CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Excise Appeal No. 85261 of 2016

(Arising out of Order-in-Original No. Belapur/13/Belapur IV/R-I/COMMR/SFA/2015-16 dated 04.11.2015 passed by Commissioner of Central Excise, Belapur)

M/s. S.P. Fabricators **Appellant**
Plot No. A-417 TTC Indl. Area,
MIDC Mahape, Navi Mumbai 400701.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
1st floor, CGO Complex, CBD Belapur,
Navi Mumbai 400614.

WITH

Excise Appeal No. 87109 of 2016

(Arising out of Order-in-Original No. Belapur/08/Belapur IV/R-I/COMMR/SFA/2016-7/BEL dated 03.06.2016 passed by Commissioner of Central Excise, Belapur)

M/s. S.P. Fabricators **Appellant**
Plot No. A-417 TTC Indl. Area,
MIDC Mahape, Navi Mumbai 400701.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
1st floor, CGO Complex, CBD Belapur,
Navi Mumbai 400614.

Appearance:

Shri S.S. Gupta, C.A. and Shri Mehul Jivani, C.A., for the Appellant
Shri Ajay Kumar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/**87263-87264/2019**

Date of Hearing: 03.10.2019
Date of Decision: 03.10.2019

PER: SANJIV SRIVASTAVA

These two appeals are directed against two orders in original as detailed below, of the Commissioner Central Excise, Belapur.

1.2 Appeal No E/87109/2016-DB arising out of order in original No Belapur/08/Belapur-IV/R-I/Commr/SFA/2016-7/BEL dated 03/06/2016. By the impugned order Commissioner has held as follows:

“23 I hereby confirm the amount of Central Excise duty of Rs 8,39,55,676/- (Rupees Eight Crore Thirty Nine Lakhs fifty Five Thousand Six Hundred and Seventy Six Only) demanded vide the Show Cause cum Demand Notice bearing F No V/Adj(SCN)15-151/Commr/2013 dated 20.08.2015 from M/s S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa, Navi Mumbai under Section 11A(4) of the Central Excise Act, 1944. However I reduce the demand to the extent of Rs 8,39,41,110/- (Rupees Eight Crore Thirty Nine Lakhs Forty One Thousand One Hundred and Ten Only) out of the total demand of Rs 8,39,55,676/- (Rupees Eight Crore Thirty Nine Lakhs fifty Five Thousand Six Hundred and Seventy Six Only) only on the grounds of the duplication of demand as discussed in para 17 & 18 of the order. Hence, the balance confirmed amount is Rs 14,500/- (Rs Fourteen Thousand Five Hundred Sixty Six Only)

24. I order for recovery of interest at appropriate rate under Section 11AA of the Central Excise Act, 9144 on the duty amount confirmed above from S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa Navi Mumbai.

25. I impose a penalty equivalent to the amount of demand confirmed of Rs 14,566/- (Rs Fourteen Thousand Five Hundred Sixty Six Only) upon M/s S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa Navi Mumbai under Section 11AC(1) (c) of the Central Excise Act, 1944.”

1.2 Appeal No E/85261/2016-DB arising out of order in original No Belapur/13/Belapur-IV/R-I/Commr/SFA/2015-16/ dated 04/11/2015. By the impugned order Commissioner has held as follows:

"(i) I confirm and order to recover the amount of demand of Rs 11,50,80,441/- (Rupees Eleven Crore Fifty Lakhs Eighty Thousand Four Hundred and Forty One Only) for the period from 2008-09 to 2012-13 under Section 11A(4) [erstwhile proviso to Section 11A(1) upto the period 07.04.2011 [Section 11A(5) w.e.f 08.04.2011] of the Central Excise Act 1944 from S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa Navi Mumbai

(ii). I confirm the demand for interest at appropriate rate and order to recover the same from M/s S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa, Navi Mumbai under Section 11AB upto the period 07.04.2011 (Section 11AA w.e.f 08.04.2011) of the Central Excise Act, 9144.

iii. I impose a penalty equivalent to fifty percent, of amount of demand confirmed i.e. Rs 11,50,80,441/- (Rupees Eleven Crore Fifty Lakhs Eighty Thousand Four Hundred and Forty One Only) upon M/s S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa Navi Mumbai under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC(1) (c) of the Central Excise Act, 1944.

iv. However, if M/s S P Fabricators Pvt Ltd., A-417, TTC Industrial Area, MIDC, Mahapa, Navi Mumbai pays the amount of confirmed demand along with the interest as detailed above, within thirty days of receipt of this order, then the penalty imposed on them shall be reduced to 25% of the duty determined at (j) above, in terms of Section 11AC(1)(C) of the Central Excise Act, 1944. If the same is not paid within 30 days of the communication/ receipt of this order, then said option will not be available to them and they will be liable to pay the amount of penalty of Rs 05,75,40,220 (Rupees Five Crore Seventy Five Lakhs Forty Thousand Two Hundred and Twenty *only.), as imposed on them at (iii) above, under Section 11AC of the Central Excise Act, 1944."*

1.4 In para 17 of the order dated 03.06.2016 Commissioner has recorded as follows:

"17. After perusal of both the demands issued on the basis of same verification of J D (Cost) even though the issue involved in both the demands are different, I find that the amount of demand for the period 2009-10 to 2012-13 Rs 8,39,41,110/- in the present demand notice forms a part of demand of Rs 11,50,80,441/- which was confirmed vide OIO dated 30.10.2015. The same is illustrated in the following table.

Sr No	Period	Amt of demand involved in the SCNs confirmed vide OIO dated 30.10.2015	Amount of demand in the present SCN	Remarks, whether overlapped or not
1	2008-09	3,11,39,331/-	-	Not overlapped since the period is not covered in the present SCN
2	2009-10	4,76,24,804/-	4,76,24,804/-	Overlapped
3	2010-11	1,58,11,649/-	1,58,11,649/-	Overlapped
4	2011-12	1,03,05,166/-	1,03,05,166/-	Overlapped
5	212-13	1,01,99,491/-	1,01,99,491/-	Overlapped
	Total	11,50,80,441/-	8,39,41,110/-	

2.1 Appellants are engaged in providing works contract service which includes supply of Aluminium door & window and installation of the same at the Customer premises. The goods used for providing the service are manufactured at the appellants factory at Mahapa, Navi Mumbai.

2.2 The goods are valued by the Appellants in terms of Rule 8 read with Rule 11 of Central Excise Valuation Rules, 2000 as these goods are not sold independently and the contract entered with the customers is composite contract having composite rate for supply of goods as well as installation of the said goods.

2.3 A show cause Notice dated 27.09.2013 was issued to them demanding a duty of Rs 69,23,028/- for the period November 2008 to March 2013 on transportation charges paid for the transportation of the goods from factory to the Customer premises under Rule 5 of Central Excise Valuation Rules, 2000, read with Section 4(1)(a) of the Central Excise Act, 1944.

2.4 During the course of adjudication of that Show Cause Notice, Appellants submitted CAS-4 certificate to substantiate their claim that the cost of transportation has been included in the cost of production while determining the value under Rule 8 read with rule 11 of Central Excise Valuation Rules, 2000. These CAS-4 Certificates were referred by the Commissioner to J D Cost for verification (on 4th April 2014) and determination of the cost of production. Vide hi report dated 05th May 2015, J D Cost revalued the entire cost of production and compute that there was short payment of duty of Rs 11,50,80,441/-.

2.5 Commissioner accordingly adjudicated the case vide his order dated 03.10.2015 (issued on 04.11.2015) confirming the demand of Rs 11,50,80,441/- along with interest and penalty.

2.6 Another Show Cause Notice dated 19th August 2015 was issued to the appellant demanding duty of Rs 8,39,55,676 for the period from 2009-10 to 2013-14 (upto September 2014), on the basis of the cost of production as determined by the J D Cost as per his report dated 05th May 2015.

2.7 This show cause notice was adjudicated by the Commissioner vide his order dated 3rd June 2016 and demand made was confirmed. However since Commissioner found that the demand made by this show cause notice for the period 2009-10 to 2012-13 has already been confirmed by him as per his order dated 03.10.2015, there is duplication of demand and hence reduced by the amount confirmed for that period by the earlier period. Thus amount recoverable as per this order is Rs 14,566/- along with interest and penalty.

2.8 Aggrieved by both the orders appellants have filed the two appeals under consideration.

3.1 We have heard Shri S S Gupta, Chartered Accountant and Shri Mehul Jiwani, C.A., for the Appellants and Shri Ajay Kumar Additional Commissioner for the Revenue.

3.2 Arguing for the Appellant learned Counsel submitted-

- Confirmation of demand of Rs 11,50,80,441/- when the show cause notice was for Rs 69,23,028/- is beyond the provisions of Section 11A of Central Excise Act, 1944;
- While the Show Cause Notice was issued demanding duty in respect of transportation charges from their premises to the customer premises in term of Section 4(1)(a) read with Rule 5 of Central Excise Valuation Rules, 2000, the demand has been confirmed by invoking the Rule 8 of Central Excise Rules, 2000 on the basis of Cost Audit report prepared by the J D Cost. Hence the order dated 03.10.2015 has travelled beyond the scope of show cause notice and is bad in law as per following decisions:-
    - Ballarpur Industries Ltd [2007 (215) ELT 489 (SC)]
    - Brindavan Beverages 9P) Ltd [2007 (213) ELT 487 (SC)]
    - Precision Rubber Industries 9P) Ltd [2016 (334) ELT 577 (SC)]
    - Reliance Ports and Terminals Ltd [2016 (334) ELT 630 (Guj)]
    - R K Construction [2016 (410 STR 879 (T-Mum)]
    - Drishty Communication Pvt Ltd [2018 (10) TMI 1326-CESTAT-AHMD]
- Once Commissioner determines that Section 4(1) (a) will be applicable (Para 51) then the demand could not have been confirmed under Rule 8 of Central Excise Valuation Rules, 2000.
- In case the demand is to be confirmed under Rule 8 then freight element cannot be included in the assessable value as has been held in Graphite India Ltd [2017 (358) ELT 263 (T-Mum)]

- Demand is time barred as the Show Cause Notice has been issued on 27th November 2013 for demanding duty short paid during the period November 2008 to March 2013 by invoking extended period of limitation. Since the appellants were under bonafide belief that cost of transportation from the factory to the site is not to be included in the assessable value. Also from the beginning they had been clearing the goods by determining the value under Rule 8 on the basis of CAS-4 certificate. This fact was throughout mentioned on the returns filed by the appellant hence department was throughout ware of the manner of valuation of the goods adopted by them. Hence the necessary ingredients to invoke extended period of limitation as provide by Section 11A are missing and hence the demand is time barred.
- Even if the J D Cost report is to be accepted then various elements of expenses which have been included in the J D Cost report could not have been added for determination of cost of production. Also there are certain quantification errors in the J D Cost report e.g. the value of clearances to project site is to be considered only whereas J D Cost has considered value of entire clearances.
- Even if the demand is to be made on the basis of J D Cost report then the date of report should be treated as date of show cause notice, then demand for the period November 2008 to May 2010 is beyond the period of 5 yrs and not sustainable.

3.3 Arguing for the revenue learned Authorized representative reiterated the findings recorded by Commissioner and submitted that the demand in the adjudication order dated 3.10.2015/ 4.11.2015 has been confirmed on the basis of the Cost Audit report prepared by the Joint Director Cost. While adjudicating the second show cause notice by his order dated 03.06.2016, Commissioner has taken the note of the demand confirmed by him in the first show cause notice and reduce the demand by that much amount. Thus there is no demand which has been made twice. Appellants are themselves valuing the goods under Rule 8 read with Rule 11 of the Central Excise Valuation Rules, 2000, and when it came to the notice of Commissioner that certain elements of Cost have not been included in the value so determined he referred that matter to Joint Director Cost, for undertaking the costing audit and determine the correct value. It was on the basis of the cost audit report that the demands have been made in against the appellants.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of arguments.

4.2 By the Adjudication order dated 03.10.2015/ 04.11.2015 subject matter of the Appeal No E/85261/2016-DB, Commissioner was adjudicating the Show Cause Notice dated 27.11.2016. The para 5, 6 and 7 of the Show Cause Notice are reproduced below:

"5. It therefore appears that the assessee have undervalued the said goods which resulted in short payment of Central Excise Duty in contravention of the provisions of Section 4(1)(a) of the Central Excise Act, 1944 read with Rule 5 of Central Excise Valuation (determination of Price of Excisable Goods) Rules, 2000 and Rule 4 read with Rule 8, Rue 6 of Central Excise Rules, 2002 in as much as

a) They have failed to arrive at correct assessable value of the goods transported to their site as required under Section 4(1)(a) of the Central Excise Act, 1944 read with Rule 5 of Central Excise Valuation (determination of Price of Excisable Goods) Rules, 2000.

b) They have failed to properly assess the duty payable on clearance of the said excisable goods for period November 2008 to March 2013, as required under the provisions of Rule 6 of Central Excise Rules, 2002

c) They have failed to pay correct Central excise duty leviable on the said goods as required under the provisions of Rule 4 read with Rule 8, Rue 6 of Central Excise Rules, 2002.

6. The assessee in their monthly returns & other statutory returns filed with the department, has neither informed the department about the non inclusion of transportation charges in the assessable value of goods cleared from Mahapa factory to installation sites nor the method valuation adopted by them for the payment of duty in respect of such clearances. These facts came to the knowledge or the department only during the course of Audit. Further they have intentionally undervalued the goods cleared to their installation sites, by not adding the transportation cost to the assessable value, which are essential to determine the proper and correct assessable value of the said goods. Thus, it appears that the assessee had deliberately suppressed the said vital facts an intention payment to evade payment of appropriate Central Excise duty, and therefore the differential duty is recoverable under the provisions of Section 11A(1) of Central Excise Act, 1944 along with interest under Section 11AA and penalty is also impossible under Section 11AC (a) of the Central Excise Act, 1944. Despite this office letter dated 19.09.2012 the assessee filed to submit the transportation charges of goods manufactured at Mahapa factory to the site where installation work is undertaken. Therefore, transportation charges are taken from the Trial Balance of the assessee which are appearing at Annexure A to this Show Notice. The total differential duty works out to Rs 69,33,038/- (Rs Sixty Nine Lakhs Thirty Three Thousand and Thirty Eight only) (Basic 67,21,395, Edu Cess 1,34,429/-, SHEC 67214/-) on the differential value amounting to Rs 6,79,44,082/- for the period November 2008 to March 2013 as detailed in Annexure "A" to the Show Cause Notice.

7. Now, therefore, the said assessee is hereby required to show cause to the Commissioner of Central Excise, Belapur Commissionerate, having his office situated at 1st Floor, CGO Complex, CHD Belapur within 30 days from the receipt of this notice as to why:-

a) *The Central Excise duty of Rs 69,33,038/- (Rs Sixty Nine Lakhs Thirty Three Thousand and Thirty Eight only) (Basic 67,21,395, Edu Cess 1,34,429/-, SHEC 67214/-) short paid by the assessee as shown in detail in Annexure A to the Show Cause Notice, for the period November 2008 to March 2013 should not be demanded and recovered from them under proviso to Section 11(A)(1) (Now Section 11A(5) w.e.f 08.04.2001) of the Central Excise Act, 1944.*

b) *Interest under Section 11AB (Now Section 11AA) w.e.f 08.04.2001) of the Central Excise Act, 1944 should not be demanded and recovered from them.*

c) *Penalty should not be imposed upon them under the provisions of Section 11AC (Now Section 11AC(1)(a) w.e.f 08.04.2001) of the Central Excise Act, 1944 and / or Rule 25 of Central excise Rules, 2002."*

4.3 In para 46 of his Order, Adjudicating Commissioner records the issue involved in the Show Cause Notice correctly and as follows:

"46 The issue involved in the present case is that whether the transportation cost of the goods transported from Mahapa factory to the site of installation is includable for payment of Central Excise duty in terms of Explanation 2 to Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with clause (a) of sub section (1) to Section 4 of the Central Excise Act, 1944, or otherwise."

Thereafter in para 47 to 50 he discusses the issue vis a vis the provisions of Act and Rules ibid, and thereafter in para 51 concludes as follows:

"51. Thus, place of removal, in a present case, become determinative factor for the purpose of valuation. In the present case place of removal is various sites/ premises of the buyer where installation works is done. Here in this case, even though goods are cleared from factory rate to sites, there is contract price available for determination of transaction value and hence

it can be considered as sale. Therefore, I find that Section 4(1)(a) of the Central Excise Act, 1944, is clearly applicable in this case. Ultimately provision of Rule 5 of the Central excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also correctly applicable in this case. Hence, I do not find any merits in assessee's contention that since in the present case there is no sale, the provision of section 4(1)(a) of the Act and Rule 5 of Central excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are not applicable in the instant case."

47. After concluding the discussions on merits on the issues raised in Show Cause Notice, Commissioner has in para 52, 53, 57, 58 and 59 recorded as follows:

"52. Further, I find that, for ascertaining the fact as to whether the cost of transportation of goods from factory to sites is included in cost of production as per the CAS 4 submitted by the assessee was referred by the Department to the J.D. Cost. On careful examination of the documents/information submitted by the assessee from time to time to him, the J.D. Cost vide his letter dated 15104/2015, has given his final report after taken into consideration pointwise submission made by the assessee, J.D. Cost has given his final verification report after exclusion of some expenditure, regarding the cost of production and excise duty liability for the period 2010 to 2012-13, which is as under-

1. *2008-09: Rs.3,11,39,3311-(Pre-revised)*
2. *2009-10: Rs.4,76,24,804/-(Pre-revised)*
3. *2010-11; Rs.1,58,11,649/- (Revised)*
4. *2011-12: Rs.1,03,05,166/- (Revised)*
5. *2012-13: Rs.1,01,99,4911- (Revised)*

Total: Rs.11,50,80,4411-

53. I find here that, in the instant case, initially issue of undervaluation was restricted to the non-inclusion of transportation cost from transportation of goods from factory to sites. The CAS 4, Trial Balances and various information/documents submitted by the assessee have been *verified by the J.D. Cost and he has submitted his report after taking into consideration all the elements of cost of production and submitted his verification report regarding the differential duty liability. Accordingly, the duty liability in the matter has been enhanced from Rs.69,23,038/- to Rs.11,50,80,441/- for the period Nov.2008 to March-2013 in respect of SCN No. V/Adj(SCN)15-105/Commr/2013/Bel dated 27/09/2013.*

57. I find that the assessee's senior representatives have participated in the whole process of preparation of report right from the beginning up to the end. The scope of the examination/verification was very well known to them right from the beginning. During the entire course of preparation of the verification report, they have not made any argument about addition of other elements of overheads into the cost of production and enhancement of scope of the Show Cause Notice in the matter. The verification of CAS 4 submitted by the assessee has been conducted by the J.D. Cost after their going through the whole report Hence I do not find any merit in the argument of the representative of the assessee that the scope of the SCN is restricted to the issue of inclusion of transportation cost from the factory up to the sites.

58. It is also worthwhile to state that, the J.D. Cost's verification report lead to the enhancement of duty liability over and above the demand notice under consideration, since the 'assessee is associated during the entire course of verification process and there was no objection raised by them in anticipation impending enhanced duty liability. Hence it is opined that, the Principal of Natural Justice has been adequately observed by associating the assessee in the entire process and handing over the communication, report originating from J.D. Cost. Therefore, I hold that the entire process constitutes the process akin to issuance of Show Cause cum Demand Notice for determination of duty liability.

59. In view of my above, 1 find that in respect of undervaluation arising out of non-inclusion of various elements including transportation cost of the goods transported from *factory to sites in the cost of production, based on the verification report given by the J.D. Cost, there is no need to issue separate Show Cause cum Demand notice to the assessee in the matter and the same requires consideration in the present Show Cause cum Demand Notice. Therefore, I am compelled to accept the J.D. Cost's verification report in totality, and hold that various elements of overheads including transportation charges from factory to sites (as per J.D.Cost verification report in the matter) have not been included in the cost of production / assessable value by the assessee during the period from 2008-09 to March 2013 resulting into short payment to the tune of Rs. 11,50,80,4411- during the period from Nov-2008 to March-2013."*

4.4 We are not in agreement with the approach of the Commissioner in enhancing the demand amount beyond the amount specified in the show cause notice. It is settled principle in law that show cause notice defines the four corners of the proceedings in which they need to be conducted. Hon'ble Supreme Court has in case of Ballarpur Industries [2007 (215) ELT 489 (SC)] clearly sated the law as follows:

*"**21.** Before concluding, we may mention that, in the present case, the second and the third show cause notices are alone remitted. The first show cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule."*

In case of Gas Authority of India Ltd [2008 (232) ELT 7 (SC)], Hon'ble Supreme Court held as follows:

"6. *We are not required to examine the above issue for the simple reason that on the facts of the present case, as can be* *seen from the extract quoted from the show cause notice, which is the foundation of the Demand made by the Department, Lean Gas is a by-product which emerges when LPG is extracted from natural gas. If the case of the Department itself in the show cause notice was that Lean Gas is a by-product, then we fail to understand as to the basis for denying the benefit of Modvat credit to the assessee during the relevant period (October 1998 to January 1999) under Rule 57D."*

Same view was reiterated by the Hon'ble Apex Court again in the case of Precision Rubber Industries (P) Ltd [2016 (334) ELT 577 (SC)]:-

"10.*Our attention has also been drawn to Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd. [2007 (215) E.L.T. 489 (S.C.)] wherein this Court held in Para 21 that it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. This view was reiterated in Commissioner of Central Excise v. Gas Authority of India Ltd. [2008 (232) E.L.T. 7 (S.C.)] in Para 7 of the order.*

11. *In so far as the present appeal is concerned, it is the case of the Revenue in the show cause notices that the goods are classifiable under Chapter Heading 4016.99. Therefore, no new case could have been set up or decided contrary to the show cause notices that the goods fall under Chapter Heading 8448.00 without issuing a fresh show cause notice to the assessee in this regard.*

12. *In these circumstances, and following the decisions of this Court, we would have ordinarily permitted the Revenue to issue a fresh show cause notice to the assessee seeking to classify the goods under Chapter Heading 8448.00. However, due to the passage of time, we are of the opinion that it would not be advisable (or permissible under the provisions of the Central Excise Tariff Act) to permit the Revenue to reopen the entire proceedings and classify the goods under Chapter Heading 8448.00."*

4.5 In view of law as laid down by Apex Court the when Commissioner has himself recorded that the issue for Confirming the demand of Rs 11,50,80,441/- was not even the part of show cause notice under his consideration we are not in position to uphold the order in that respect. However after setting aside the said demand we remit the matter back to Commissioner for fresh adjudication of the show cause notice on the grounds and amount for which the same was issued.

4.6 In respect of the second show cause notice dated 19th August 2015 subject matter in appeal No E/87109/0216-DB, the demand has been made on the following grounds:

"6. Therefore, it appears that the assessee failed to arrive at correct assessable value as per the provisions laid down under Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Rule 4 and Rule 6 of Central Excise Rules, 2002 for the semi finished goods cleared to their sister units at Bangalore and Chennai which was further used for captive consumption by them in the manufacture of finished goods and has resulted in short payment of duty. The CAS-4 verification reports were received from the JD (Cost) Central Excise, Mumbai Zone-II vide his letter No.JDC/BELAPURISP Fab/CAS-4/2014/368 dated 19.12.2014 and on 05.05.2015.

7. In terms of the Section 3 of the Central Excise Act, 1944 read with Section 4 of the Central Excise Act, 1944 the duty of excise shall be chargeable on any excisable goods with reference to their value and in case where the goods are not sold, the value shall be determined in such manner as may be prescribed.

8. It further appears that the assessee was aware of the provisions under Section 3 of the Central Excise Act, 1944 read with Section 4 of the Central Excise Act, 1944. The assessee were undervaluing the goods cleared to the sister units at Bangalore and Chennai. The assessee was not at liberty to assess the duty arbitrarily and in capricious manner in violation *of the provisions under Section 3 of the Central Excise Act, 1944 read with Section 4 of the Central Excise Act, 1944. They were required to arrive at the correct costing of the goods and pay duty on the value in terms of the Rule 8 of the Central Excise Valuation Rules, 2000. Thus they have contravened the provisions of Section 3 of the Central Excise Act, 1944 read with Section 4 of the Central Excise Act, 1944.*

9. Now, therefore, the said assessee is hereby required to show cause to the Commissioner of Central Excise, Belapur Commissionerate, having his office situated at 1st floor, CGO Complex, CBD, Belapur within 30 days from the receipt of this notice as to why :-

a) The Central Excise duty of Rs. 8,39,55,676/-(Rupees Eight Crore Thirty Nine Lakh Fifty Five Thousands Six hundred Seventy Six Only) including E.Cess and S&HSECess short paid by the assessee as shown in detail in Annexure-A to the Show Cause Notice, for the period from the year 2009-10 to 2013-14(April to September) should not be demanded and recovered from them under proviso to Section 11 (A)(4) of the Central Excise Act, 1944.

b) Interest under Section 11M of Central Excise Act, 1944 should not be demanded and recovered from them.

c) Penalty should not be imposed upon them under the provision of Section 11 AC (1)(c) of the Central Excise Act, 1944 and/or Rule 25 of Central Excise Rules, 2002."

4.7 In para 13 to 15 of his order dated 03/06/2016, Commissioner has recorded as follows:

"13. I find that the SCN in the present case has been issued to the assessee based on the observations of Para 2 of EA 2000 Audit on the records of the assessee. It has been observed that the assessee is clearing Aluminium Profiles and its accessories to their sister units at Chennai and Banglore on payment of duty which are captively consumed by them. As such the assessable

value of the goods has to be arrived at as per proviso to Rule 9 read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods), Rules, 2000 on the basis of CAS 4 Certificate. To ascertain the correctness of assessable value on which duty is paid at the time of clearance of the goods assessee was asked to submit the CAS 4 Certificates in respect of the relevant period. But assessee failed to submit the same to the Audit Officers. Hence Divisional DC/AC was requested to verify this aspect of valuation by obtaining product-wise CAS 4 from the assessee for the Mahape unit and to take the necessary action to safeguard the Govt. revenue, if any discrepancies are noticed.

14. Therefore, CAS4 certificates and trail balance for the period Dec.2008 to March 2013, FOR Mahape unit submitted by the assessee were forwarded to J.D. (Cost) and made a request to verify the same and ascertain the correctness of the same in order to verify the genuineness of the practice of valuation adopted by the assessee in respect of clearances to their sister units as pointed out by the Audit Officers. After various correspondence by the assessee to J.D. (Cost) and verifying the information/documents submitted by the assessee, the J.D.(Cost) vide his letter dated 05.05.2015 has given his final verification report in this regard. In his report, he has arrived cost of production and Central Excise duty for the year 2010-11 to 2012-13. He has calculated the differential Excise duty on the basis of his verification which is as under-

1. 2009-10 : Rs.4,76,24,804/-

2. 2010-11 : Rs.1,58,11,649/-

3. 2011-12 : Rs.1,03,05,166/-

4. 2012-13 : Rs.1,01,99,491/-

15. The J.D.(Cost) has prepared his costing report after taking into consideration all elements of costing of the goods, whereas the issue involved in the present SCN issued to the assessee is regarding valuation of the goods cleared by the assessee to their sister unit located at Chennai and Banglore. In this context, I find that on the issue of non inclusion of transportation charges *from factory gate to the work site as pointed out in the EA 2000 Audit, Show Cause cum Demand Notice was issued to the assessee. In that case, matter was referred to the J.D.(Cost) for verification. After verification of all the aspects of costing, the J.D. (Cost) has given his report dated 05.05.2015. The same is also relied upon in the present SCN. Based on his report dated 05.05.2015, the demand notice issued to the assessee has been confirmed by the Commissioner, C. Ex., Belapur vide his Order-in-Original No. Belapur/13/Belapur IV/R-I/Commr/SFAl2015- 16 dated 30.10.2015. While confirming the said demand the Commissioner, in his order has decided that-*

"I find that the assessee's senior representatives have participated in the whole process of preparation of report right from the beginning up to the end. The scope of the examination/verification was very well known to them right from the beginning. During the entire course of preparation of the verification report, they have not made any argument about addition of other elements of overheads into the cost of production and enhancement of scope of the Show Cause Notice in the matter. The verification of CAS4 submitted by the assessee has been conducted by the J.D. Cost after their going through the whole report Hence I do not find any merit in the argument of the representative of the assessee that the scope of the SCN is restricted to the issue of inclusion of transportation cost from the factory up to the sites.

It is also worthwhile to state that, the J.D. Cost's verification report lead to the enhancement of duty liability over and above the demand notice under consideration, since the assessee is associated during the entire course of verification process and there was no objection raised by them in anticipation impending enhanced duty liability. Hence it is opined that, the Principal of Natural Justice has been adequately observed by associating the assessee in the entire process and handing over the communication, report originating from J. D. Cost. Therefore, I hold that the entire process constitutes the process akin to issuance of Show Cause cum Demand Notice for *determination of duty liability.*

In view of my above discussion, I find that in respect of undervaluation arising out - of non-inclusion of various elements including transportation cost of the goods transported from factory to sites in the cost of production, based on the verification report given by the J.D. Cost, there is no need to issue separate Show Cause cum Demand notice to the assessee in the matter and the same requires consideration in the present Show Cause cum Demand Notice. Therefore, I am compelled to accept the J. O. Cost's verification report in totality, and hold that various elements of overheads including transportation charges from factory to sites (as per J. O. Cost verification report in the matter) have not been included in the cost of production 1 assessable value by the assessee during the period from 2008-09 to March 2013 resulting into short payment to the tune of Rs. 11,50,80,4411- during the period from Nov-200B to March-2013."

4.8 In para 17 (refer para 1, supra), Commissioner has category held in respect of overlap in the demand proposed in this Show Cause Notice and demand confirmed by him in his earlier order. When the First Show Cause Notice was issued on the basis of EA 2000 Audit making certain charges against the appellant, then how can another show cause notice have been issued on the basis of same EA 2000 Audit for the same period which is contrary to the first show cause notice. In the first Show Cause the value is sought to be determined in terms of Section 4(1)(a) read with Rule 4 and 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, whereas in the present show cause notice demand is sought to be made by invoking Rule 8 of the Valuation Rules ibid. In our view such an approach for the period of overlap is contrary to the decision of the Apex Court in cases referred above.

4.9 Revenue has not filed any appeal in the matter against the order of the Commissioner against the adjustment made by the Commissioner in his order against the demand erroneously confirmed by him for during the period of overlap without any show cause notice in his order dated 03.10.2015/04.11.2015. In fact after adjustment Commissioner has by his order dated 03.06.2016 confirmed the demand of Rs 14,566/- for the period April 2013 to September 2013. Since no appeal has been preferred by the revenue in the appellants appeal we are not in position to remand the matter back to for the period of overlap even when the said demand confirmed by the Commissioner in his order dated 03.10.2015/ 04.11.2016 has been set aside.

4.10 Since Rule 8 of the valuation Rule is applicable only in the case where the goods are captively consumed, which is contrary to the fact that for the earlier period, the demand has been made by invoking the provisions of Section 4(1)(a) read with 5 of Central Excise Valuation (Determination of Price of Excisable Goods), 2000 we are not in position to uphold the demand confirmed in isolation in the present case even for the post period. Hence we set aside the same and remand the matter back to Commissioner for re-adjudication of the issue for the period April 2013 to September 2013.

5.1 In result we allow both the appeals and remand the matters back to adjudicating authority for re-consideration in light of the observations made in para 4.5 and 4.10. Needless to say that Commissioner should in remand re-adjudicate the matter within six months of receipt of this order after hearing the appellants.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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