assessable value on which duty stands discharged. The profit forms part of the fabrication / conversion charges. The Deputy Commissioner, over the above the fabrication charges, once again added profit element taken from the balance sheet. It is incorrect to enhance the value by including the profit margin when fabrication / conversion / job charges is already included in the value. Kindly refer following judgements: (i) Ravi Steel Industries Vs. CCE – 2014 (308) ELT 694 (T) (ii) Advance Engineers Vs. CCE – 2003 (157) ELT 476 (T) (iii) CCE Vs. Crown Tobacco Co. – 1999 (111) ELT 150 (T) (iv) Jyoti Structures Ltd. Vs. CCE – 1999 (106) ELT 402 (T)
(IV) Sale of	(a) The appellant is a job worker.

Scrap	Therefore, the proceeds of sale of scrap is not includible in the assessable value of the job worked goods. The Appellants place reliance on the following judgements: (i) Ad-Manun Packaging Vs. CCE 2016 (341) ELT 348 (T) (ii) Campco Chocolate Factory Vs. CCE 2010 (258) ELT 273 (T) (iii) P. R. Rolling Mills Vs. CCE 2010 (249) ELT 232 (T) Affirmed by the Supreme Court in Commissioner Vs. P.R. Rolling Mills – 2010 (260) ELT A84 (SC). (b) The Appellants have paid excise duty on the scrap at the time of removal of scrap from the factory.
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The appellants and HPCL/ BPCL could have followed the alternate procedure under Rule 4(5)(a) of the Cenvat Credit Rules, 2004 which permits a job worker to clear the goods manufactured on job work basis without payment of duty and no duty need to have been paid by the appellants on the goods manufactured on job work basis. Hence, demand of differential duty is unsustainable in law.

C.1 In the present case, had the HPCL & BPCL followed the procedure contained in Rule 4(5)(a) of Cenvat Credit Rules, 2004, no duty was payable by the

appellants on the rolled products supplied to the input suppliers.

C.2 In this case the appellants had received duty paid inputs from HPCL / BPCL along with the duty paying documents, and the appellants took credit of the duty paid on the said inputs and utilised the said credit to discharge the duty on the final product.

C.3 Since the appellants were undertaking the job work, the facility of removal of the inputs without payment of duty was available to the input suppliers under Rule 4(5)(a) of the Cenvat Credit Rules, 2004. In that event, the appellants were to receive the inputs from input suppliers under the said Rule, and the appellants were not required to pay any duty on the intermediate goods cleared from the factory of the input suppliers. The question of any short payment of duty by not including profit margin or manufacturing expenses in the assessable value would therefore not arise.

C.4 In that situation it would not have made any difference to the excise department as to whether or not the appellants have included the profit margin of the appellants. Consequently, there would have been no case to demand any duty from the appellants.

C.5 Even though the procedure for movement of the inputs under the Cenvat Credit Rules, 2004 was not followed by the appellants in the present case, the availability of the alternate procedure under which no duty is payable clearly shows that there could not be short levy or short payment of duty.

C.6 The aforesaid submission that no duty is payable by the appellants on the goods manufactured on job work basis out of the raw material supplied by inputs suppliers is supported by the decision of the Supreme Court reported at 2005 (183) ELT 239 (SC) in the case of International Auto Products Ltd Vs. CCE in Civil Appeal No. 176 of 2000 and in the case of Jay Yuhshin Ltd Vs. CCE in Civil Appeal No. 4086-87 of 2001.

C.7 The aforesaid decision of the Hon'ble Supreme Court in the case of Jay Yuhshin squarely applies in the present case.

Duty paid on inputs used in the manufacture of final products is not includible in the value of final products.

D.1 The Appellants submit that the Excise Duty on raw material is included in the assessable value of the final products in case of drums supplied to BPCL. This is evident from the certificate of cost provided by BPCL and illustrative copy of such certificate is enclosed as

Annexure-2 herewith for ready reference. Duty paid on inputs used in the manufacture of final products is not includible in the value of final products. However, the Appellants have paid duty in excess of what they were actually liable to pay as they have included the duty paid on inputs in the assessable value of final goods.

D.2 The Appellants submit that MODVAT credit of Rs.4,74,82,287/- has been availed by the Appellants during the period of dispute. The Commissioner has incorrectly included the same in the valuation of the final products manufactured by the Appellants. The Appellants place reliance on the judgement of the in the case of CCE Vs Dai IchiKarkaria Ltd. – 1999 (112) ELT 353 (SC). The following judgments also lay down a similar ratio:

- (a) Surya Conductors P. Ltd. Vs. CCE
2005 (180) ELT 163 (T)
Affirmed by Supreme Court in 2005 (180)
ELT A95 (SC)
- (b) Mark Auto Industries Vs. CCE
2001 (138) ELT 399 (T)
- (c) Kerala State Electricity Board Vs. CCE
2001 (133) ELT 104 (T).

Present case is revenue neutral. Credit of duty paid by the Appellants will be available to HPCL and BPCL.

E. Without prejudice to the above, the Appellants submit that they have paid duty on clearance on scrap from their factory. It is submitted that the present case is revenue neutral. Credit of duty paid by the Appellants will be available to HPCL and BPCL. The Appellants place reliance on the judgement of the Hon'ble Tribunal in the case of Hindustan Zinc Ltd. Vs. Commissioner — [2008 \(232\) ELT 687](#) and P.T.C. Industries Ltd. Vs. Commissioner — [2003 \(159\) ELT 1046](#) (T) wherein it was held that duty demand is not maintainable when the consequences of the demand are revenue neutral.

Duty paid in excess on certain clearances needs to be adjusted against short duty paid on other clearances.

F.1 The Order-in-Original dated 21.2.2014 has held that the Appellants have paid excess duty of Rs.12,80,876/- which is governed by Section 11B of the Central Excise Act, 1944. In other words, the excess payment of duty would not be adjusted towards the short payment of duty. The Appellants submit that Rule 7 provides that the refund if arising out of finalisation order is subjected to unjust enrichment. This provision applies only in cases where excess payment of duty is adjusted with the short payment of duty and still there is excess payment of duty. The

refund of such excess payment alone would be subjected to unjust enrichment.

F.2 The Appellants submit that since they have cleared goods after provisionally assessing the same, the authority should have adjusted the excess payment of duty with short payment of duty and the principle of unjust enrichment is not applicable for such excess payment which is to be adjusted with the short payment of duty. The Appellants rely on the following judgements in support of this submission:

- (a) Toyota Kirloskar Auto Parts Pvt. Ltd. Vs. Commissioner
2012 (276) ELT 332 (Kar.)
- (b) Jonas Woodhead & Sons (I) Ltd. Vs. Commissioner
2015 (329) ELT 577 (T)
- (c) Essar Steel India Ltd. Vs. CCE
2017 (345) ELT 139 (T).

F.3 The Appellants further submit that they had deposited an amount of Rs.28,45,147/- and Rs.4,62,477/- whereas the Order-in-Original only appropriated an amount of Rs.26,50,155/-. Hence, the impugned Order-in-Original has taken incorrect figures of payment and therefore the impugned Order-in-Original is liable to be set aside.

3. On the other hand, Shri. V.K. Agarwal, Additional Commissioner (A.R.) and Shri. Sanjay Hasija, Ld. Superintendent (A.R.) appearing on behalf of the Revenue reiterates the findings of the impugned order. As regard the inclusion of cost of lids, he submits that since the lid is integral part of the drum and supplied along with drum its value must be included in the value of drum as held by various judgments. He further submits that appellant doing job work exclusively for HPCL and BPCL therefore profit margin which is over and above the fabrication cost should be considered as consideration and the same should be added in the value of drum which appellant failed to include, thus there is shortage of payment of duty. As regard the sale of scrap, he submits that by retaining scrap and sale thereof by the appellant on their own behalf, the proceed of sale of scrap is additional consideration thus to the extent of value of scrap, the assessable value of the drum got suppressed and there is under value of drums, therefore sale value of scrap should be added in the assessable value of the drums. He also submits that appellant have not correctly taken cost of CRS sheets therefore goods were undervalued by taking incorrect/less cost of raw material. He also submits that cost of transportation was not added in the value by the appellant. For the purpose of job work valuation

the landed cost of raw material should be taken for arriving at the correct assessable value. The landed cost of raw material shall include the transportation charges up to the delivery of raw material at job work base, therefore the raw material cost cannot be excluded from the assessable value of the drums. In support of his submission he placed reliance on the following judgments;-

(a) *Jain Packaging Pvt Ltd Vs. Collector of Central excise Bombay*[1997(94)ELT 225](Tri)]

(b) *Walchandnagar Industries Ltd Vs. Commissioner*[2014(311)ELT 274(Tri. Mum)]

(c) *Commissioner Vs. ThermaxBobcock & Wilcox Ltd* [2005(182) ELT 336(Tri. Mum)]

(d) *Commissioner Vs. LIPI Boilers Industries Ltd*[2011(263)ELT 271(Tri. Mum)]

(e) *PeterPlast Synthetics Pvt Ltd Vs. Commissioner*[2005(192)ELT 842(Tri. Mum)]

(f) *Electronics & Controls Power Systems Pvt Ltd Vs Commissioner*[2010(275) ELT 578(Tri. Bang)]

(g) *Commissioner Vs. Frick India Ltd*[2007(216)ELT 497(S.C.)]

(h) *MIL India Ltd Vs. Commissioner of C. Ex. Noida*[2007(210) ELT 188(S.C.)]

(i) *India TIN Industries Ltd Vs. Commissioner*[2000(125) ELT 864(Tri.)]

(j) Commissioner Vs. Ankur Packaging Pvt Ltd[2015(320)ELT 482(Tr. Mum)]

(k) Ferro Alloys Corporation Ltd Vs. Commissioner[2007(216)ELT 713]

(l) Bansiwala iron& Steel Rolling Mills Vs. Commissioner[2011(263) ELT 571(Tri. Del)]

(m) Reddy& Sons Vs. Commissioner[2001(137) ELT 679(Tri. Kolkata]

(n) Nellai Concrete Products & co. P. Ltd Vs Commissioner[2013(296) ELT 132(Tri. Chennai)]

4. We have carefully considered the submissions made by both sides and perused the records.

5. We find that the issues to be decided by us in the present case are as under:

(a) Whether the appellant have taken correct cost of raw material i.e. CRS sheets for arriving at correct assessable value.

(b) Whether the cost of bought out lid supplied along with drums is includible in the assessable value of drums.

(c) Whether the profit element appearing in balance sheet of the appellant is includible in the assessable value of the drum when the fabrication

cost paid by the principle, M/s. BPCL and HPCL as already been included.

(d) Whether the value of the scrap retained by the appellant and realised proceeds by selling scrap in the market can be added in the assessable value of the drums.

6. As regard the different rates taken by the Revenue for unit cost of drums, fabrication cost and lid cost. We find that in order-in-original the adjudicating authority has taken different cost of raw material and the duty was re-quantified by enhancing from Rs. 75,40,706/- – which was originally confirmed to Rs. 2,31,30,925/-. Firstly the unit cost per drum was given by the C.A. of BPCL and HPCL. The department has not adduced any evidence which is contrary to C.A. certificate provided by HPCL and BPCL therefore the unit per cost provided by BPCL and HPCL has to be accepted. Moreover, in the first order of finalisation of provisional assessment total duty demand was confirmed for an amount of Rs. 75,40,706/- against which the appellant had filed appeal, however no appeal was filed by the Revenue therefore even though the Commissioner(Appeals) had remanded the matter to the adjudicating authority it was not open for the adjudicating authority to increase the demand of Rs. 75,40,706/- as Revenue was not

aggrieved with finalisation of assessment order which demanded Rs. 75,40,706/- therefore the enhancement of the demand from Rs. 75,40,706/- to Rs. 2,31,30,925/- is absolutely illegal and without any authority of law as held by the Hon'ble Bombay High in case of Su. Jewel Exim Pvt Limited vs UOI [2010(253)ELT 713(Bom)]. Hon'ble Court held as under:

Para 16. If one turns to the provisions of Section 129 of the Customs Act, 1962, the Tribunal has no jurisdiction to pass an order, so as to permit a ground to be raised by the Respondent which, if allowed, would made the position of the Appellant worse than what it was before. An appellant cannot be worse off by being in appeal before the Tribunal. Thus, looking to the appellate jurisdiction of the Tribunal, the submissions made by Mr. Kantharia appearing for the Revenue cannot be accepted. No adverse order can be passed against the Petitioners in the appeal pending before the Appellate Authority as already observed herein above.

Para 17. the above touchstone. The bills of Considered on entry and other documents cannot be detained by the Respondents merely because the appeal is pending for final disposal before the Appellate Tribunal. The appeal preferred by the Petitioners is only against imposition of penalty. The learned counsel for the Respondents was unable to show any provision in law indicating that the Revenue is entitled to detain the documents till the hearing and final disposal of the appeal preferred by the Petitioners. Therefore, we do not find any substance in

the stand taken by the Revenue in refusing to return the Petitioners' bills of entry and other documents.

In view of the above order, it can be seen that it is appellant's appeal challenging the demand of Rs. 75,40,706/- therefore without filing an appeal by the department proposing enhancement of demand, appellant by filing an appeal cannot be in the worse position by which demand is increased therefore the demand of Rs. 75,40,706/- in any circumstance could not have been increased to Rs. 2,31,30,925/-.

7. As regard the inclusion of cost of lid, we find that for the manufacture of drum there is no role of lid. The drum is manufactured without lid. It is also noticed that in the previous occasion appellant had been supplying the drums without lid. It is also fact that in all cases of manufacture and supply of drums lid was not supplied. However, only in some cases and for limited period bought out lid was supplied along with drums. Therefore we are of the clear view that cost of lid cannot be included in the value of drums. As per the principle of valuation laid down by the Hon'ble Supreme Court in case of Ujagar print it is only raw material which is used for the manufacture of final product, cost thereof should be included. Lid does not

take part in the manufacture of drum therefore cost of the same cannot be included in the assessable value. The identical issue has been considered in case of Bombay Tubes & Container (supra) wherein Tribunal passed following order:

The appellants are manufacturers of aluminium collapsible tubes which were liable to pay Central Excise duty under Item 27 of Central Excise Tariff. The plastic caps for such collapsible tubes were purchased by them from the market and collapsible tubes were sold along with the plastic caps. The impugned order has demanded duty in respect of collapsible tubes after including the value of the plastic caps also. In addition to the duty demand of over Rs. 1 lac, a penalty of Rs. 5,000/- also has been imposed. Hence this appeal.

2.The appellants have requested for transfer of the case to Bombay vide their letter dated 4-9-2000. However, on perusing the records and considering the case law on the subject, we find that the price of plastic cap is not liable to be included in the assessable value of the collapsible tubes. This position remains confirmed by the Supreme Court in the Civil Writ No. 1930 of 1984 [[1990 \(45\) E.L.T. A33](#) (S.C.)] filed by the Collector of Central Excise, Calcutta. This Tribunal has also followed that decision in Final Order No. 154/91-A in the case of A.Z. Metal Industries Pvt. Ltd. v. Collector of Central Excise reported in [1992 \(62\) E.L.T. 724](#).

3.In view of the fact that the issue remains covered in favour of the appellants, the present appeal is allowed with consequential relief, if any, to the appellants.

Similar issue has been considered by this Tribunal in another judgment in case of A.Z. Metal Industries (supra) where in Tribunal has observed as under:

“We have considered the facts and heard the Ld. Lawyers. We find no merit in this appeal. The appeal is dismissed.” In view of the position so settled, in the present case also, the demand raised against the appellants on the ground that they had discharged duty liability under Item 27 CET only on the aluminium collapsible tubes, and not on the tubes fitted with caps, is not sustainable. The impugned order is, therefore, set aside and the appeal allowed.”

In view of the above judgments which are on the identical facts, it is clear that cost of bought out lid cannot be included in the assessable value of the final product i.e. drums. We therefore hold that demand of duty to this extent will not sustain.

8. As regard the inclusion of profit element which is appearing in the balance sheet in the value of the drum for the purpose of charging excise duty, we find that as per Hon'ble Supreme Court judgment in case of Ujagar Print the principle of valuation was categorically laid down, accordingly to which the method of valuation of job work goods is that value should be cost of raw material plus job work charges including the profit of job worker. We find that profit which is appearing in

the balance sheet is arrived out of receipt of fabrication charges which already included profit which is appearing in the balance sheet. There is no case of the department that appellant have received some additional consideration over and above the job charges received from the principals HPCL and BPCL, therefore profit appearing in the balance sheet which is part of the fabrication charges cannot be again included in the assessable value of the drum, demand to this extent is also not sustainable. On this issue, this tribunal in the Ravi Steel Industries (supra) dealing with the same issue of notional profit held as under:

5.1 *The short question for consideration is whether the fabrics cleared by the appellant vide 22 invoices mentioned in the show cause notice are Velvet fabrics or not. The claim of the appellant is that they are man-made fabrics. The basis of the Revenue's claim is that samples drawn from Lot No. 12831 and 14954 were opined to be velvet fabrics by SASMIRA. Samples drawn from the same lot No. by the appellant and subjected to test by SASMIRA vide test report dated 10-8-1998 show them to be other than velvet fabrics. These two lot nos. pertained to invoice No. 5854, dated 16-2-1998 whereas in the show cause notice, the invoices referred to thereunder pertains to the period August, 1997 to January, 1998 and the said invoice does not figure in the show cause notice. In these circumstances, the Revenue has not established its case that the fabrics processed and cleared during August, 1997 to January, 1998 were Velvet fabrics falling under Chapter 58. As regards Revenue's appeal, since the job-charges already includes profit of the job-worker, the question of adding notional profit of 4% does not arise.*

6. In view of the above discussion, the impugned demand is not sustainable in law and consequently the demand for interest under Section 11AB and equivalent amount of penalty imposed under Section 11AC and penalties of Rs. 25,000/- and Rs. 10,000/- imposed respectively on Shri D.G. Agarwal and Shri S.B. Yadav, Excise official of the appellant firm do not survive. Accordingly, the appeal of M/s Ravi Steel Industries, Shri D.G. Agarwal and Shri S.B. Yadav are allowed with the consequential relief, if any, in accordance with law. The appeal filed by the Revenue is dismissed as devoid of merits.

In case of advance engineering (supra) the same view was taken by this Tribunal wherein following order was passed:-

Para 4. The emphasise by the Commissioner on the contents of the circular of the Board does not really help the department's case. The Board's circular related to valuation of goods captively consumed, whereas we are concerned with the goods on job work. Apart from the fact that the Board circular required inclusion of an element of profit in the assessable value, the principle is an exception and by applying that principle, we have concluded that job charges would have included the profit.

In case of Crown Tobacco Co. (supra) it was held that job charges covers manufacturing cost and profit of the job worker hence question of paying duty separately on manufacturing profit would not arise.

In case of Jyoti structures Ltd (supra) this Tribunal held that profit element included in the job work charges, value declared by the job worker includes profit element only department put a case that any amount

was collected from buyer as profit over and above the job charges. Value declared must be considered to have been included in the manufacture profit. In view of the above judgments on the identical issue the profit margin which was sought to be included by the Revenue is illegal and incorrect.

9. As regard the issue that whether the sale proceed of the scrap is to be included in the valuation of the job work, we find that the appellant have paid duty on the scrap value and the same value was sought to be included in the assessable value of drums. Once the value has suffered the duty, demand of duty on such value will amount to duplication of demand. This Tribunal in case of Ad-Manun Packaging (supra) held that

8. After considering the decision of the Tribunal in the case of Lawkim Ltd. & Ors. [[1987 \(31\) E.L.T. 700](#) (Tribunal)] and various other decisions, the Tribunal in Paragraph 6.2 reproduced the ratio as in the case of International Auto Ltd. [[2005 \(183\) E.L.T. 239](#) (S.C.)] and held that adding the value of scrap to the value of the job worked goods is incorrect. This decision of the Tribunal was challenged by the Revenue in civil appeal before the Apex Court and the Apex Court on 6-9-2010 dismissed the appeal on the grounds of delay as well as on merit. This dismissal by the Apex Court is reported at [2010 \(260\) E.L.T. A84](#).

9. In view of the foregoing, we find that the case laws relied upon by the lower authorities and the Departmental Representative will not carry their case any further.

In case of Campco Chocolate Factory (supra) as regard the proposal to include cost of scrap in the job work charges this Tribunal passed following order:

8. We have carefully perused the case records and considered the submissions of both sides. We find considerable merit in the argument that the impugned demand was not sustainable for the reason that the appellant had discharged duty due on the cocoa butter and cocoa powder in accordance with law based on the Ujagar Prints formula approved by the Apex Court. The relevant value was computed by aggregating the cost of raw material and job charges including profit received by the appellants. The cost of husk already stood included in the value when the cost of cocoa beans was included in the value. In a similar case, the Apex Court held a contrary view in General Engineering Works v. CCE, Jaipur [2007 (212) E.L.T. 295 (S.C.)]. However, in a subsequent judgment in the International Auto Ltd. (supra), the Apex Court held that non-inclusion of cost of certain inputs in the assessable value of an intermediate product manufactured by the job worker was of no consequence as the principal manufacturer cleared the final product on payment of appropriate duty and the duty paid by the job worker on the intermediate product was available to the principal manufacturer as Cenvat credit.

9. After considering the judgment of the Apex Court in the Jay Engineering case and the International Auto case, the Tribunal, in P.R. Rolling Mills Pvt. Ltd. case (supra), held that the question of adding the value of scrap in the value of the intermediate product cleared by a job worker to the principal manufacturer did not arise. We find that in the Lawkim Ltd. case, the decision of the Tribunal was to the same effect. We note that the Apex Court, in the International Auto Ltd. case, held as follows in paras 6 and 7 of the judgment.

“6. We are of the view that the submission of the appellant is correct. The Tribunal appears to have been confused between the manufacture of the final product, namely, excavators and the manufacture of the intermediate product, namely, the floor plate assemblies. The scheme of Modvat permits the person who clears the ultimate final product to take the benefit of the Modvat scheme at the time of clearance of such final product. The manufacturer of the final product, in this case TELCO, would therefore, be entitled not only to adjust the credit on the inputs supplied by it to the intermediate purchaser such as the appellant but also to the credit for the duty paid by the intermediate purchaser on its

products. The reliance on the decision in Burn Standard Company Ltd. (supra) by the Tribunal was misplaced. That case has no doubt held that the value of the free inputs were to be included in the final product. In that case, the final product was wagons and the question was whether the items which were supplied free by the Railway Board to the assessee could be included in the value of the wagons. This Court came to the conclusion that it could. The first distinguishable feature is that this Court in that case was neither concerned with the Modvat scheme, nor with the provisions of Rule 57F(2)(b). Furthermore, the Court was not considering a situation where the question was of the liability of an intermediate product being subjected to excise duty. What was in consideration was the final product, namely, wagons.

7. In this appeal as we have already noted, the final product was the excavator. According to the Modvat scheme, it is the Modvat of such final product which would have to include the cost of the inputs and in respect of which Modvat credit could be taken at the time of clearance of the final product. The Tribunal having misconstrued the provisions of Rule 57F(2)(b), its decision cannot stand. The decision of the Tribunal is accordingly set aside and the appeal is allowed."

On identical issue in another case of P.R. Rolling Mills (supra) this Tribunal passed following order;

6.3 *We find that the General Engineering case was decided on 10-3-2005 but the International Auto case was decided later on 17-3-2005. This case has been applied to the M/s. Lawkim Ltd. case, whose facts are identical to the present case. If the intermediary products are not liable to duty at the hands of the job worker, then the question of adding the value of scrap does not arise at all.*

6.4 *The Kolkata Bench in the case of Orissa Industries Ltd. v. CCE, Bhuvaneswar (supra) have also relied on the International Auto case and held that the job worker (intermediate manufacturer) need not pay differential duty by taking value inclusive of cost of raw materials, as raw materials supplier would be entitled to credit or Intermediate goods could be returned without payment of duty under Rule 57F procedure. If the intermediary product is not liable for duty, the question of adding the value of scrap does not*

arise at all. In these circumstances, in our view, the value of scrap need not be included in the assessable value of the products manufactured by the appellant.

10. In view of the above judgments, the Tribunal has taken consistent stand that once the value of job work has arrived at by taking entire cost of raw material which includes portion of scrap value of scrap once again need not be included. The appellant also made submission that since appellant as well as principal are manufacturer and discharged the duty on the respective product alternate provision for job work i.e. Rule 4(5)(a) of Cenvat Credit Rules was available. According to which appellant were not required to pay any duty particularly for the reason that the principle on the manufacture of their final product i.e. bitumen discharged duty on the value which includes value of the drum supplied by the appellant. There is force in argument of the appellant that alternate provision does not levy an excise duty on the appellant. The identical issue has been considered by the Hon'ble Supreme Court in case of International Auto Products Ltd Vs. CCE wherein apex court held as under:

5. Before learned Counsel appearing on behalf of the appellant has submitted that the entire transaction between the TELCO and the appellant was covered by Rule 57F(2)(b) of the Central Excise Rules, 1944. Under these Rules the assessee is the manufacturer of the final product,

in this case, excavators. The manufacturer of the final product is permitted to remove inputs to a place outside the factory for the purpose of manufacture of intermediate products so that they are returned to the factory for further use in the manufacture of final products. In such a case the credit is taken by the manufacturer of the final products on the inputs purchased by it which are made available to the intermediate product produces. Modvat credit is taken by the manufacturer of the final product on the inputs supplied by it to the manufacturer of the intermediate products which credit is reversed ultimately when the final product is removed from such manufacturers' factory. As far as the appellant, (the intermediate purchaser) is concerned, it is not liable to pay duty on the inputs supplied by TELCO since it had not taken the credit for the Modvat in respect of inputs. It is submitted that it cannot be called upon to pay the duty in respect of those inputs nor can the value of the inputs be added to the excisable value of the assemblies.

6. We are of the view that the submission of the appellant is correct. The Tribunal appears to have been confused between the manufacture of the final product, namely, excavators and the manufacture of the intermediate product, namely, the floor plate assemblies. The scheme of Modvat permits the person who clears the ultimate final product to take the benefit of the Modvat scheme at the time of clearance of such final product. The manufacturer of the final product, in this case TELCO, would therefore, be entitled not only to adjust the credit on the inputs supplied by it to the intermediate purchaser such as the appellant but also to the credit for the duty paid by the intermediate purchaser on its products. The reliance on the decision in Burn Standard Company Ltd. (supra) by the Tribunal was misplaced. That case has no doubt held that the value of the free inputs were to be included in the final product. In that case, the final product was wagons and the question was whether the items which were supplied free by the Railway Board to the assessee could be included in the value of the wagons. This

Court came to the conclusion that it could. The first distinguishable feature is that this Court in that case was neither concerned with the Modvat scheme, nor with the provisions of Rule 57F(2)(b). Furthermore, the Court was not considering a situation where the question was of the liability of an intermediate product being subjected to excise duty. What was in consideration was the final product, namely, wagons.

7. In this appeal as we have already noted, the final product was the excavator. According to the Modvat scheme, it is the Modvat of such final product which would have to include the cost of the inputs and in respect of which Modvat credit could be taken at the time of clearance of the final product. The Tribunal having misconstrued the provisions of Rule 57F(2)(b), its decision cannot stand. The decision of the Tribunal is accordingly set aside and the appeal is allowed.

In case of P R rolling Mill (Supra) tribunal held that in the intermediary goods returned without payment of duty under Rule 57F of Central Excise Rules, 1944, the job worker needs not to pay differential duty. Similar facts are involved in the present case.

11. It is also the submissions of the appellant that since principle BPCL and HPCL recipient of the goods manufactured by the appellant on job work basis, they are availing Cenvat credit on such drums and discharged the duty on their final product by paying duty from their Cenvat as well as huge amount from PLA, therefore entire exercise is Revenue neutral. We

agree with this contention of the appellant that in one hand appellant was otherwise entitle for the manufacture and clearance the goods without payment of duty under Rule 4(5)(a) and if at all duty is payable the same is available as Cenvat credit to the BPCL and HPCL, therefore entire case is of revenue neutral.

12. As per our above discussion, demand does not sustain on multiple counts as discussed above, therefore impugned order is set aside and appeals are allowed.

(Pronounced in court on 28.6.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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