

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 85478 of 2016

(Arising out of Order-in-Original No. PUN-EXCUS-001-PR.COM-013 to 040-15-16 dated 30.11.2015 passed by the Principal Commissioner of Central Excise, Pune-I)

M/s. Thermax Ltd.

Plot No. 13, D-1 Block,
MIDC Industrial Area,
Chinchwad, Pune 411 019.

Appellant

Vs.

Commissioner of CGST & CE, Pune-I

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Respondent

WITH

Excise Appeal No. 86356 of 2016

(Arising out of Order-in-Original No. PUN-EXCUS- 002-PR.COM-023 TO 034-15-16 Dated 11.03.2016 passed by the Principal Commissioner of Central Excise, Pune-I)

M/s. Thermax Ltd.

Plot No. 13, D-1 Block,
MIDC Industrial Area,
Chinchwad, Pune 411 019.

Appellant

Vs.

Commissioner of CGST & CE, Pune-I

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Respondent

WITH

Excise Appeal No. 85593 of 2017

(Arising out of Order-in-Original No. PUN-EXCUS-001-PR.COM-036-16-17 Dated 30.11.2016 passed by the Principal Commissioner of Central Excise, Pune-I)

M/s. Thermax Ltd.

Plot No. 13, D-1 Block,
MIDC Industrial Area,
Chinchwad, Pune 411 019.

Appellant

Vs.

Commissioner of CGST & CE, Pune-I

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Respondent

AND

Excise Appeal No. 89005 of 2018

(Arising out of Order-in-Original No. PUN-EXCUS-001-COM-003-18-19 Dated 30.05.2018 passed by the Commissioner of Central Excise, Pune)

M/s. Thermax Ltd.

Plot No. 13, D-1 Block,
MIDC Industrial Area,
Chinchwad, Pune 411 019.

Appellant

Vs.

Commissioner of CGST & CE, Pune-I

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Respondent

Appearance:

Shri V. Sridharan, Senior Advocate, with Shri Rajesh Ostwal and Shri Saurabh Bhise, Advocates, for the Appellant
Shri C. Dhanasekaran, Special Counsel, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 28.11.2022

Date of Decision: 12.12.2022

FINAL ORDER NO. A/86190-86193/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order in originals as indicated in table below, of the Commissioner Central Excise Pune.

Appeal no	OIO	Period	SCN	Division
E/85478/16	PUN-EXCUS-001-PR.COM-013 TO 040-15-16 Dated 30.11.2015	July 2000 to March 2015	28	Boiler & Heating Division
E/85593/17	PUN-EXCUS-001-PR.COM-036-16-17 Dated 30.11.2016	April 2015 to Sep 2015	1	-do-
E/89005/18	PUN-EXCUS-001-COM-003-18- 19 Dated 30.05.2018	October to March 2017	Statement of Demand Dated 16.10.2017	-do-
E/86356/16	PUN-EXCUS-002-PR.COM-023 TO 034-15-16 Dated 11.03.2016	October 2006 to Sep 2012	12	Pollution Control Equipments

1.2 By the impugned orders following has been held:

PUN-EXCUS-001-PR.COM-013 TO 040-15-16 Dated 30.11.2015

"ORDER

33.01 I hold that the Bought Out items in these cases of the Noticee are essential and integral parts of Boilers without which Boiler Designed. Manufactured and Supplied under Contract cannot be functionable and hence value of these Bought Out items/parts procured directly at Boiler assembly site for Erection, Installation & Commissioning of same, totally amounting to Rs. 6924,78,22,485/- (Rupees Six Thousand Nine Hundred Twenty Four Crores, Seventy Eight Lakhs, Twenty Two Thousand, Four Hundred and Eighty Five Only) is includable in the transaction value / assessable value of Boilers, manufactured and supplied by M/s Thermax Babcock & Wilcox Ltd., Chinchwad (Now merged & known as M/s. TL) & M/s Thermax Ltd., Chinchwad for the period covered under 28 SCNs issued against them during July,2000 to March, 2015, as required under Section 4(1)(b) / 4(1)(a) of the Central Excise Act, 1944 read with Rule 6 of the Valuation Rules, 2000, as applicable during the relevant period.

33.02. I also hold that M/s. Thermax Babcock & Wilcox Ltd., Chinchwad (Now merged & known as M/s. TL) & M/s Thermax Ltd., Chinchwad have suppressed material facts by not including the value of Bought Out items in the assessable value of Boilers Designed, Manufactured, Supplied, Installed, Erected & Commissioned under turnkey Contracts agreed upon with their customers with intent to avoid / evade the Central Excise duty payable thereon and thereby contravened the provisions of Section 4(1)(a)/ Section 4(1)(b) read with Rule 6 of Central Excise Valuation 2000. Accordingly, for the first two SCNS issued against the Noticees for the period July, 2000 to March, 2004 proviso to sub- section (1) of Section 11A of CEA, 1944 is invokable for duty demanded therein. Further as regards remaining 26 periodical SCNs issued during the period April, 2004 to September, 2015 against the Noticees invoking proviso to Section 11A(1) of CEA, 1944 does not arise and Section 11A(1) will suffice for the duty demanded therein. The goods totally valued Rs. 69,24,78,22,485/- on which due duty has not been discharged, is liable for confiscation under the provisions of Rule 25 of Central Excise Rules (no.2)Rules 2001/Rules, 2002 but for its non-availability for the same.

33.03 I hold that the Erection & Commissioning Charges cannot be treated as part of assessable value chargeable to Central Excise duty as it is a settled Law. Accordingly, I drop the total duty demand of Rs. 7,49,22,418/- (Rupees Seven Crores Forty Nine Lakhs Twenty Two Thousand Four Hundred and Eighteen only) i.e. Rs. 3,55,11,682/- + Rs. 3,94,10,736/- demands made against M/s Thermax Babcock & Wilcox Ltd., Chinchwad (Now merged & known as M/s. TL) & M/s Thermax Ltd., Chinchwad respectively against the total Erection & Commissioning value of Rs.46,36,43,378/- recovered by them & considered for duty calculations in 13 SCNS issued during the period from July, 2000 to September, 2005, as detailed in Para 16, Para 31 of this Notice.

33.04 I confirm the total duty demanded in the First two SCNS issued for the period July, 2000 to March, 2004 amounting of Rs. 88,84,72,174/- (Rupees;- Eighty Eight Crores Eighty Four Lakhs Seventy Two Thousand One Hundred and Seventy Four only) i.e. Rs. 36,04,12,452/- + Rs. 52,80,59,722/- demands made against M/s Thermax Babcock & Wilcox Ltd., Chinchwad (Now merged & known as M/s. TL) & M/s Thermax Ltd., Chinchwad respectively, as detailed in Para 14.06 read with Para 31 of this Notice, against total value of Bought Out items recovered from customers amounting to Rs. 555,29,51,085/- but not included in assessable value of Boilers supplied under turnkey Contracts under the provisions of proviso to sub-Section (1) of Section 11A of CEA, 1944.

33.05 I confirm the total duty demanded in the remaining 26 SCNs issued for the period April, 2004 to September, 2015 amounting of Rs. 781,92,73,542/- (Rupees;- Seven Hundred Eighty One Crores Ninety Two Lakhs Seventy Three Thousand Five Hundred and Forty Two only) i.e. Rs.34,10,86,464/- + Rs.747,81,87,078/- demands made against M/s Thermax Babcock & Wilcox Ltd., Chinchwad (Now merged & known as M/s. TL) & M/s Thermax Ltd., Chinchwad respectively, as detailed in Para 14.06 read with Para 31 of this Notice, against total value of Bought Out items recovered from customers amounting to Rs. 63,69,48,71,400/- but not included in assessable value of Boilers supplied under turnkey Contracts. but

not included in assessable value of Boilers supplied under turnkey Contracts under the provisions of Section 11A (1) of CEA, 1944.

33.06 I order recovery of interest from the Noticee, under the provisions of Section 11AA/11BB of the Central Excise Act, 1944 as the case may be in respect of the amount as confirmed in para 33.04 & 33.05 above.

33.07 I impose a penalty of Rs. 36,04,12,452/- - (Rupees Thirty Six Crores Four Lakhs Twelve Thousand Four Hundred Fifty Two only) on M/s Thermax Babcock & Wilcox Ltd., (Now Known as M/s Thermax Ltd.) Plot No. D-13, MIDC, Industrial Area, Chinchwad, Pune-411019 under the provisions of Rule 173 Q of erstwhile CER, 1944/ Rule 25 of Central Excise (2) Rules 2001/ Rules 2002 read with Section 11AC of the Central Excise Act, 1944 with respect to demand confirmed vide Para 33.04 above.

33.08 I also impose a penalty of Rs. 52,80,59,722/- (Rupees Fifty Two Crores Eighty Lacs Fifty Nine Thousand Seven Hundred Twenty Two Only) on M/s Thermax Ltd. Plot No. D-13, MIDC, Industrial Area, Chinchwad, Pune-411019 under the provisions of Rule 173 Q of erstwhile CER, 1944/ Rule 25 of Central Excise (2) Rules 2001/ Rules 2002 read with Section 11AC of the Central Excise Act, 1944 with respect to demand confirmed vide Para 33.04 above.

33.09 I impose a penalty of Rs. 7,00,00,000/- (Rupees Seven Crores only) on M/s Thermax Babcock & Wilcox Ltd., (Now Known as M/s Thermax Ltd.), Chinchwad, Pune- under the provisions of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944, with respect to demand confirmed vide Para 33.05 above.

33.10 I also impose a penalty of Rs.150,00,00,000/- (Rupees One Hundred and Fifty Crores only) on M/s Thermax Ltd., Plot No.13, D-1 MIDC, Industrial Area, Chinchwad, Pune-411019 under the provisions of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944, with respect to demand confirmed vide Para 33.05 above.

33.11 I also give an option to the Noticee, under the second proviso to Section 11AC of the Finance Act, 1994, to pay penalty

equivalent to 25% of the amount as determined/ confirmed, in para 33.07, 33.08, 33.09 & 33.10 above, provided they pay the entire amount as determined/ confirmed, in para 33.04 & 33.05 above, along with interest payable thereon as ordered in para 33.06 above as well as the 25% penalty, within 30 days of the date of communication of this order.

34.00 This order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the Central Excise Act, 1944/Service Tax provisions and / or the rules made there under and / or any other law for the time being in force."

PUN-EXCUS- 002-PR.COM-023 TO 034-15-16 Dated 11.03.2016

"ORDER

(i) I hold that the Bought Out items in these cases of the Noticee are essential and integral parts of Pollution Control Equipment without which Pollution Control Equipment Designed, Manufactured and Supplied under Contract cannot be made functional, and hence value of these Bought Out items/parts procured directly at Pollution Control Equipment assembly site for Erection, Installation & Commissioning of same, totally amounting to Rs. 603,29,74,305/- (Rupees Six Hundred Three Crores Twenty Nine Lakhs Seventy Four Thousand, Three Hundred Five Only) is includible in the transaction value / assessable value of Pollution Control Equipment, manufactured and supplied by the Noticee during the period from October 2006 to September 2012 (in respect of all the twelve SCNS under discussion) as per the provisions of Section 4(1)(b) / 4(1)(a) of the Central Excise Act, 1944 read with Rule 6 of the Valuation Rules, 2000, as applicable during the relevant period.

(ii) I hold that the Erection & Commissioning Charges cannot be treated as part of assessable value chargeable to Central Excise duty as it is a settled Law, as discussed in Para 15 above. Accordingly, I drop the total duty demand of Rs. 41,78,644/- (Rupees Forty One Lakhs Seventy Eight Thousand Six Hundred Forty Four only) against the total Erection and Commissioning value of Rs. 2,54,30,000/- recovered by them and considered for duty calculations in SCN NO.79/P-II/R-CHR-I/COMMR/2007

dated 24-10-2007 and SCN No. 34/P-II/R- CHR-I/COMMR/2008 dated 05-05-2008 for the period from October 2006 to September 2007, as discussed and detailed in Para 15 and 27 above.

(iii) I confirm the total duty demand of amounting of Rs. 73,30,78,952/- (Rupees Seventy Three Crores Thirty Lakhs Seventy Eight Thousand Nine Hundred Fifty Two only) as raised in the 12 SCNs under discussion and issued for the period October 2006 to September 2012, as detailed in Para 27.1 above, against total value of Bought Out items recovered from customers amounting to Rs. 6,03,29,74,305/- but not included in assessable value of Pollution Control Equipment supplied under turnkey Contracts and order recovery of the said confirmed duty demand of Rs. 73,30,78,952/- (Rupees Seventy Three Crores Thirty Lakhs Seventy Eight Thousand Nine Hundred Fifty Two only) from the Noticee, under the provisions of Section 11A(2)/11A(10) of the Central Excise Act, as the case may be.

(iv) I confirm the demand of interest and order recovery of the same at applicable rate(s) from the Noticee, on the duty demand confirmed at Sr. No. (iii) above, under the provisions of Section 11AA/11AB of the Central Excise Act, 1944 as the case may be.

(v) I impose a penalty of Rs. 73,30,78,952/- (Rupees Seventy Three Crores Thirty Lakhs Seventy Eight Thousand Nine Hundred Fifty Two only) upon the Noticee i.e. M/s. Thermax Ltd., Enviro Division, Gat No. 183/3, Waki Village, Chakan, Taluka: Rajgurunagar, District: Pune, under the provisions of Rule 25 (1)(d) of the Central Excise Rules, 2002 read with provisions of Section 11AC of the Central Excise Act, 1944, as applicable, as discussed in Para 29 above, for their tax delinquency during the period from October 2006 to September 2012.

(vi) However, I give an option to the Noticee, under Section 11AC(1)(e) of the Central Excise Act, 1944, to pay penalty equivalent to 25% of the total demand of Central Excise duty as determined and confirmed at Sr. No. (iii) above for the period from October 2006 to September 2012), provided the Noticee pays the entire amount of Central Excise duty as determined/confirmed above in Sr. No. (iii) above, along with interest payable thereon as ordered in Sr. (iv) above, as well as,

the 25% penalty, within 30 days of the date of the communication of the order.

31. This order is issued without prejudice to any other action that may be taken against the assessee or anybody else under the provisions of the Central Excise Act, 1944 and / or the Rules made there under and / or any other law for the time being in force."

PUN-EXCUS-001-PR COMMR-036-16-17 dated 15.12.2016

"ORDER

(i) I hold that the Bought Out items in this case of the Noticee are essential and integral parts of Boilers without which Boiler Designed, Manufactured and Supplied under Contract cannot be functionable and hence value of these Bought Out items/parts procured directly at Boiler assembly site for Erection, Installation & Commissioning of same, totally amounting to Rs.490,16,41,896/-(Rupees Four Hundred Ninety Crores. Sixteen Lakhs, Forty One Thousand, Eight Hundred and Ninety Six Only) is includible in the transaction value / assessable value of Boilers, manufactured and supplied by M/s Thermax Ltd., Chinchwad for the period covered under the present SCN issued against them during the period April,2015 to September, 2015, as required under Section 4(1)(a) of the Central Excise Act, 1944 read with Rule 6 of the Valuation. Rules, 2000, as applicable during the relevant period.

(ii) I confirm the total duty demanded in the SCN issued for the period April, 2015 to September, 2015 amounting of Rs. Rs.61,27,05,237/- | Rupees Sixty One Crores, Twenty Seven Lacs, Five Thousand Two Hundred and Thirty Seven Only) against M/s Thermax Ltd., Chinchwad, as detailed in Para 6 of the SCN under the provisions of the Section 1 IA (1)(a) read with 11A(10) of CEA, 1944.

(iii) I hereby confirm the demand of interest and order recovery of the same from the Noticee, under the provisions of Section 11AA of the Central Excise Act, 1944 in respect of the amount as confirmed in Sub-Para (ii) above.

(iv) I also impose a penalty Rs.6,12,70,523/- (Rupees Six Crores, Twelve Lacs, Seventy Thousand, Five Hundred and Twenty Three Only) on M/s Thermax Ltd. Plot No. D-13, MIDC,

Industrial Area, Chinchwad, Pune-411019 under the provisions of Rule 25(1) (d) of Central Excise Rules 2002 read with Section 11 AC (1) (a) of the Central Excise Act, 1944

(v) I further give an option under the provisions of Section 11AC (1) (b) of the CEA, 1944 to the Noticee to avail off the reduced penalty @ 25% of the penalty imposed vide (iv) above by way of paying the duty confirmed vide (ii) above, interest liability thereon confirmed vide (iii) above and such the reduced penalty within 30 days of the date of communication of this order.

28.00 This order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the Central Excise Act, 1944/Service Tax provisions and / or the rules made there under and / or any other law for the time being in force."

PUN-EXCUS=001-COMMR-003-18- 19 Dated 30.05.2018

"ORDER

a) I determine and confirm differential Central Excise duty amounting to Rs.46,28,15,422/- (Rupees Forty six crores, twenty eight lakhs, fifteen thousand, four hundred twenty two only), short paid by the Assessee M/s. Thermax Limited in respect of Boilers Designed, Manufactured and Supplied under agreement / contract during the period October 2015 to March 2017 as detailed in Annexure-A to the Statement of Demand, by them under the provisions of Section 11A(1) of the Central Excise Act, 1944 read with Section 11A(10) of the Central Excise Act, 1944; accordingly order for its recovery.

b) I confirm the demand of interest on the amount of Central Excise duty confirmed amounting to Rs.46,28,15,422/- as detailed in Para (a) above, at the applicable rates, and order recovery of the same from the Assessee M/s. Thermax Limited;

c) I impose Penalty of Rs. 4,62,81,542/- (Rupees Four crores sixty two lakhs eighty one thousand five hundred and forty two only) under the provisions of Section 11AC(1)(a) of the Central Excise Act, 1944 on the Assessee M/s. Thermax Limited; I accordingly order for its recovery.

d) However, I give an option to the assessee the Assessee M/s. Thermax Limited, under Section 11AC(1)(b) of the Central Excise Act, 1944, to pay penalty equivalent to 25% of the penalty imposed at Sr. No.(c) above provided the assessee pays the entire amount of Central excise duty as determined and confirmed at Para (a) above, along with interest payable thereon as ordered in Para (b) above, as well as, the reduced 25% penalty, within 30 days of communication of the order;

24. This order is issued without prejudice to any other action that may be taken against the Assessee M/s. Thermax Limited under the provisions of Central Excise Act, 1944 and / or the rules made there under and / or any other law for the time being in force."

2.1 For ease of reference we are referring henceforth in this order to the order-in-original dated 30.11.2015.

2.2 Appellants are engaged in the manufacture of various types of excisable goods viz. "Boilers, Thermo Fluid Heater, Hot Water Generator, Economiser Super Heater, Vapour Absorption Heat Pump, etc." falling under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as the CETA, 1985).

2.3 Appellant cleared excisable goods viz. Boilers, falling under Chapter No.84 of the CETA, 1985, in CKD condition as per the Contract value, executed between the Noticees and the buyer. As per the said Contract, value of the goods include the costs of drawing and designing, manufacture up-to their Installation and Commissioning and also the costs of its essential spares, bought out items/parts. As such, the sale/transaction is completed only after successful Commissioning of Boilers.

2.4 On scrutiny of the records for the period from July 2000 to March 2015, it was observed that appellant executed various composite Contracts for sale of the above said excisable goods, which include Erection & Commissioning of the Boilers, at customer's site. In process appellants not only supplied their own manufactured goods in CKD condition on which they paid Central Excise duty, but also procured various essential spares, bought out items / parts from various suppliers /vendor manufacturers. Without the procurement of the above said

spares, bought out items/ parts, the entire Erection/Installation/Commissioning of the Boilers is incomplete. The sale of goods are completed only on Commissioning of these Machines & Equipment at buyer's works / site, as per the terms of Purchase Order / Contract.

2.5 However, while determining the transaction value of the excisable goods, these elements were not taken into account, as required under Section 4(1) (a) of the Central Excise Act, 1944 (w.e.f. 01-07-2000) read with Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

2.6 As per the Section 4(1) (a) of the CEA, 1944, the duty of excise is chargeable on any excisable goods with reference to their value. On each removal of the goods, such value shall, in case, where the goods are sold, for delivery at the time and place of removal, and the appellant and the buyer of the goods are not related and price is the sole consideration for the sale, be the transaction value. Transaction value means the price actually paid or payable for the goods when sold and includes in addition to the amount charged as price, any amount that buyer is liable to pay by reason of, or in connection with the sale.

2.7 During the period from July 2000 to March, 2004, appellant had willfully suppressed the transaction value with an intention to evade duty of the finished goods by not adding the cost of essential spares/bought out parts, charges of Erection, Installation and Commissioning etc. Therefore the provisions of Section 11A(1), Section 11AB and Section 11AC of the CEA, 1944 read with Rule 173 Q of the erstwhile Central Excise Rules, 1944, Rule 25 of Central Excise Rules (no.2) Rules 2001 /Rules, 2002 as the case may be are invocable in this case for demanding the Central Excise Duty/CENVAT duty, for the extended period from July 2000 to March 2004 along with interest and penalty respectively, and for the period April 2004 to March,2015, the provisions of Section 11A(1)/ 11A(1)(a), Section 11AB/ 11AA as applicable during the relevant period, and Rule 25 of Central Excise Rules, 2002 are invocable in these cases for demanding the Central Excise duty/CENVAT duty, along with interest and penalty respectively.

2.8 CESTAT vide Order No. A/34- 35/WB/2005/C-I, dated 14-01-2005, in the case of appellant themselves, on the similar issue have already decided in Para 11 (b) that "The value of Bought Out items received at site and used in the Erection of Boilers have to be added to the assessable value of the Boilers".

2.9 Hon'ble Supreme Court vide its Order dated 08-05-2015 arising out of the above mentioned CESTAT's Order dated 14-01-2005 has decreed that if there is no demand of duty in respect of bought-out items in the relevant Show Cause Notices the direction contained in para-10 and 11(b) of the impugned order of the Tribunal to the jurisdictional officer, to determine and recover the duty from the appellant shall have to go. However, it is only if the officer is satisfied that no demand was made in respect of aforesaid items while computing the demand. It therefore implies that the Hon'ble Supreme Court vide the above referred Order has not decreed that the value of the bought-out items is not to be included in the assessable value of the Boilers for payment of duty.

2.10 Thus appellant contravened the provisions of Rule 4, Rule 5, Rule 6, and Rule 8 of the Central Excise Rules, 2002, inasmuch as they failed to include, the value of essential spares/bought out items/parts, supplied directly at various sites for Erection of excisable goods i.e. Boilers, in the transaction value of Boilers manufactured and supplied by them, during the period from July 2000 to March,2015 as required under Section 4(1)(b)/4(1)(a) of the CEA, 1944 read with Rule 6 of the Valuation Rules, 2000 and failed to pay appropriate duty on the same.

2.11 The duty short-paid totally amounting to Rs. 878,26,68,076/- is liable to be recovered from the Noticees along with interest in terms of the provisions of Section 11A(1)/11A(1)(a)/11A read with Section 11AB/11 AA of the CEA, 1944, as applicable during the relevant period. It further appears that by the aforesaid acts of omission & commission, the Noticees have rendered themselves liable for penalty under erstwhile Rule 173Q/25/25(1)(d) of the Central Excise (No.2) Central Excise Rules, 2001/2002, as applicable during the relevant period.

2.12 Following Show Cause-cum-Demand Notices (SCNs) were issued to the appellant

SCN	Period	Duty
SCN To TBL Chinchwad		
07.04.2005	July 2000 to March 2004	38,46,40,385/-
03.05.2005	April 2004 to Sept 2004	6,92,67,198/-
26.10.2005	Oct 2004 to March 2005	3,04,76,936/-
10.03.2006	April 2005 to Sept 2005	1,88,72,158/-
13.10.2006	Oct 2005 to March 2006	13,51,69,094/-
SCN To TL Chinchwad		
07.04.2005	July 2000 to March 2004	53,98,98,850/-
03.05.2005	April 2004 to Sept 2004	7,94,00,954/-
26.10.2005	Oct 2004 to March 2005	12,21,67,399/-
10.03.2006	April 2005 to Sept 2005	15,08,01,859/-
12.10.2006	Oct 2005 to March 2006	13,85,71,105/-
06.03.2007	April 2006 to Sept 2006	13,31,67,391/-
24.10.2007	Oct 2006 to March 2007	33,35,99,461/-
05.05.2008	April 2007 to Sept 2007	55,42,50,086/-
21.11.2008	Oct 2007 to March 2008	64,69,20,237/-
21.04.2010	April 2008 to Sept 2008	60,56,55,000/-
22.09.2009	Oct 2008 to March 2009	61,32,39,153/-
23.02.2010	April 2009 to Sept 2009	19,99,56,613/-
16.09.2010	Oct 2009 to March 2010	29,17,08,019/-
09.03.2011	April 2010 to Sept 2010	35,38,61,665/-
24.10.2011	Oct 2010 to March 2011	36,75,70,858/-
19.01.2012	April 2011 to Sept 2011	36,31,85,452/-
31.05.2012	Oct 2011 to March 2012	45,54,80,386/-
05.04.2013	April 2012 to Sept 2012	30,58,77,855/-
17.10.2013	Oct 2012 to March 2013	23,45,39,505/-
01.05.2014	April 2013 to Sept 2013	15,41,90,646/-
30.10.2014	Oct 2013 to March 2014	33,04,42,026/-
20.04.2015	April 2014 to Sept 2014	38,24,88,438/-
15.09.2015	Oct 2014 to March 2015	78,72,69,339/-
25.04.2016	01-04-2015 to 30.09.2015	61,27,05,237/-
16-10-2017	01-10-2015 to 31-03-2017	46,28,15,422/-
SCN to Pollution Control Division		
24-10-2007	01-10-2006 to 31-03-2007	7,96,44,215/-
05-05-2008	01-04-2007 to 30-09-2007	6,83,51,789/-
19-12-2008	01-10-2007 to 31-03-2008	7,42,47,158/-
24-04-2009	01-04-2008 to 30-09-2008	14,25,17,000/-
25-09-2009	01-10-2008 to 31-03-2009	7,18,55,163/-
24-02-2010	01-04-2009 to 30-09-2009	2,18,25,050/-
16-09-2010	01-10-2009 to 31-03-2010	6,64,57,178/-
09-03-2011	01-04-2010 to 30-09-2010	2,60,10,754/-
24-10-2011	01-10-2010 to 31-03-2011	2,89,84,712/-
18-01-2012	01-04-2011 to 30-09-2011	5,87,91,894/-
20-09-2012	01-10-2011 to 31-03-2012	8,00,14,023/-
05-04-2013	01-04-2012 to 30-09-2013	1,85,58,660/-

2.13 By the said show cause notices appellants were called upon to show cause as to why:

- (i) *The value of spares/essential bought out items/parts & charges of Erection & Commissioning totally*

amounting to Rs.6971,14,65,862/- (Rupees Six Thousand Nine Hundred Seventy One Crores, Fourteen Lakhs, Sixty Five Thousand, Eight Hundred and Sixty Two Only) should not be included in the transaction value / assessable value of Boilers, manufactured and supplied by them during the period from July,2000 to March, 2015, as required under Section 4(1)(b)/4(1)(a) of the Central Excise Act, 1944 read with Rule 6 of the Valuation Rules, 2000, as applicable during the relevant period;

- (ii) Central Excise duty totally amounting to Rs.878,26,68,076/- (Rupees Eight Hundred Seventy Eight Crores, Twenty Six Lakhs, Sixty Eight Thousand, Seventy Six Only), short-paid by them on the said value of spares/essential bought out /parts and charges of Erection & Commissioning should not be demanded and recovered from them, under Section 11A(1)/11A (1) (a) of the Central Excise Act, 1944 as applicable during the relevant period;*
- (iii) Interest should not be demanded and recovered from them, on the amount of duty short-paid by the Noticees, as demanded in para (ii) above, as specified under Section 11AB/11AA of the Central Excise Act, 1944 as applicable during the relevant period;*
- (iv) Penalty should not be imposed upon them under Rule 173Q/25/25 (1)(d) of erstwhile Central Excise Rules, 1944,the Central Excise (No.2) Central Excise Rules, 2001/ 2002, as applicable during the relevant period.*

2.14 These show cause notices have been adjudicated by the impugned orders. Aggrieved appellant have filed these appeals.

3.1 We have heard Shri V Sridharan, Senior Advocate along with Shri Rajesh Ostwal and Shri Saurabh Bhise, Advocates for the appellant and Shri C Dhanasekaran, Special Counsel for the revenue.

3.2 Arguing for the appellant learned counsel submits-

- Excise duty can be charged only if an activity amounts to manufacture under the provisions of the Central Excise Act and in present case, activity of erection and commissioning undertaken at the customers' site does not amount to manufacture.
- Goods must be assessed in the condition in which they are removed from the factory.
 - Reliance Textile Industries Ltd. [1993 (63) ELT 67 (Bom.)];
 - E. Merck (India) Pvt. Ltd. [1983 ECR 662]
 - Indian Oil Corporation Ltd. {1987 (27) ELT 482 (T.)}
- Levy of excise duty is linked to the place of manufacture in situations involving availability of area-based exemptions or exemption under Notification No. 67/95-CE.
- In any case, boiler erected at site of customer emerges in immovable form and does not fulfil test of excisability.- Triveni Engineering & Industries [2000 (120) ELT 273 (S.C.)] and Order No. 58/1/2002-CX dated 15.1.2002 issued by the Board.
- Without prejudice, even if it is assumed that boiler when erected along with bought out items emerges as an excisable good, the same attracts exemption from whole of duty in terms of Notification No. 67/95-CE.
 - a) S S Engineer 2019-TIOL-1124-CESTAT-MUM
 - Thermal Systems Pvt. Ltd. 2019 (3) TMI 787 - CESTAT HYDERABAD
 - Cheema Boilers Ltd. 2018 (362) ELT 268 (T)
 - Thermax Surface Coating Ltd. 2002 (145) ELT 356 (T.)
 - Triveni Engineering & Indus. Ltd. 2001 (136) ELT 617 (T.) Affirmed by Supreme Court at 2002 (139) ELT A310 (S.C.)
 - Isgec Covema Ltd. 2002 (147) ELT 368 (T.)
 - Newton Engg. & Construction Co. 2004 (176) ELT 684 (T.)
 - Asea Brown Boveri Ltd. 2003 (154) ELT 493 (T.)
 - Elcon Clipsal India Ltd. Vs. CCE 2002 (146) ELT 360 (T.)
 - SAIL Vs. CCE 2016 (334) ELT 661 (T.)

- Even if it is assumed that erection, commissioning & installation of boiler / other equipment at the customer's site amounts to manufacture, excisability of the same cannot be determined by Pune-I / Pune-II Commissionerate.
 - Silson India Pvt. Ltd. 2006 (194) ELT 37 (T.);
 - Madras Power Supplies 2002 (149) ELT 369 (T.);
 - I.T.I. Equatorial Satcom Ltd. 2001 (136) ELT 156 (T.);
 - L & T Ltd. – 2006 (195) ELT 116 (T.);
 - Jeetex Engineering Ltd. – 2001 (130) ELT 801 (T.);
 - Jupiter Enterprises 2014 (314) ELT 301 (T.)
- Pursuant to Order passed by Supreme Court, portion of Tribunal's Order relating to valuation was set aside. In any case, Revenue cannot place reliance on the Tribunal's Order without adjudicating original 3 SCNs remanded by the Supreme Court. Revenue in the original 3 SCNs did not include value of bought out items while computing demand.
- Predominantly, decisions have taken a view that value of bought out items is not includible.
 - S S Engineer 2019-TIOL-1124-CESTAT-MUM
 - Thermal Systems Pvt. Ltd. 2019 (3) TMI 787-CESTAT HYDERABAD
 - Cheema Boilers Ltd. Vs. CCE 2018 (362) ELT 268 (T.)
 - Fuse Base Eltoro Ltd. 2000 (116) ELT 279 (T.)
 - Radiant Electronics Ltd. 1996 (85) ELT 102 (T.)
 - Statfield Systems (Coating) Pvt. Ltd. 1996 (87) ELT 510 (T.)
 - Eicher Tractors 2001 (127) ELT 846 (T.)
 - Cimmco Birla Ltd. 2003 (156) ELT 1019 (T.)
 - Goetze (India) Ltd. 2004 (169) ELT 274 (T.)
 - Milestone Aluminium Co. Pvt. Ltd. 2007 (214) ELT 417 (T.)
 - Kerala State Electronic Dev. Corpn. 2008 (224) ELT 88 (T.)
 - Greysham & Co. Vs. CCE 2014 (304) ELT 129 (T.)

- Brew Force Machines Pvt. Ltd. 2016 (333) ELT 468 (T)
 - Honeywell Automation India 2017 (347) ELT 117 (T.)
 - India Tube Mills & Metal Industries 2017 (353) ELT 353 (T.)
 - Intech Surface Coating 2017 (12) TMI 283 - CESTAT MUMBAI
 - Friction Materials 1996 (86) ELT 685 (T.)
 - Voltas Ltd. 2006 (196) ELT 358 (T.)
 - Super Electronics 2001 (127) ELT 302 (T.)
 - Supercold Refrigeration Systems Pvt. Ltd. 2005 (191) ELT 379 (T.) Affirmed by Supreme Court at 2006 (193) ELT A23 (S.C.)
 - Tycon Automation Pvt. Ltd. 2017 (357) ELT 861 (T.)
 - Emco Ltd. 2018 (7) TMI 1712 - CESTAT AHMEDABAD
 - Unitech Power Transmission Ltd. 2018 (4) TMI 902 - CESTAT MUMBAI
 - Godrej & Boyce Mfg. Co. Ltd. 2017 (4) TMI 1217 - CESTAT CHENNAI
 - Bharat Heavy Electricals Ltd. 2001 (133) ELT 584 (T.)
 - Kerala State Electronics Dev. Corpn. Ltd. 2004 (171) ELT 281 (T.) Affirmed by Supreme Court at 2006 (199) ELT A130 (S.C.)
 - Electronics & Controls Power Systems P. Ltd. 2011 (263) ELT 126 (T.)
 - T & I Ltd. 2011 (266) ELT 414 (T.)
 - Dalal Mckenna Pvt. Ltd. 2014 (300) ELT 259 (T.)
 - Siemens Ltd 2002 (150) ELT 422 (T.) Affirmed by Supreme Court at 2003 (158) ELT A74 (S.C.)
 - WPIL Ltd. 2022 (3) TMI 1255 - CESTAT ALLAHABAD
 - J. Sons & Company Ltd. 19 2019 (8) TMI 955 - CESTAT ALLAHABAD
 - Babubhai Narottamdas & Co. Vs. CCE 2019 (8) TMI 256 - CESTAT MUMBAI
- Burden of proof is on Revenue to establish that the bought out items are essential for functioning of Boiler.

- Without prejudice to above, boiler cleared from factory of the appellants is a complete boiler removed in unassembled form.
- Without prejudice to above, bought out items were not essential to functioning of boiler / other equipment. Therefore, their value cannot be included in value of boilers / other equipment.
- It is already settled that value of bought out items cleared directly to site of customer for heat pump shall not be includible in assessable value of heat pump.
- Impugned orders travelled beyond scope of the show cause notices.
- Without prejudice to the above, the appellants are eligible to claim cenvat credit of tax paid on bought out items received at site of customer.- MIL India Ltd. 2007 (210) ELT 188 (S.C.).
- In any case, cum-duty benefit must be granted.
 - Meghdoot Gramoudyog Sewa Sansthan 2014 (312) ELT 699 (T)
 - Hi-Line Pens Ltd. 2017 (5) GSTL 423 (T.)
 - Samyu Glass Pvt. Ltd. 2017 (6) GSTL 330 (T.)
- For first two show cause notices dated 7.4.2005, suppression of facts with intent to evade payment of duty cannot be alleged on part of the appellants.
- Imposition of penalty is incorrect.

3.3 Arguing for the revenue learned special counsel while reiterating the findings recorded in the impugned order submits that-

- The common issue in these 4 Appeals is whether the value of bought-out items received at the site and used in the erection of boilers are liable to be added to the assessable value of boilers under the Central Excise Act.
- Issue has been decided by CESTAT's (2005 (182) ELT 336 (T) in their own case, which was affirmed by the Hon'ble Supreme Court of India (2015 (320) ELT 32 S.C).
- Revenue established that the brought-out items are essential for the Erection and Commissioning of the

boiler in terms of the turnkey contract. Moreover, the turnkey contract does not specify any bought-out items. It only indicates the specification of the boiler to be designed and manufactured. The entire responsibility of designing, Manufacture, supply, erection, installations and commissioning are solely cast on the appellant. The vendor's manufacturers are in no way concerned with the customer who has placed the order for the Design, Manufacture, supply, Installation and Commissioning of the concerned the boiler. The vendors receive their payments from the appellant only and never from the customers.

- The case of the revenue is not centred on the status of an emergent product on the eve of post-installation and erection at the site of the customer. The case of the revenue is based on the Excisable status of the goods manufactured and cleared to the site of Erection under their terms and the condition of the turnkey contract agreed upon with the customer. It, therefore, follows that whether the boiler erected at the site is movable or not is immaterial and has no bearing upon the sustainability of the duty demanded in the subject notices.
- Even though The appellant's vendors supply various items directly to the appellant's Customer's site on payment of central excise duty. The appellant charges their customer differently. Revenue has undertaken data analysis based on a few Commercial invoices of their vendors and the appellant's tax invoice issued to their customer. The analysis clearly indicates that vendors have charged a lesser amount. In their commercial invoice, the appellant charged a very high amount to their customers which escaped from the levy of Central excise duty. This is a clear case of undervaluation and short payment of duty on complete boilers supplied under the terms and conditions of the agreed-upon turnkey contract. Moreover, the contract agreed upon does not specify any bought-out items.

- The appellant gives a warranty up to 18 months from the date of successful commissioning of the boiler which includes not only boiler components manufactured and supplied from their factory but also vendor-supplied components direct to the site and used in the assembly of the final boiler. This warranty charges are not separately recovered from their customers. It, therefore, follows that the contract value agreed includes such warranty obligations. It is settled law that warranty charges on the manufactured goods supplied are includible in its accessible value.
- The appellant claimed Exemption from duty in terms of Notification No 67 /95-CE. The Order in Original clearly indicate that Bought items are essentially required for the erection, commissioning and installation of the boiler at the site of the customer and without which the boiler cannot be commissioned and hence cannot be functional. The case of the revenue is not centred on the status of the emergent product on the eve of post-installation and the erection at the site of the customer. The case of the revenue is based on the excisable status of goods manufactured and cleared to the site of erection under the terms and conditions of the turnkey contract agreed upon with the customer. Therefore the above view expressed by the appellant has no relevance and application in the subject matter.
- It is settled law that. Design and drawing charges incurred in manufacturing should be included in the accessible value of the finished goods for discharging the Central Excise duty payable thereon, It is revealed in most of the contract the appellant have not recovered the design and drawing charges separately from the customers to whom they have manufactured and supplied with the boiler. However, in the subject case, every contract executed by the appellant has the scope of supply which includes design, manufacture, supply, installation, erection and successful Commission of Boilers .Therefore, the overall profit margin loaded and recovered by the appellant from the customer

through tax invoices raised thereon on the so-called bought-out goods used in the assembly of the final boiler at the site should also account for the cost and scope of Design and Drawings of the Goods manufactured at the factory of the appellant and also at the factory of the vendor manufacturers who manufactured and supplied goods to appellant's factory or even direct to boiler installations site as per the instructions of the appellant for assembly of Boiler under a turnkey contract.

- The appellant company is located within the jurisdiction of Pune- 1 Commissionerate. The adjudication of all the Show Cause Notices is within the competence and jurisdiction of the Principal Commissioner, Central Excise Pune - 1 Commissionerate. There is no legal infirmity in this regard.
- Interest the interest is rightly invoked against the appellant. Since the demand for Tax has been upheld the demand for interest will follow. It is now settled law that interest under Section 11AA / AB was for the delay in the payment of tax from the date when it was due. the Appellant has failed to determine the correct assessable value and pay the appropriate amount of duty by the due date. Accordingly, the interest demanded cannot be faulted.
- The extended period was rightly invoked by the Adjudicating Authority for the following reasons. It is clearly established that the Appellant failed to include the value of bought-out items into the value of boilers / Pollution Control Equipment during the period with the intent to evade payment of duty and contravened relevant provisions of the Act and Rules made thereunder. The case of the revenue is that the appellant has contravened the provision of Rule 4, Rule 5, Rule 6, and Rule 8 of Central Excise Rules 2002 in as much as they failed to include the value of essential spare/bought out items / parts supplied directly at the various site for the erection of excisable goods, namely boilers in the transaction value of boilers manufactured

and supplied by them during this period. Had the department not detected non-payment of Duty by the Appellant, it would have gone unnoticed and caused a huge loss of revenue to the Government exchequer. The delinquency on the part of the Appellant stands proved. They cannot be absolved of their statutory liabilities.

- Penalty under Rule 25(1)(d) of Central Excise Rules, 2002 read with Section 11 AC of CEA, 1944.
- Reliance is placed on the following decisions:
 - Thermax Bobcock & Wilcox Ltd. - 2005 (182) ELT 336 (T)
 - Thermax Bobcock & Wilcox Ltd. 2015 (320) ELT 32 (S.C)
 - Baroda Machinery Manufacturer 1997 (91) ELT 88 (T)
 - Star Industrial & Textile Enterprises Ltd. 2003 (156) ELT 418 (T)
 - Lipi Boilers Industries Ltd. 2011 (263) ELT 271 (T)
 - Thermax Ltd. 2016 (337) ELT 456 (Tri. - Mumbai)
 - Air Control & Chem. Engg. Co. I td. 1996 (88) ELT 718 (T)
 - Mittal Engg. Works 2001 (136) ELT 311 (Tri. - Del)
 - Sirpur Paper Mills Ltd. 1998 (97) ELT 3 (S.C.)
 - Walchandnagar Industries Ltd. 2014 (311) ELT 274 (Tri. - Mumbai)
 - MEK Slotted Angles (India) Ltd. 2004 (178) ELT 948 (Tri. - Mumbai)

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

4.2 In relevant paragraphs of the impugned order dated 30.11.2015 are reproduced as below:

"17.00 IN THE FACTS AND CIRCUMSTANCES OF THE CASE THE RELEVANCY OF FINAL SETTLEMENT OF CLASSIFICATION DISPUTE BY THE APEX COURT CLASSIFYING 'BOILERS' MANUFACTURED AT FACTORY OF THE NOTICEES AS 'INCOMPLETE 'BOILER' CLEARED IN

UNASSEMBLED FORM" UNDER CHAPTER SUB-HEADING NO. 8402.10 OF THE CETA,1985.

17.01 Briefly the facts are that the Noticee is engaged in the manufacture of Boilers of huge sizes. He enters into turnkey Contract for the design, manufacture, supply, Erection & Commissioning of such Boilers. The pressure parts of such Boilers are manufactured in the Noticee's factory. Some parts are manufactured at the Noticee's vendors premise and brought to his factory. The parts which are manufactured by the respondents and the ones that are brought to the factory are cleared together. The Noticee clears these parts classifying them under Chapter Sub-heading No. 8402.10 of CETA applicable to Boilers on payment of duty.

17.02 The following parts of the Boilers are manufactured and cleared by the Noticee classifying them as Boilers:

(a) Pressure parts of Boiler consisting of steam drum, water drum and membrane panel, ducting module, evaporator etc. (b) Economiser; (c) Super heater; (d) Heat recovery unit; (e) Structural items like ladders, chimneys and other items for holding the Boiler; (f) Pipes and tubes; (g) Flexible tubings.

The Noticee receive certain parts of Boilers, such as;

(a) Feed water pumps; (b) Fans; (c) Safety Valves; (d) Level gauges; (e) process Valves; (f) Soot blowers; (g) Instruments; (h) L.P. & H.P. Dosing; (i) Dust collector; (i) OPH Unit and (k) Motors, directly at site of Erection. The above said parts are so called bought out items by the Noticee.

17.03 The classification of pressure and non-pressure parts cleared from the factory are incomplete Boilers removed in unassembled form and are therefore classifiable under S.H.N.8402.10 as Boilers as has been settled by the Apex Court in their own case [2015- TIOL-125-SC-CX.]

The Honourable CESTAT in their own case Commissioner of C.Ex. Pune-I Vs.M/s Thermax Babcock & Wilcox Ltd [2005(182)E.L.T. 336(Tri,Mumbai)] in para -6(a) of the Order observed as under:

"(a) Whether the goods as cleared by the respondent is classifiable as Boilers under sub-heading 8402.10:

We observe that the HSN explanatory note at page 1240 under heading 84.02 says that economizers, air pre-heaters, super-heaters, de-super-heaters steam receivers, steam accumulators, soot removers, water tube, fire-box walls, and other apparatus of accumulation etc. are auxiliary item supplied along with the Boilers These auxiliary item increase or regulate the output of a Boiler or its efficiency. But the expert, whose opinion the Commissioner took into consideration, opines that economizer, super heater and heat recovery unit are essential parts of a Boiler. This opinion therefore is at variance to that extent with what is stated in the explanatory note referred to above. But we still hold that this variance in opinions expressed, does not alter the fact that the parts of Boilers as cleared by the respondents, do constitute an incomplete Boiler in an unassembled form. The facts as come out clearly indicate that the essential parts of Boilers are cleared from the factory as it is not possible to clear a complete Boiler in one go. Even when one considers that some of the parts removed from the factory are of auxiliary nature, one has to agree that an incomplete Boiler in unassembled form is cleared. That the Boiler in unassembled form is removed in several lots on different dates itself does not mean that parts but not the whole are cleared from the factory in view of the fact that the respondent has a Contract to erect and commission a Boiler and has been disclosing this fact to the Department.

For the reasons stated above we hold that the parts removed in several consignments is a Boiler in incomplete form and therefore have to be classified under the heading meant for the complete machine, in this case under 8402.10. We uphold the contention of the Commissioner that Rule 2(a) of Interpretative Rules apply to this case."

18.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE WHAT ARE BOUGHT OUT ITEMS AND ARE THEY NECESSARY TO MAKE A BOILER FUNCTIONAL. WHETHER THEIR VALUE HAS TO BE INCLUDED IN THE ASSESSABLE VALUE OF BOILER DESIGNED, MANUFACTURED AND SUPPLIED UNDER THE CONTRACT WITH FURTHER CONTRACTUAL OBLIGATION OF ITS ALLIATION AS WELL AS

SUCCESSFUL COMMISSIONING OF THE BOILER AT CUSTOMER'S SITE.

18.01 The Noticee submits that it is an undisputed fact that the goods cleared from its factory in the CKD condition are Boilers/other equipment's. It is submitted that the CESTAT order has also held that the goods cleared by the Noticee are Boilers and not parts of Boilers. Moreover, it is submitted that the said view of the CESTAT is supported by the HSN Explanatory Notes also. Thus, from the above said Explanatory Note is quite clear that the goods cleared from the factory of the Noticee is a complete Boiler in itself. Thus, it is settled position now that the goods cleared from the factory of the Noticee are complete Boilers/other equipment in themselves. In this regard, it is further submitted that these Boilers/other equipment's are functional even without the accessory bought out items which are dispatched directly to the site of the Customers. Thus, the Noticee claims that bought out items are not an essential part of the Boiler/other equipment's cleared from their factory.

18.02 It is also submitted by the Noticee that each of the bought out item performs only ancillary functions and are therefore, in the nature of accessories only. Further, most of these bought out items are required only for fixation of Boiler at the customers site. Thus, these bought out items are not required to make the Boiler/other equipment's functional, the Boiler/other equipment's cleared from the factory of the Noticee are functional even without these bought out items.

18.03 Accordingly, the Noticee submits that as the bought out items are mere accessories of the Boilers/other equipment and are not required to make the Boiler/other equipment functional, the value of the said bought out items cannot be included in the assessable value of the Boilers/other equipment. Reliance is also placed on the following judicial precedents wherein it has been held by the courts that the value bought out items which are directly sent to the site and which are not essential integral parts of the goods manufactured by the manufacturer cannot be included in the assessable value of the goods manufactured and cleared by the manufacturer:-viz,

- *Shriram Bearings Ltd. v. CCE (1997 (91) ELT 255]*

- *CCE Acer India Limited, 2004 [(172) ELT 289 (SC)]*.
- *BHEL v. CCE (2000 (119) ELT 578 (T))*
- *CCE, Trichy v. M/s Neycer India Ltd. [2015-TIOL-115-SC-CX]*
- *Kerala State Electronic Dev. Corpn. v. C.C., Trivandrum (2008 (224) E.L.T. 88 (Tri. - Bang))*
- *Supercold Refrigeration Systems P Ltd v. CCE (2005 (191) ELT 379 (T) (approved by Hon'ble Supreme Court in 2006 (193) ELT A34)*
- *CCE v. A.Z. Electronics [2001 (134) ELT 689 (T)]*
- *Siemens Ltd. v. CCE[2002 (150) ELT 422 (T)]*
- *Electronics Corp. of India Ltd. v. CCE[2004 (167) ELT 420 (T)]*
- *Super Electronics v. CCE[2001 (127) ELT 302 (T)]*
- *Cimmco Birla Ltd. v. CCE(2003 (156) ELT 1019 (T))*

18.04 Accordingly, in light of the above said judgments, the Noticee submits that as the bought out items supplied directly to the customers site are not essential integral parts of the Boilers and are merely accessories, the value of the said bought out items cannot be included in the assessable value of the Boilers. Further, it is submitted by the Noticee that it a settled position of law that the burden of proof is on the Department to establish its case beyond reasonable doubt and the Department can at no stage make allegation without strong documentary evidences. For this reliance is placed upon the following judicial precedents:

- *Bharat Steel Ltd. v. CCE, New Delhi, [2009 (242) ELT 308 (Tri.)]*
- *Mahesh Kumar Goyel v. CCE, Calcutta-II, (2004 (177) ELT 561 (Tri.))*
- *Lloyds' Metal Engineering Ltd. v. CCE, Mumbai, [2004 (175) ELT 132 (Tri.)]*

The differential duty quantified in the SCNS issued is based on the details of bought out items procured at site directly from the various vendors and while furnishing such information the Noticee found to have made the following categorical declaration from time to time and is reproduced below:

a) It is net value excluding taxes and duties.

b) They have not manufactured any of the Bought Cut items under reference nor carried out any process on such Bought Out items. The goods were re-sold out and out directly from supplier to customer.

c) These goods have suffered excise duty as applicable in the hands of respective manufactures and therefore, question of charging excise duty for second time on the same bought out goods does not arise.

d) Bought Out items were neither received in their factory nor have they claimed any CENVAT credit on the said goods.

In view of the above circumstances, the Noticee claimed that they were not liable to pay excise duty on the Bought Out items.

18.05 The scrutiny of information supplied by the Noticee reveals the List of common / standard Brought-out items procured & supplied directly to customer and' is reproduced below:

<i>Sr. No.</i>	<i>Description of Items</i>	<i>Function</i>
<i>1</i>	<i>Fabricated steel structural namely columns, beams, supports, Fuel Bunker, Fuel Silos, Fuel tanks, Canopy, Gangway, pipe rack.</i>	<i>Considering height and heavy weight of Boiler, these structural are required for mounting Boilers on fabricated platform supported by beams, columns etc. Ladders, railings and staircases are required for movement of technicians.</i>
<i>2</i>	<i>Ducting</i>	<i>Required to carry air & gases towards furnace and emit unwanted portion to ESP & chimney.</i>
<i>3</i>	<i>Chimney</i>	<i>Required to emit burned gases at required height.</i>
<i>4</i>	<i>Industrial Fans</i>	<i>To supply the air required for combustion, and emit unwanted portion to ESP & Chimney.</i>
<i>5</i>	<i>Pollution Control System (ESP)</i>	<i>To control air pollution from flue gases coming out of Boiler.</i>
<i>6</i>	<i>Feed Water Pump</i>	<i>The function of the pumps is to continuously pump water in the Boiler which is continuously heated and converted into steam.</i>
<i>7</i>	<i>Control Valves</i>	<i>To regulate and control quantum of water, steam, air flow etc. as</i>

		<i>per requirement.</i>
8	<i>Piping</i>	<i>Carry water for supply to Boiler and subsequent piping for distribution of steam.</i>
9	<i>Instrumentation</i>	<i>Automation and control of steam generating plant operating processes and safety</i>
10	<i>Pressure gauges</i>	<i>Indication the pressures level at various part of the steam generating plant.</i>
11	<i>All type of Valves</i>	<i>Safeguard the steam generating plant from over pressurizing during operation & avoid accidents. These are fitted on various places at steam generating plant.</i>
12	<i>Secondary Air System</i>	<i>Air flow to control the furnace temperature at desired level, during Boiler operation.</i>

18.06 From the functions of each Bought Out items as enumerated above it is clear that the Boilers cannot be Erected and Commissioned as per the terms and conditions of the turnkey Contract agreed upon by the Noticee with the customers unless such essential parts are also delivered at the site of Boiler assembly. For example, 'Feed water pump' -It is essential to continuously pump water in the Boiler where water is continuously heated and converted into steam. If there is no provision for feeding of water into Boiler, the generation of steam from it does not arise and hence without 'feed water pump' the very purpose of installation of Boiler in an Industry to generate steam itself is defeated. Similarly parts like 'Instrumentation', 'Piping', 'Pressure gauges', 'Control Valves' 'Secondary Air System' 'Ducting', 'Chimny', 'Pollution Control system' etc are also very much essential as most of the Boilers manufactured and supplied by the Noticee are High Pressure Boilers working at very high temperature and hence in order to regulate and control stem pressure & temperature so as to operate Boilers safely and to avoid accidental explosions and ensuring industrial safety. As evident from a representative sample of P.O./turnkey Contract say, the Noticee was awarded with a contract of Design, Manufacture, Supply, Install, Erect and Commission of 22 TPH steam generator, it would arrange to

manufacture Boiler as per Design and specifications of the turnkey Contract and supply all essential parts in CKD condition to the Boiler assembly site, some from its own factory and others from vendors factory and undertake the Installation and Erection work as agreed upon. After completion of Installation & Erection of Boiler the Noticee would operationalize the Boiler and show to the customer steam generation from it @ 22 Metric Ton of Steam per Hour consistently at the desired pressure as specified in the turnkey Contract agreed upon with its customer and from this date of successful Commissioning it gives the Performance Gurantee of the Boiler for 12 Months .Only after satisfactory operation of Boiler throughout the Guarantee period the customer would release 10% of Retention Money kept for the purpose as last payment towards the total Contract Value agreed upon with the Noticee.

18.07 If these Bought Out items are not essential parts of Boilers then why they were supplied to Boilers assembly site by the Noticee even though there was no separate orders placed on them for the same. The submissions made by the Noticee in this proceedings does not account for and answer this crucial and important question. The turnkey contract agreed upon does not specify any bought out items. It only indicates specifications of Boiler to be Designed and Manufactured. The entire responsibility of Designing, Manufacture, Supply, Erect, Install and Commission are solely cast on the Noticee. Accordingly, the Noticee have to design not only Boiler parts to be manufactured at their own factory but also other parts if they wish to get it manufactured by sub-contracting the work to other vendor manufacturers. The Notice also have to make drawings of General layout of Boiler to be installed and its piping layout and also process drawings of individual equipments and parts to be manufacture as per specifications of Boilers to be manufactured. Industrial requirement of Each Boiler and its utility vary from industry to industry and depending upon its capacity to produce steam etc design of the same vary and therefore each Boiler is tailor made to the requirement. None of its parts are freely available in market and they have to be manufactured as per the Design/Boiler specifications and supplied to Boiler assembly site.

18.08 In view of the above facts and circumstances of the

present case it is revealed that the stand taken by the Revenue that subject Bought Out Goods are very much essential and integral part of the Boilers to make it functional and it is settled Law in the case of the Noticee itself that what is manufactured and cleared from their factory to Boiler assembly site is an incomplete Boiler cleared in unassembled state and is classifiable as Boiler under Sub-Heading No. 8402.10 of the CETA, 1985. Whereas, in the various judgments cited by the Noticee in support of their contention, it has been held by the courts that the value bought out items which are directly sent to the site and which are not essential integral parts of the goods manufactured by the manufacturer cannot be included in the assessable value of the goods manufactured and cleared by the manufacturer. Thus all above listed judgments relied upon by the Noticee are clearly distinguished and not applicable to the facts and circumstances of the present case and hence they need not be discussed further.

19.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE THE NOTICEE'S CLAIM THAT IT IS ALREADY SETTLED THAT THE VALUE OF BOUGHT ITEMS DIRECTLY CLEARED TO THE CUSTOMER'S PREMISES FOR THE ERECTION, COMMISSIONING & INSTALLATION OF HEAT PUMP IS NOT INCLUDIBLE IN THE ASSESSABLE VALUE OF HEAT PUMP MANUFACTURED AND CLEARED BY THE NOTICEE, THEREFORE, THE PROCEEDINGS ARE HIT BY RES JUDICATA, IS CORRECT OR OTHERWISE

19.01 It is submitted by the Noticee that the issue whether the value of bought out items cleared directly to the customer's site for Erection, Commissioning & Installation of Heat

pump is clearly settled in the Noticee's own cases as the Revenue has accepted the decision of Commissioner (A) and has not contended the same before the higher authorities. Therefore, the Department cannot now allege that the value of bought out items is to be included in the assessable value of the Heat pump as the said proceedings are hit by the principle of res judicata. Thus, it is submitted that once a list is set at rest by a decision which has attained finality, re-opening and re-adjudicating the same issue would be barred by the principles of res judicata. In

this regard, it is submitted that it has consistently been held in plethora of judgments that the subsequent proceedings on the same facts as contained in the earlier proceedings which have attained finality, will be hit by the doctrine of res-judicata. In light of the above, it is submitted that the proceedings initiated by the Department in the subsequent SCNS on the Heat pumps is completely perverse and is bound to be dropped as the same are hit by the principle of res judicata.

19.02 The history of the earlier case referred by the notice i.e. Show-cause-notice dated 10.03.1998 with respect to Heat Pump:

19.03 The Noticee was issued SCN dated 10.3.1998 which alleged that the goods cleared from the factory of the Noticee as heat pump is not a heat pump but a part of the air-conditioning & refrigerator equipment's and the value of lithium bromide, bought out items & accessories is required to be included in the assessable value of heat pumps. The said SCN's were adjudicated vide OIO dated 21.08.1998 wherein it was held that the goods cleared from the factory of the Noticee are parts of the air-conditioning & refrigerator equipment's and the demand on inclusion of value of lithium bromide, bought out items & accessories was dropped. The Revenue filed an appeal against this portion of the OIO contending that the value of lithium bromide, bought out items & accessories should be included in the value of the goods cleared from the factory of the Noticee. The said appeal filed by the Revenue was rejected by the Commissioner (Appeals) vide OIA No.P-I/104/99 dated 30.09.1999. Further, the appeal filed by the Noticee against the said OIO was allowed by the Commissioner(Appeals) vide a separate OIA No.P-I/105/99 dated 30.09.1999 wherein it was held that the goods cleared from the factory of Noticee are not parts of air-conditioning & refrigerator equipment's but a complete machine i.e. heat pumps.

19.04 The Revenue again filed an appeal against the said OIA before the Hon'ble CESTAT, however, in the said appeal the Revenue did not raise any allegation with respect to inclusion of the bought out items in the value of the Heat Pump and the said appeal was only against the classification of heat pump &

inclusion of value of lithium bromide in the assessable value of Heat Pump. The Hon'ble Tribunal vide Final Order No. A/35-37/09/EB/C-II dated 22.01.2009 held that the value of the bought out items (Lithium Bromide) is not includible in the value of the complete machine and the goods cleared from the factory of the Noticee are not parts of air-conditioning & refrigerator equipment but complete air-conditioning & refrigerator equipment.

19.05 It is submitted that the Noticee has already filed an appeal before the Supreme Court against the portion of the said order of the CESTAT which is against the Noticee whereby the Tribunal has held that the product in dispute is a refrigerating equipment and not the heat pump. However the issue stands settled that the equipment so cleared by the Noticee is complete in itself and not part of any machine.

19.06 With this back ground the Noticee claims that the issue with respect to inclusion of value of bought out items in the assessable value of Heat pumps cleared from the factory is settled in favour of the them as the Revenue has not contended the same before the higher authorities. In this context it is noticed that the Revenue has demanded duty on Bought Out goods cleared to site of Erection pertaining to not only Boilers but also other Equipments including 'Vapour Absorption Heat Pumps' with effect from July,2000 on wards. However, the Revenue has not included the value of 'Lithium Bromide' one of the Bought Item relating to 'Vapour Absorption Heat Pumps' for calculation of duty demand in these demand Notices on the ground that regular periodical SCN s in respect of 'Lithium Bromide' are issued from time to time. It therefore is a fact that Revenue demanded duty on other low end bought out

..

items of Vapour Absorption Heat Pumps' with effect from July,2000 onwards. Since the Hon'ble CESTAT had ruled in the case of M/s TBL (now became M/s TL) that Bought Out essential parts of Boilers and other equipments cleared to assembly site are includable in assessable value of Boiler, and CESTAT being higher forum than Commissioner Appeals, Revenue might have started issuing these demands including other low end bought

items of Vapour Absorption Heat Pumps' for safe guarding the Government Revenue. Further in their own case of Vapour Absorption Heat Pumps' the issue stands settled that the equipment so cleared by the Noticee is complete in itself and not part of any machine. Therefore value of its bought out items cleared to assembly site is includable in the assessable value of Equipment. In view of these facts and circumstances of the case it is not hit by the principle of res judicata as claimed by the Noticee.

20.00 IN THE FACTS AND CIRCUMSTANCES OF THE AS TO WHETHER THE NOTICEE'S CLAIM THAT THE GOODS HAVE TO BE ASSESSED IN THE CONDITION IN WHICH THEY ARE REMOVED FROM THE FACTORY IS ACCEPTABLE OR OTHERWISE.

20.01 The Noticee submits that in the present case, the Boilers/other equipment manufactured and cleared from the factory of the Noticee are complete in itself and are not in any incomplete form. Therefore, such a Boiler/other equipment can only be taxed in the condition in which it is cleared from the factory and bought out items cannot be covered in it. The Noticee placed reliance on the following case laws in support of their contention.viz,

- *Reliance Textile Industries Ltd. v. UOI – [1993 (63) ELT 67 (Bom)]*
- *E. Merck (India) Pvt. Ltd. v. CCE - [1983 ECR 662]*
- *Indian Oil Corporation Ltd. v. CCE-[1987 (27) ELT 482 (T)],*
- *Sidhartha Tubes Ltd. v. CCE - [2000 (115) ELT 32 (SC)]*
- *Union of India v. J.G. Glass Indus. Ltd. – [1998 (97) ELT 5 (SC)]*

20.02 It is the case of the Revenue that the Bought Out Goods cleared to assembly site through vendors to be included in the assessable value of Boiler supplied to customers under the terms and conditions of turnkey Contracts agreed upon with its customers. Accordingly Boiler parts cleared in CKD condition from their own factory are rightly assessed to duty as incomplete Boiler in unassembled form. Similarly vendors of the Noticee while clearing the manufactured goods to Boiler assembly site of

Noticee's customers have also paid duty as applicable classifying the same under respective headings of individual goods but not as incomplete Boiler in unassembled CKD condition. However, it is noted that these Bought Out items are the Goods required to complement the incomplete Boilers manufactured at the factory of the Noticees and are got manufactured by the Noticees from their vendor manufacturers as per the need of Boiler design agreed to be supplied under a turnkey Contract. So these Bought Out items are essentially tailor made for the 'Boiler' being manufactured at the factory of the Noticee as a part of a turnkey Contract. Further, these Bought out items are normally cleared to the site of Noticee's customer as instructed by the Noticee. For such clearances, the respective vendor manufacturers prepare covering invoice consigned to the Noticee Companies with instruction to deliver the same at the site of Noticee's customer where the Boiler manufactured under a turnkey Contract is being installed and commissioned by the Noticees. The vendor manufacturers are in no way concerned with the customer who has placed the order for Design, Manufacture, Supply, Install and Commission the concerned 'Boiler'. The vendors receive their payments from the Noticees only and never from the customers. The invoice of the vendors accompanying these Bought Out goods to the site of Installation are collected by the site engineers/supervisors of the Noticee and thereafter the Noticee raise their Tax Invoice on the customer for these Bought Out goods delivered at their site by the vendors. The customer makes payment to the Noticee on the basis of such Tax Invoices. Even though these bought items are complementary goods so as to assemble the final Boiler to be supplied under the Contract as yet, for sake of convenience, the Noticee do not receive the same in its factory but they instruct vendors to deliver the same direct to site and hence having not received these Bought Out goods in their factory premise, the Cenvat credit of duty paid thereon by the vendors has not been available to them and hence the same has not been availed by them.

On comparison of vendors invoice with relevant Tax Invoice of the Noticee for the concerned Bought Out goods, it is revealed that the Noticee charge and recover the price from the customer

keeping very high margin which may exceed even 100% of vendors price at times and that too excluding the duty paid by the vendor (which is being reimbursed separately by the customer over and above the commercial price of the goods charged) on these Bought Out goods at the time of removal from its factory. In view of these facts and circumstances the Revenue appeared to have issued the subject duty demands to safe guard Government Revenue from deliberate attempt of under valuation of assessable value for evading/avoiding payment of due duty by the Noticee through the novel modus operandi of duty evasion Accordingly the above mentioned case laws cited by the Noticee are distinguishable from the facts of the present cases.

21.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE IS IT RELEVANT THAT THE ACTIVITY OF ERECTION AND COMMISSIONING UNDERTAKEN AT THE CUSTOMER'S SITE AMOUNT TO MANUFACTURE UNDER THE CENTRAL EXCISE LAWS OR OTHERWISE.

21.01 It is stated by the Noticee that Central Excise duty under the Excise Laws can be charged only if an activity amounts to manufacturing under the provisions of the Central Excise Act and in present case, the activity of Erection & Commissioning undertaken at the customer's site does not amount to manufacture under the Excise Laws. It is submitted by the Noticee that the excise duty under the CEA, 1944 is a duty on manufacture therefore in order to impose duty of excise the incident of manufacture must have taken place. The Noticee submits that it enters into a turnkey Contract for manufacture, Erection & Commissioning of the Boiler with the customers. For the said Contract, the Noticee manufactures and clears the Boiler in CKD condition to the customer's site from its factory and dispatches other ancillary bought out items directly to the customer's site. The Noticee then undertakes the activity of Erection & Commissioning of the Boiler at the customers site. Further, the bought out items are erected on the auxiliary equipment erected at the customer's site. It is submitted that the above said procedure of Erection & Commissioning undertaken by the Noticee at the site of the customer does not amount to manufacturing as it is mere assembly of the Boiler

dispatched in the CKD condition by the Noticee along with the bought out items directly received at the site of customer. As submitted above, the Boiler manufactured & cleared by the Noticee is complete in itself and therefore, the Erection & Commissioning of the Boiler removed in the CKD condition at the customer site along with the bought out items would not amount to manufacturing. For this reliance is placed on the following judicial precedents wherein it has been held that assembly of the SKD or CKD packs at site would not amount to manufacture:

- *Mittal Engineering Works (P) Ltd. v. C.C.E., Meerut [1996 (88) E.L.T. 622 (S.C.)]:*
- *C.C.E., Hyderabad v. Hyderabad Race Club [1996 (88) E.L.T. 633 (S.C.)]*
- *Auto Measurematic Ltd. v. Assistant Collector Of C. Ex., Madras [1997 (96) E.L.T. 14 (S.C.)]*
- *Inconserve v. CCE (2000(120) ELT 638(CEGAT)]*
- *Tata Robins Fraser Ltd. v. CCE (1990 (46) ELT 562 (T)]*
The said decision was maintained by the Apex Court in Collector Vs. Tata Robins Fraser Ltd. [1996 (84) ELT A108 (SC)].

Thus the Noticee contended that the SCN demanding excise duty on the value of the bought out items is incorrect as the process undertaken at the site of customer by using the bought out items does not amount to manufacture under the Act and hence, the same would not be liable to excise duty.

21.02 The case of the Revenue is that that the Noticees have contravened the provisions of Rule 4, Rule 5, Rule 6, and Rule 8 of the Central Excise Rules, 2002 inasmuch as they failed to include, the value of essential spares/bought out items / parts, supplied directly at various sites for Erection of excisable goods i.e. Boilers, in the transaction value of Boilers manufactured and supplied by them, during the period from July 2000 to March, 2015 as required under Section 4(1)(b)/4(1)(a) of the CEA, 1944 read with Rule 6 of the Valuation Rules, 2000 and failed to pay appropriate duty on the same. The Revenue has not sought to demand and recover duty on the Boiler which comes in to existence at the customer's site. Whereas it has sought to demand and recover duty on the Boiler which is manufactured

and cleared in CKD condition as per the terms and conditions of turnkey Contract agreed upon with its customers. The Notice have paid duty on those parts of Boilers manufactured and cleared in CKD condition from their own factory. But they deliberately avoided payment of duty on the other parts of Boilers got manufactured at vendor's end as per the Boiler design approved and agreed to supply under turnkey Contract with the customer, without these parts Boiler cannot be Commissioned. Further in all the subject cases of the Notices turnkey Contracts agreed upon with customers are composite Contracts and the SCOPE OF SUPPLY includes complete design, Engineering, Manufacture and Supply of Boilers as per the required technical specifications. For instance a Boiler cannot be functional without parts such as feed water pump, safety valves, process valves, level gauges, Soot blowers, Dust collector, Motors.etc. It is settled law in their own case that the Noticee had removed Boilers in unassembled form at the factory site. These parts received at site are used in erection of Boilers and are necessary to make Boiler functional. Their value therefore has to be included in the assessable value. In view of these facts and circumstances of the case the Noticee's above contention that since Erection/Commissioning does not amount to manufacture and hence duty cannot be demanded on the bought out items is incorrect and misconceived and accordingly all the judgments cited in support of their contention are accordingly distinguished.

22.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE THE BOILER/OTHER EQUIPMENT ERECTED AT THE SITE OF CUSTOMER EMERGE IN IMMOVABLE FORM AND DOES NOT FULFIL THE TEST OF EXCISABILITY AND IF SO, WHETHER THE SUBJECT DEMAND NOTICES ARE SUSTAINABLE OR OTHERWISE:

22.01 It is submitted by the Noticee that even it is assumed without accepting that the activity of Erection and Commission undertaken at the customer's site amounts to manufacture, then also the excise duty cannot be charged on the same as the Boiler/other equipment after being erected at the site of the customer has emerged into an immovable property. The

Boiler/other equipment after being erected cannot be removed as such to the market, the same has to be dismantled which would cause major damages to the plant. Therefore, the same becomes an immovable property after being erected along with the bought out items at the site of the customer. It is submitted that in order to impose excise duty liability on any Noticees the article in question produced by him must qualify as an excisable goods. Further it is a settled principle of law that in order to qualify as excisable goods the article in question must have emerged as movable goods. It is well-settled by the various judgments of the Supreme Court that in order to levy excise duty on a particular item, it must be proved that the same has been obtained as a result of manufacture and the product should emerge in a marketable condition which would necessarily imply movability of the product. In other words, even if the activity has amounted to manufacture but if the goods have emerged in an immovable condition, no excise duty can be charged on the same. The Noticee supported their claim by citing the judgment of the Supreme Court in the case of Triveni Engineering Works. Hon'ble Supreme Court in the case of Triveni Engineering & Industries Vs. CCE -[2000 (120) ELT 273 (SC)] has held as under;

"14. There can be no doubt that if an article is an immovable property, it cannot be termed as "excisable goods" for purposes of the Act. From a combined reading of the definition of 'immovable property' in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the Excise Law.....

It is also submitted by the Noticee that this position of law as laid down by Hon'ble Supreme Court has also been accepted by the CBEC Circular dated 15.01.2002. Therefore, if an item has emerged in an immovable condition and the same can be removed only after dis-assembling it into various components, no excise duty can be charged on such item.

22.02 Reliance is also placed by the Noticee on the case of Sentinel Rolling Shutters and Engineering Co.(P) Ltd. Vs. CST [1978 (42) STC 409 (SC)] wherein Hon'ble Supreme Court while

considering whether a rolling shutter affixed to the building is an immovable property held that only when the shutter is fixed to the building, the rolling shutter is "born" and it becomes a permanent fixture to the premises. Thus, if an article in dispute is incapable of being shifted from one place to another without first being dismantled into its component, parts then such item is to be treated as immovable.

22.03 Reliance is also placed by the Noticee on the CESTAT decision in the case of BPL Mobile Communication Limited [2006 (198) ELT 216] wherein the CESTAT has held that setting up various components at site to form BTS (Base Transmission System) for telecommunication does not amount to manufacture of any movable goods. The said decision of the CESTAT has been affirmed by the Bombay High Court in the case of CCE vs. Hutchison Max Telecom Private Limited [2008 (224) ELT 191].

22.04 In view of the above, it is contended by the Noticee that the Boiler/other equipment after being erected and installed at the customer site along with other bought out items is not excisable goods and therefore not liable to central excise duty. Thus, the demand proposed by the Department in the SCN is incorrect and without taking into consideration the facts of the present case.

22.05 As already discussed, the case of the Revenue is not centred on the status of emergent product on the eve of post Installation and Erection at site of the customer. The case of the Revenue is based on the excisable status of the Goods manufactured and cleared to site of Erection under the terms and conditions of the turnkey contract agreed upon with the customer. It therefore follows that whether the Boiler erected at site is movable or not is immaterial and has no bearing upon sustainability of the duty demanded in the subject Notices. If the subject bought out goods supplied by the Noticee under turnkey contract are essential parts of Boiler manufactured as per drawing and design of the Boiler to be supplied and erected and are excisable goods as per the Central Excise Law, then as per the said Board's Circular itself, it would be enough to fasten the duty liability on the Noticee. In view of these facts and circumstances of the case the contention of the Noticee is not

tenable and accordingly the judgments cited and Board's Circular referred etc become distinguished and hence are not in support of Noticee's contention.

23.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE THE DECISION OF CESTAT IN THE CASE OF CCE VS. SANMAR WEIGHING SYSTEMS LTD.-[2005 (190) ELT 228 (T)] APPLIES TO THE PRESENT CASE.

23.01 The Noticee placed reliance on the decision of the CESTAT in the case of CCE Vs. Sanmar Weighing Systems Ltd. [2005 (190) ELT 228 (T)]. In that case, Sanmar Weighing Systems Ltd. had entered into Contract with their buyers for supply and Installation of electronic weighing system at customer's site. Sanmar manufactured only certain parts of the said weighing system at their factory and other parts were procured and directly supplied to the customers. The Central Excise Department proposed to demand duty on the entire Contract value of the weighing system installed at the site. The Commissioner of Central Excise dropped the demand and on an appeal filed by the Revenue the CESTAT rejected the appeal. The relevant portion of this decision is as under:-

"This appeal is by the Revenue. The respondents were engaged in the manufacture of electronic truck weighing systems, belt weighing systems, etc., which they used to manufacture for customers like railways, coal industries, cement industries, etc. under turn-key Contracts. Under one such Contract, the respondents, during May 1985 to March 1989, installed an electronic weighing system at the customers' site. This system consisted of weigh-bridge, consoles, load cell, visual display unit, UPS, electrical surge protector and over-speed indicator, among which only consoles/data processors were manufactured by the respondents in their factory and these items were cleared to the customers' site. All other items were purchased by them. The original authority included the value of the bought-out items also in the assessable value of the electronic weighing system and accordingly raised a differential duty demand on the Noticees. This decision was taken in appeal. The Commissioner (Appeals) held

that electronic weighing system, erected at site out of the manufactured and bought-out inputs, was an immovable property and not 'goods' for the purpose of levy of Central Excise duty. He also classified the consoles/data processors under Heading 84.71 [automatic data processing machine] and held that the same were not parts of any weighing machinery. He relied on the Supreme Court's judgment in Mittal Engineering Works (P) Ltd v. CCE - 1996 (88) E.L.T. 622 (SC). Accordingly, Id. Commissioner (Appeals) set aside the demand of duty. Hence this appeal of the Revenue.

2. After examining the records and hearing both sides, we find that the dispute to be resolved is whether the value of the bought-out items is includible in the assessable value of the electronic weighing system. The appellant, apparently, has assumed that the clearance, from the Noticees's factory, of the manufactured and bought-out items amounted to clearance of electronic weighing system in CKD condition for the purpose of levy of duty of excise. The appellant has treated the weighing system as 'goods' recognised under the Central Excise Act, by relying on the Supreme Court's judgment in Sirpur Paper Mills Ltd. v. CCE - 1998 (97) E.L.T. 3 (S.C.). But it is noticed that this view of the Revenue stands rejected by the Central Board of Excise and Customs vide Order No. 58/1/02-CX, dated 15-1-2002 issued by the Board under Section 37B of the Central Excise Act. After taking into account various decisions of the Tribunal as well as judgments of the Supreme Court including those in the cases of Mittal Engineering (supra) and Sirpur Paper Mills (supra), the Board accepted the legal position that, when the final product was considered as immovable and hence not excisable goods, the same in CKD or unassembled form would also not be dutiable as a whole by applying Rule 2(a) of the Rules of Interpretation of the Central Excise Tariff, though components, inputs and parts, which were specified excisable products, would remain dutiable as such identifiable goods at the time of their clearance from the factory. We find that the impugned order of Id.

Commissioner (Appeals) holding the electronic weighing system to be a non-excisable immovable property, while holding the consoles/data processors to be excisable as automatic data processing machines under Heading 84.71, is quite in keeping with the correct view taken by the Board in its order dated 15-1-2002.

3.In the result, the Revenue's appeal stands dismissed.

23.02 The Noticee states that the above decision squarely applies to the present case since in the present case also they had manufactured certain goods at their factory and procured and directly supplied certain other goods to the sites of the customers. The case of the department in the present case is also that the Erection & Commissioning of these goods at the sites resulted in emergence of Boilers or other equipment and therefore the common proposal in the Show Cause Notices is to demand duty on the value of bought out items and Erection & Commissioning charges. In view of the above decision of the CESTAT, the proposal made in these Show Cause Notices is liable to be dropped.

23.03 It is settle law in the Noticee's own case that Erection and Commissioning does not amount to manufacture and duty demanded thereon is not sustainable. It is also settled law in their own case that the Noticee had removed Boilers in unassembled form at the factory site. The Apex Court finally settled classification dispute by classifying 'boilers' manufactured at factory of the Noticees as "incomplete 'boiler' cleared in unassembled form" under Chapter sub-heading No. 8402.10 of the CETA, 1985. These parts received at site are used in erection of Boilers and are necessary to make Boiler functional. Their value therefore has to be included in the assessable value. In view of these facts and circumstances of the case the Noticee's above contention that duty cannot be demanded on the bought out items as is in the case cited above is incorrect and misconceived and accordingly the judgment cited in support of their contention is accordingly distinguished.

24.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE EVEN IF IT IS ASSUMED THAT THE BOILER/OTHER EQUIPMENT WHEN ERECTED ALONG WITH

BOUGHT OUT ITEMS HAS EMERGED AS AN EXCISABLE GOODS, THE SAME ATTRACTS EXEMPTION FROM WHOLE OF THE DUTY IN TERMS OF NOTIFICATION NO. 67/95-CE.

24.01 It is submitted by the Noticee that even if it is assumed that the Boiler/other equipment as erected by the Noticee at its customers site amounts to an excisable goods the same emerges in the nature of a capital goods which further has been captively consumed. Hence, the Boiler/other equipment as erected attract exemption from whole of the duty in terms of Notification No. 67/95-CE.

24.02 On perusal of the Detailed Design & Drawings (GA and PI Map) it reveals that the bought out items are essentially required for the Erection, Commissioning & Installation of the Boilers at the site of the customer and without which the Boiler cannot be Commissioned and hence cannot be functional.

24.03 As already discussed, the case of the Revenue is not centred on the status of emergent product on the eve of post Installation and Erection at site of the customer. The case of the Revenue is based on the excisable status of the Goods manufactured and cleared to site of Erection under the terms and conditions of the turnkey contract agreed upon with the customer. It is revealed that the Notice issued by the Revenue intends to demand and recover duty on the Boilers before its erection. Therefore the above view expressed by the Noticee has no relevance and application in the subject matter.

25.00 WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE EVEN IF IT IS ASSUMED THAT ERECTION, COMMISSIONING & INSTALLATION OF BOILER/OTHER EQUIPMENT AT THE CUSTOMER'S SITE AMOUNTS TO MANUFACTURE, WHETHER EXCISABILITY OF THE SAME CAN BE DETERMINED BY PUNE-I COMMISSIONERATE:

25.01 The Noticee submit that in the present case, demand of differential duty has been raised by the Department by taking into account the entire value of the Boiler/other equipment as erected at the customers site. In this regard without prejudice to any other submission it is submitted that even if it is assumed that the activity of assembling, Erection, Commissioning & Installation of the Boiler or other equipment amounts to activity

of manufacture, the excisability of the same can only be determined by the jurisdictional Commissioner of the location where such machine has been assembled. It is submitted that, in the present case, none of the machines which have been considered for raising the duty demand have been assembled at a location within territorial jurisdiction of the Pune-I Commissionerate. In such a case, where the alleged activity of manufacture has taken place beyond the jurisdiction of the Pune-I Commissionerate, the activity even if determined to be manufacturing, cannot be taxed by Pune - I Commissionerate.

In this regard reliance is placed on following decisions of Hon'ble Tribunal wherein it has been categorically held that excise duty can be demanded by jurisdictional excise officer having jurisdiction over the place where excisable goods have been manufactured.

a. Dynacon Equipment (P) Ltd. V. CCE [2008 (232) ELT 457 (Tri. Chennai)]

b. CCE V. JeetexEngg Ltd.[2001 (130) ELT 801 (Tri. Chennai)]

c. Silson India Pvt. Ltd. V. CCE(2005 (194) ELT 37 (Tri. Mumbai)]

25.02 Thus, even if the Erection & Commissioning of the Boiler or other equipment at the customers site is considered to be a manufacturing activity then the excisability of the said machine cannot be decided by the Pune commissionerate. Hence, the Pune commissionerate lacks jurisdiction to decide the present proceedings.

25.03 It may be fact that the site Erection of Boilers under taken by the Noticee may be located all over India as informed by the Noticee and hence are of course, fall outside the jurisdiction of Pune-I Commissionerate. But the differential duty sought to be demanded and recovered from the Noticees by issuance 28 SCNS during the period from July, 2000 to March, 2015 is on the value of Bought Out items supplied direct to Boilers assembly site by vendors while execution of turkey Contracts agreed with the customers. Since the Noticee's Company is located within the jurisdiction of Pune-1 Commissionerate and all the 28 SCNS are against the Noticees Pune units only, the adjudication of these

Notices will be within the competence and jurisdiction of the Principal Commissioner, Central Excise, Pune-I Commissionerate. The Noticees contention is therefore not acceptable. As regards judgments cited by the Noticee in this regard accordingly need not be dealt with.

26.00 DATA ANALYSIS:

26.01 The following are the scanned copy representative sample of an invoice issued by vendor for supply of Boiler parts to the Noticee but delivered directly at site of assembly of Boilers along with the relevant representative sample of Tax Invoice issued by the Noticee to its customer in respect of supply of the same Boiler parts received through vendors which throw light on the relevant facts of the case. Similarly a representative sample of billing schedule in the already executed turnkey Contract of EID PARRY (INDIA) LTD with the Noticee was taken for case study and its scanned copy is also appended below.

<Scanned copies deleted>

26.02 It is revealed that M/s. Thermax Ltd. Chinchwad have received following bought out items from M/s. Emerson Process Management at their project site at Nova Iron Steel, Nova (India) Pvt. Ltd. vide their Invoice No. 16406346 dated 19.12.2013 and Packing Slip No.18407208, viz

Sr. No.	Description/Model No.	Qty	Unit Price (in Rs.)	Total Amount (in Rs.)
1	Pressure Transmitter	10	20732	207320/-
2	Pressure Transmitter	2	18824	37648
3	Pressure Transmitter	1	17530	17530/-
4	Pressure Transmitter	9	17530	157770/-
5	Pressure Transmitter	4	20732	87928/-
6	Pressure Transmitter	9	8310	74790/-
	Total Rs			595516/-
	BED @ 12%		12%	71462/-
	Ed. Cess @2%		2%	1429/-
	S & HSD Cess		1%	715/-
	Total Duty (Rs)			73606/-

	CST/ VAT			13382/-
	Total Rs			682504/-

26.03 After receipt of the goods by Thermax representative at the project site of Nova. M/s. Thermax Ltd. from its factory issued an invoice on M/s. Nova Iron & Steel vide, Invoice No. ACR 99102205 dated 18.01.2014 which contained the following details:-

Description	Percentage	Basic Amount
Transmitters & Analysis	100%	1122000/-
	REIMB-Excise	73605/-
	REIMB - Sale Tax	13382/-
		1208987/-
	Advance 40%	448800/-
	Net Payable	760187/-

The above demonstration establishes that the Noticee while selling the items procured from vendor under reference has charged Rs.11,22,000/- + Central Excise duty and Sales Tax as paid to be reimbursed whereas it was invoiced by vendor to the Noticee at Rs.595516/-+ Central Excise duty and Sales Tax as applicable and thus kept net profit margin of Rs. 526484/- i.e. more than 85% margin. It is noted that no Central Excise duty was discharged by the Noticee on this invoice including the differential value recovered (part Contract value) from the customer.

26.04 The scrutiny of these case records and submissions of the Noticee reveals that Bought Out items referred to in the subject case are not the goods purchased from open market such as whole seller, retailer or hard-ware shops or dealers etc. as usually thought by everyone in the first instance. But these Bought Out items are the Goods required to complement the incomplete Boilers manufactured at the factory of the Noticees and are got manufactured by the Noticees from their vendor manufacturers as per the need of Boiler design agreed to be supplied under a turnkey Contract. So these Bought Out items are essentially tailor made for the 'Boiler' being manufactured at the factory of the Noticee as a part of a turnkey Contract.

Further, these Bought Out items are normally cleared to the site of Noticee's customer as instructed by the Noticee. For such clearances, the respective vendor manufacturers prepare covering invoice consigned to the Noticee Companies with instruction to deliver the same at the site of Noticee's customer where the Boiler manufactured under a turnkey Contract is being installed and commissioned by the Noticees. The vendor manufacturers are in no way concerned with the customer who has placed the order for Design, Manufacture, Supply, Install and Commission the concerned 'Boiler'. The vendors receive their payments from the Noticees only and never from the customers. The invoice of the vendors accompanying these Bought Out goods to the site of Installation are collected by the site engineers/supervisors of the Noticee and thereafter the Noticee raise their Tax Invoice on the customer for these Bought Out goods delivered at their site by the vendors. The customer makes payment to the Noticee on the basis of such Tax Invoices. Even though these bought items are complementary goods so as to assemble the final Boiler to be supplied under the Contract as yet, for sake of convenience, the Noticee do not receive the same in its factory but they instruct vendors to deliver the same direct to site and hence having not received these Bought Out goods in their factory premise, the Cenvat credit of duty paid thereon by the vendors has not been available to them and hence the same has not been availed by them. On comparison of vendors invoice with relevant Tax Invoice of the Noticee for the concerned Bought Out goods, it is revealed that the Noticee charge and recover the price from the customer keeping very high margin which may exceed even 100% of vendors price at times and that too excluding the duty paid by the vendor (which is being reimbursed separately by the customer over and above the commercial price of the goods charged) on these Bought Out goods at the time of removal from its factory.

26.05 Warranty Charges;

The scope of supply and commercial terms and conditions etc are revealed from the scanned copy of one of the representative sample of turnkey Contract for supply of Waste Heat Recovery Boilers (WHRB) downstream of 1x500TPD Sponge Iron Klin for

the Steel of M/s Nova Iron & Steel Ltd at their Plant at Chhattisgarh, which is as below;

<Scanned copy of the purchase order is deleted>

26.06 It reveals that the Noticee gives warranty up to 18 months from the date of successful Commissioning of Boiler which includes not only Boiler components manufactured and supplied from their factory but also vendor supplied components direct to site and used in assembly of the final Boiler. This warranty charges is not separately recovered by the Noticee from their customers. It therefore follows that the Contract value agreed includes such warranty obligations. It is settled law that Warranty charges on the manufactured goods supplied is includible in its assessable value. Now a million dollar question is how and when the Noticee recovers the warranty charges from its customers for having provided warranty of 12-18 months from the date of successful Commissioning of Boiler supplied under turnkey Contract? The scrutiny of Bill-wise break- up of these turnkey Contracts furnished by the Noticee reveals that no separate recovery has been made towards warranty charges. It shows breakup of bills made for supply of factory made parts and parts got manufactured at vendors premise and supplied direct to site of installation. The total value thus arrived in the Bill tallies with the turnkey Contract value agreed for supply of Boiler. It therefore appears that the question on recovery of cost of warranty provided to Boiler supplied under the Contract in the scope of the Noticee should only be answered by the high profit margin loaded on in the Tax Invoice of the Noticee for the so called Bought Out goods used in assembly of final Boiler at site. It is noted that even though Central Excise Duty has been discharged by the vendors at the time of dispatch of goods as yet, the differential value loaded on the same by the Noticee while raising Tax Invoice on its customers has definitely escaped from levy of Central Excise Duty thereon as only reimbursement of Central Excise Duty paid by the vendors is shown therein and thus it may amount to under valuation and short payment of duty on the complete Boiler supplied under the terms and conditions of turnkey Contracts agreed upon.

26.07 Design and Drawing charges:

Similarly, it is settled law that the design and drawing charges incurred in manufacturing should be included in the assessable value of the finished goods for discharging the Central Excise duty payable thereon. It is revealed that in most of the Contracts the Noticees have not recovered the design and drawing charges separately from the customers to whom they have manufactured and supplied the Boiler. However, in the subject case, every Contract executed by the Noticee has the scope of supply which includes Design, Manufacture, Supply, Install, Erect and successful Commission of Boilers. Therefore, the overall profit margin loaded and recovered by the Noticee from the customer through Tax Invoices raised thereon on the so called Bought Out goods used in assembly of final Boiler at site, should also account for the cost and scope of Design and Drawings of the goods manufactured at the factory of the Noticees and also at the factory of the vendor manufacturers who manufactured and supplied Goods to Noticee's factory or even direct to Boiler Installation site as per instruction of the Noticee for assembly of Boiler under turnkey Contracts.

26.08 As per the Contract, value of the goods included costs right from drawing and designing of the goods to its Installation and Commissioning and also the costs of its essential spare (bought out) parts. As such the sale or transaction is completed after successful Commissioning of the Boiler or other equipment's. The allegation in the Notice that without these parts a Boiler cannot be commissioned appears to be correct. For instance a Boiler cannot function without parts such as feed water pump, safety valves, process valves, level gauger etc. These parts are necessary to make a Boiler functional. Their value therefore has to be included in the assessable value. It is immaterial that no Modavt credit has been taken by the respondents. The value of bought out items received at site and used in the Erection of Boilers have to be added to the assessable value of Boilers. Since Noticees have not received these Bought Out items in their factory, they are not eligible to avail Cenvat credits of duty paid by vendors. Had the goods were routed through Noticees factory, then they would have been eligible to avail and utilize the Cenvat credits of duty paid thereon, but on the differential value invoiced to customers, the

Noticee should have paid differential duty in cash. In the facts and circumstances of the case as explained already, if the activity of manufacture to be treated on behalf of Noticee, then the duty paid by vendors is also to be treated as on their behalf and therefore in the interest of fair play and justice the amount equivalent to duty payable/paid on the Bought Out goods sent direct to site so as to facilitate assembly of Boiler, will have to be treated as part discharge of duty liability by the Noticee on par with Cenvat credit of the same which otherwise would have been available for utilization on its receipt in the Noticee's factory premise. Thus it reveals that after such adjustments, a differential duty on the net differential value of Bought Out goods delivered direct to site on behalf of the Noticee remained unpaid as neither the vendors knew about it/considered such additional value recovered on the goods for payment of duty nor the Noticee discharged the same while raising invoice including such extra recovery from its customer with whom turnkey contract for supply of Boilers was agreed upon.

.....

32.0 In view of the above discussions, findings it may be summarized as under:

- I. It would be correct to issue a common adjudication order against all the subject 28 nos. of Show Cause - cum- Demand Notices issued not only against M/s. Thermax Ltd. Chinchwad, but also against M/s. Thermax Babcock and Wilcox Ltd. Chinchwad.*
- II. It is well settled law that the Erection & Commissioning charges cannot be treated as part of assessable value chargeable to Central Excise duty.*
- III. The classification of pressure and non-pressure parts cleared from the factory are incomplete Boilers removed in unassembled form and are therefore classifiable under S.H.N. 8402.10 as Boilers as has been settled by the Apex Court in their own case [2015-TIOL-125-SC-CX.]*
- IV. In all the subject cases of the Noticee, the turnkey Contracts agreed upon with customers are composite Contracts and the SCOPE OF SUPPLY invariably includes*

complete Design, Engineering, Manufacture and Supply of Boilers as per the required technical specifications.

- V. *The Noticee's Company is located within the jurisdiction of Pune-I Commissionerate and all the 28 SCNs are against the Noticee's Pune units only, the adjudication of these Notices will be within the competence and jurisdiction of the Principal Commissioner, Central Excise, Pune-I Commissionerate.*
- VI. *The Bought Out parts received at Boiler assembly site are used in erection of Boilers and are necessary to make Boiler functional. Their value therefore has to be included in the assessable value.*
- VII. *The Noticee are liable to pay interest under Section 11AA/11BB of the CEA, 1944*
- VIII. *The provisions of Section 11A(1), Section 11AB and Section 11AC of the CEA, 1944 read with Rule 173 Q of the erstwhile Central Excise Rules, 1944, Rule 25 of Central Excise Rules (no.2) Rules 2001/Rules, 2002 as the case may be are invocable in this case for demanding the Central Excise Duty/CENVAT duty, for the extended period from July 2000 to March 2004 along with interest and penalty respectively, and for the period April 2004 to March, 2015, the provisions of Section 11A(1)/ 11A(1)(a), Section 11AB/ 11AA as applicable during the relevant period, and Rule 25 of Central Excise Rules, 2002 are invocable in these cases for demanding the Central Excise Duty/CENVAT duty, along with interest and penalty respectively. The goods totally valued Rs. 69,24,78,22,485/- on which due duty has not been discharged is liable for confiscation under the provisions of Rule 25 of Central Excise Rules (no.2) Rules 2001/Rules, 2002 but for its non - availability for the same.*
- IX. *The Noticee's action of non-inclusion of value of Bought Out Goods which are essential and integral part of Boilers supplied in the assessable value of Boilers Designed, manufactured supplied Installed and Erected at Boiler site of the customer under the terms and conditions of the Contract agreed with its customers*

resulted in deliberate avoidance and evasion of duty due thereon.

- X. *The Noticees are liable for penalty under the provisions of erstwhile Rule 173 Q of Central Excise(no.2) Rules,2001/2002,Rule 25(1) (d) read with Section 11AC of the CEA,1944, for having contravened the provisions of Section 4(1)(a)/4(1)(b) of the CEA, 1944 read with Rule 6 of Central Excise Valuation Rules, 2000.*

4.3 In crux we find that the only issue that needs to be discussed in the present case is in respect of addition of the value of Brought Items to the assessable value of the goods manufactured and cleared by the appellant. In para 18.05 of the impugned order, various brought out items have been listed along with the functions. After recording this findings the Commissioner has concluded that these are essentially the part of boiler, and the value of these goods need to be included in the value of the Boiler manufactured and cleared by the appellant. By Circular No 964/07/2012-CX dated 2nd April 2012, Board has also clarified as follows:

"2 The matter has been examined in the Board. The Boilers are a combination of various systems such as Coal Handling System, Coal Feeding System, Draft Air System, Demineralization Plant, Boiler Feed Water System, Boiler Tubes, Boiler Drums, Super Heat System, Flue Gases Treatment System and Ash Handling System etc. All these Systems work in tandem to make a modern Boiler. These Systems comprise of many parts including structural components which are essentially the part of Boiler by way of technical specifications. As per Section Note 4 to the Section XVI of the First Schedule to the Central Excise Tariff Act, 1985, " Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."

4.4 4.8 In case of BHEL [2018 (10) GSTL 3 (SC)] Hon'ble Supreme Court has held as follows:

"3. Both, the adjudicating authority and the Customs, Excise and Service Tax Appellate Tribunal (For short, 'the Tribunal') took the view that though clearances were made and transported as components of boiler, the same were liable to be classified under sub-heading 8402.10 and not under sub-heading 8402.90.

4. In coming to the aforesaid conclusion both the authorities relied on an expert opinion of the Technical Adviser (Boilers), Ministry of Commerce and Industry dated 12-9-2003 the main part of which is as hereunder :-

"Definition of Boiler under Indian Boilers Act, 1923 :

Under the above Act, "Boiler" means any closed vessel exceeding 22.75 ltrs. in capacity which is used expressly for generating steam under pressure and includes (i) any mounting (valves etc.); (ii) other fittings attached to such vessel; which is wholly or partly under pressure when steam is shut off.

Fittings include economizer (if integrated), feed pipe, steam pipe and the valves, since all these are attached to boiler and will work wholly or partly under pressure.

Water at very high pressure is fed to the boiler by feed pump. Heat addition takes place in boiler wherein the water is converted into steam. To increase the efficiency, the steam has to be generated at higher pressure and higher temperature, which is done by the Economisers initially. The steam is further heated by Super Heaters and re-heaters to a high temperature ranging upto 540 deg. C or above depending upon the design parameters. Economisers, Superheater, Re-heaters essentially consists of tube bundles whole sole purpose is to heat the steam further to increase its efficiency.

To monitor the system more effectively, various instruments are used to measure various parameters like pressure, temperature, flow of the media in various sections of the boiler. Control Systems are used to ensure that these parameters are within the limits for safe operation.

Components like E.S.P. Fans, Control Equipment constitutes auxiliary/ accessories of Boiler and are not essential constitutes

of Boiler, Even without these, a complete boiler will come into existence.

It is thus clear that Boiler will come into existence on manufacture erection of the following :

(i) Drum

(ii) Fittings like :

Feed pipe and Steam pipe;

Economizer;

Super heater and Re-heater.

There are many other items in the boiler feed water lines which are used for increasing the efficiency but may not be essential.

(iii) Mountings like valves.

Mountings and fittings attached to drum are under pressure and hence covered under the definition 'Boiler' under the Indian Boilers Act.

Components like Fans, Air pre-heaters, Electro Static precipitators Control Equipment constitute auxiliary/accessories of Boiler and Boiler will come into existence even without these auxiliary/accessories.

The Boiler inspectorate is always involved in the inspection right from the stage of Raw-material section to the dispatch and erection of various Components where Pressure is involved.

It is a fact that the high capacity boilers cannot be transported in one lot to the site, therefore they have to be sent as individual item and sub-assemblies. Therefore, the parts which are essentially needed to construct a complete boiler may be considered under the term boiler. But the parts which are provided with the boiler to enhance the efficiency such as automation, data requisition, indicators, recorders etc. are used for ease and safe operation of boilers and cannot be considered as boiler parts.

In the light of the above, BHEL may be asked to separate out the list of such parts (i) which are essential for constructing a boiler and (ii) the parts which are used in boilers but not essential as explained above."

5. That apart, relying on the HSN note Part V under Section XVI, as extracted below, the aforesaid two authorities concluded that such components which are essential to classify the boiler as a machine, even if transported as components, must be understood to have been transported as a complete machine. Therefore, levy of duty should be under sub-heading 8402.10 and not sub-heading 8402.90 as claimed by the Revenue.

HSN note Part V under Section XVI :

"For convenience of transport many machines and apparatus are transported in an unassembled state. Although in effect the goods are then a collection of parts, they are classified as being the machine in question and not in any separate heading for parts. The same applies to an incomplete machine having the features of the complete machine (see Part IV), presented unassembled (see also in this connection the General Explanatory Notes to Chapters 84 and 85). However unassembled components in excess of the numbered required for a complete machine or for an incomplete machine having the characteristics of a complete machine, are classified in their own appropriate heading."

6. Insofar as the particular assessment is concerned, from the report of the expert as extracted above, it is clear that the said expert had suggested that the respondent-assessee should be asked to file separate list of the parts which are essential for the boiler and other parts which are used in the boilers but which are not essential parts thereof.

7. We do not know as to whether the aforesaid exercise has been carried out by the Revenue in the present assessment year. Be that as it may, in the face of the opinion of the expert and the HSN note, details of which have been extracted above, we are of the view that the Primary Authority as well as the First Appellate Authority was perfectly justified in coming to the conclusion that the components of the boilers cleared as parts but essential to put into operation the boilers, would be classifiable under sub-heading 8402.10 and not as claimed by Revenue under sub-heading 8402.90. We, therefore, do not find any infirmity in the order assailed before us so as to justify

taking of a view different from what has been recorded by the First Authority as well as the Appellate Authority."

4.5 From the above decision, and clarification issued by the Board, it is observed that finding of the Commissioner that all the systems received at the site of the erection of the Boiler, do not essentially constitute as essential parts of the boiler required for the erection and commissioning of the boiler. Certain parts as noted by the Hon'ble Apex Court will be in nature of auxiliaries etc., however they in view of the HSN explanatory note continue to be classified as Boiler under heading 8402.10 and not under the heading 8402.90. In the case of CIMMCO Birla [2003 (156) ELT 1019 (T-Del)] following was held.

"3.*We heard Id. Counsel for the appellant as well as Id. DR, for the Revenue. There is no dispute on the fact that the goods valued at Rs. 2,21,40,412/- were supplied through the sub-contractor of the appellant at the site of the unit. There is no case that the above goods were manufactured by the appellant and cleared from its factory. The decision relied on by the Commissioner (Appeals) has no application in the facts of the present case. In Asha Pavro Electronics Pvt. Ltd. the bought out items formed part of finished goods, therefore, its value had to be added to the finished goods which were cleared from the assessee's unit.*

4.*We find no merit in the view taken by the authorities below that the value of the bought out items was also to be added for computing the assessable value of the goods manufactured by the assessee. The fact that the bought out goods were required for completing the contract of erecting the unit will not in any way make those goods part of goods manufactured and cleared from the appellant's factory. In view of the above, we set aside the order impugned and allow the appeal."*

Similar view has been expressed by the CESTAT in the case of Greysam & Co [2014 (304) ELT 129 (T-Del)] stating as follows:

"3.*We have considered the submissions of the learned DR and have perused the records. The undisputed facts are that the appellant manufactured certain Air Brake Equipments and cleared the same from their factory to Integrated Coach Factory, Chennai of the Railways. Pipes and pipe fittings of the Air Brake*

systems were bought from the outside and supplied separately to the ICF, Chennai and thereafter the goods manufactured and cleared by the appellant along with bought out pipes and pipe fittings were installed in the Railways Coaches as Air Brake Systems. In our view since what had been manufactured and cleared by the appellant was Air Brake Equipment and this is not a case of where bought out items had been brought to the factory for use in the manufacture of the final products, the value of bought out items would not be includible in the assessable value. Similarly the installation of the Air Brake equipment has nothing to do with the manufacture of the equipments and hence the charges for the same are not includible in the assessable value of the Air Brake equipment. The impugned order is, therefore, not correct. The same is set aside. The appeal is allowed."

In case of BHEL [2001 (133) ELT 584 (T-Del)] following has been held:

"4. *A perusal of the record makes it clear that the duty demand was in respect of certain items procured by the appellant from the market and supplied directly to power project in terms of the contract. There could be no duty liability on the appellant with regard to such goods of the appellant who was not manufacturer of such goods. They had also not utilised those items in the manufacture of any new excisable products. In these circumstances, we find no justification for the duty demand of about Rs. 35 lakhs in respect of bought out goods. Demand of duty on account of advance payment also was not justified in the present case, inasmuch as there is no case made out that the appellant has supplied any manufactured goods to their buyer at a reduced price, in consideration of advance payment. In fact, all the supplies in the present case were in terms of a contract for about Rs. 28 crores. Out of the above, only part of the goods were manufactured by the appellant. Terms of payment had stipulated percentages of payment due at various stages of the contract. In these circumstances allegation cannot be made that goods supplied were at lesser value than their normal value. Accordingly, this demand also has to fail."*

In case of Dalal McKenna Pvt Ltd. [2014 (300) ELT 259 9T-Mum)] CESTAT held as follows:

"9.*Considered their submissions in detail. We find that it is not in disputed that appellants are the manufacturer of 4 items namely Air Separation column/unit (also known as cold box), expansion engine, liquid oxygen pump, liquid nitrogen pump. We have seen through the purchase orders, out of 36 purchase orders, 34 purchase orders pertaining to the items manufactured in their factory. Therefore, in the case of 34 purchase orders appellant has neither supplied nor installed the Nitrogen/Oxygen plant. In two cases, the customers have issued the purchase orders for supply of plant, in those cases also the appellant had supplied only 4 items manufactured by them and remaining items were directly supplied by third party to the customer's at their site against proper invoice. The plants were also erected at the site by assembling the above 4 items and bought out items by assembling by the third party. The appellant has never supplied plant in toto. Therefore, the value of bought out items are not includible in the assessable value as same are neither spare parts nor accessories to the items manufactured by the appellant. The decision of Narne Tulaman Manufacturers Pvt. Ltd. (supra) is not applicable to the facts of this case as in that case the manufactured goods and bought out items were cleared from the factory and the final product assembled from such duty paid items. In that situation, the Hon'ble Supreme Court held weigh bridge are dutiable. The decision of Mahindra & Mahindra (supra) is also not applicable to the facts of this case as in that case Tribunal held that fabrication of steel structures like roof frame and sheds amounts to manufacture whether the same are fabricated at customers place. In the present case Nitrogen/Oxygen Plants were assembled at the customers place i.e. factory of the manufacturer not by the appellants. Therefore, the appellants have not supplied the plants to their customers."*

4.6 Undisputedly the goods which have been cleared by the Appellants have to be assessed in the form in which they were cleared by the appellant. In the case of Reliance Textile Industries Ltd. [1993 (63) ELT 67 (Bom.)], Hon'ble High Court held as follows:

"7. The liability of the petitioners to pay duty arises as soon as base yarn comes into existence and the same is cleared from the factory gate. The excise duty payable is on the basis that the manufactured product is base yarn and at that juncture it is not permissible for the department to levy excise duty on the basis that the manufactured product is textured yarn. It is not in dispute that when base yarn undergoes texturising process to bring into existence texturised yarn, then separate excise duty is leviable for the process of manufacture. In these circumstances, it is impossible to accede to the submission urged on behalf of the department that at the time of clearance of base yarn, the petitioners are liable to pay excise duty which is required to be paid after the texturised yarn comes into existence. The provisional assessment made by the department, therefore, is unsustainable."

4.7 Having held so we also find merits in the submission made by the appellant that the goods as per the turnkey contract entered by them emerged only at the site of customer which do not fall within the jurisdiction of the Pune Commissionerate. Accordingly the issues relating to excisability and valuation of the goods as per the turnkey contract could not have been determined by the Commissioner Pune, having jurisdiction over the factory/ factories of the appellant. In the case of Jupiter Enterprises [2014 (314) ELT 301 (T.)] coordinate bench has observed as follows:

"9. On perusal of records, it transpires that the adjudicating authority has erred in coming to conclusion that he is empowered to demand duty on sizing machines, which are assembled and come into existence at the site of the buyers of the appellant which are situated beyond jurisdiction of adjudicating authority/the Commissioner of the Central Excise, Ahmedabad-I. In our view, the adjudicating authority has totally misread the provisions inasmuch as, he has recorded no findings on this specific averments, while it is admitted that sizing machines to come to existence, various parts are purchased by the appellant from outside and delivered by such sellers directly at the site of assembling. The decisions cited by the Id. Counsel on the preposition which are enumerated in Paragraph 3 are

directly on the point and on the question of jurisdiction itself the appeal of the appellant succeeds and the demand of Excise duty raised in respect of sizing machines is liable to be set aside."

We are also in agreement with the submission made by the appellant that if the goods as erected at site are held excisable then they will be exempted as per the notification No 67/95-CE.

4.8 Tribunal has in the case of the Appellant [2005 (182) E.L.T. 336 (Tri. – Mumbai)] themselves has held as follows:

"6. *Heard both sides.*

(a) *Whether the goods as cleared by the respondent is classifiable as boiler under sub-heading 8402.10:*

We observe that the HSN explanatory note at page 1240 under heading 84.02 says that economizers, air pre-heaters, super-heaters, de-super-heaters steam receivers, steam accumulators, soot removers, water tube, fire-box walls, and other apparatus of accumulation etc. are auxiliary item supplied along with the boilers. These auxiliary item increase or regulate the output of a boiler or its efficiency. But the expert, whose opinion the Commissioner took into consideration, opines that economizer, super heater and heat recovery unit are essential parts of a boiler. This opinion therefore is at variance to that extent with what is stated in the explanatory note referred to above. But we still hold that this variance in opinions expressed, does not alter the fact that the parts of boilers as cleared by the respondents, do constitute an incomplete boiler in an unassembled form. The facts as come out clearly indicate that the essential parts of boilers are cleared from the factory as it is not possible to clear a complete boiler in one go. Even when one considers that some of the parts removed from the factory are of auxiliary nature, one has to agree that an incomplete boiler in unassembled form is cleared. That the boiler in unassembled form is removed in several lots on different dates itself does not mean that parts but not the whole are cleared from the factory in view of the fact that the respondent has a contract to erect and commission a boiler and has been disclosing this fact to the Department.

For the reasons stated above we hold that the parts removed in several consignments is a boiler in incomplete form and

therefore have to be classified under the heading meant for the complete machine, in this case under 8402.10. We uphold the contention of the Commissioner that Rule 2(a) of Interpretative Rules apply to this case. We therefore uphold the contention of the Commissioner and reject the Revenues appeals in so far as this aspect is concerned.

(b) Bought out items-inclusion of value thereof :

Revenue has challenged the Commissioner (Appeals) decision that the value of the bought out items are not to be added to the assessable value. The various bought out components are auxiliary accessories to the boiler and what is cleared from the factory is a complete boiler; according to the Commissioner. He also accepted the assessee's contention that he had not claimed Modvat credit of duty paid on bought out items and therefore the bought out items cannot be said to be the constituents of a boiler.

7. According to the Revenue a boiler, as complete functional unit, comes into existence only after the goods cleared from the factory and bought items directly received at site, are assembled at site. It is argued that the contract is for erection of a boiler and therefore the value of the bought out item form part of the assessable value. The fact that no processing was done on the bought out items and that no credit is availed is immaterial according to revenue.

8. The respondents argue that the bought out items are in the nature of accessories and not parts of boiler manufactured and supplied by them. Boiler is complete without these bought out items. The respondents relied on CBEC order No. 4/92 issued under Section 37B in this regard and on the decision of the Tribunal in the Shrike Construction Equipments Pvt. Ltd. v. CCE, Pune [1997 (95) E.L.T. 644 (Tribunal)].

9. We observe that the respondents reliance on the CBEC order cited supra is misplaced. The said order does not relate to the present issue that is whether the value of bought out items is to be added or not. The decision in Shrike Construction Equipments Pvt. Ltd. case does not decide the issue of inclusion of value of bought out items. The Revenues' contention that without these parts a boiler cannot be commissioned appears to be correct. For

instance a boiler cannot be functionable without parts such as feed water pump, safety valves, process valves, level guager etc. These parts are necessary to make a boiler functional. Their value therefore has to be included in the assessable value. It is immaterial that no Modvat credit has been taken by the respondents. We are not sure that any Modvat was available to the respondents on these bought out items. We therefore hold that the Commissioners' contention that because a boiler has been removed in unassembled form from the respondents' factory the value of bought out items should not be included is incorrect; we accordingly set aside that part of the Commissioner's order. While on the subject we may also mention that it is not understood as to what the Commissioner means by saying that the bought out items are "auxiliary accessories".

10. The Revenue's appeal is partly allowed. The jurisdictional officer is directed to determine and recover the duty from the respondents arising out of addition value of the bought out items in the assessable value of the boilers.

11. The appeal of the Revenue is decided thus :

(a) The goods as cleared by the respondents are classifiable under 8402.10 as boilers.

(b) The value of bought out items received at site and used in the erection of boilers have to be added to the assessable value of boilers."

4.9 In the case of Siemen Limited [2002 (150) ELT 422 (T-Mum)] CESTAT has held as follows:

"3. We have examined the judgments. In the latter cited judgment, the Tribunal had departed from their earlier judgment in the case of Tata Libert Limited [2000 (121) E.L.T. 474 (T) = 2000 (39) RLT 1006] and had adopted the ratio of the judgment in the case of C.C.E. v. Jeetex Engineering Limited [2000 (130) E.L.T. 801]. In the judgment, the Tribunal noticed that the manufacturer had manufactured incomplete UPS and had arranged to supply the batteries as trading activity. The ratio of this judgment squarely applies to the facts of the present case. Shri Umashankar relies upon the Tribunal judgment in the case

of Supra Hi-Tech Electro Equipment (P) Ltd. [1997 (93) E.L.T. 604] where the value of batteries was held as includible in the value of the UPS. Shri Prakash Shah distinguished this decision of on the observation that in that case, the batteries were supplied from the manufacturer's factory along with the UPS system. The learned Departmental Representative also cites judgment reproduced in 1994 (71) E.L.T. 508 in support of his argument. We find that this was considered by the Tribunal in the cited judgment of A.Z. Electronics and was not adopted.

4. In the Jeetex Engineering Ltd.'s case the Tribunal had mentioned that the price would not be included where the batteries were not supplied from the manufacturer's factory and were directly installed at the Customers premises. Shri Umashankar stated that such distinction was made only on the ground of commercial expediency and that the result was the same where batteries were supplied from the manufacturer's premises or were supplied to the buyers premises from the other source. We find this argument not acceptable since the Tribunal in the earlier cited judgment had made the decision on this ground."

It is noted that Presiding Member in the bench which has decided the case of Siemens was same as the Presiding Member in the appellant case referred above. This judgement has been maintained in the Apex Court as reported at [2003 (158) ELT A 74 (SC)].

4.10 Appellant challenged the order in their case before Hon'ble Supreme Court and disposing of the appeal filed by the Appellant, court has observed as follows:

"There were two issues before the Tribunal. First pertains to the classification of pressure and non-pressure parts cleared from the factory. This issue has been decided in favour of the assessee/ appellant and the Department has not filed any appeal against the same.

2. Second issue was in respect of value of bought out items viz, whether the value thereof should be added to the assessable value of the boilers. It is contended that the assessee had removed boilers in unassembled form at the factory site according to the excise authorities.

3. *The Tribunal has decided this issue in favour of the Revenue accepting its plea that without these parts a boiler cannot function.*

4. *It is this part of the Tribunal's order which is assailed in the present appeal.*

5. At the outset Mr. Lakshmikumaran, learned counsel pointed out that though in the show cause notice such brought out parts were mentioned in annexure D thereto, while computing the demands which were raised in the show cause notice, no excise is demanded on the above item. If that be so, there is no need to go into the issue raised by the appellant in this appeal as the decision of this appeal either way would not affect the appellant if the duty itself is not demanded thereupon.

6. *Thus, while dismissing this appeal, we clarify that if there was no such amount demanded in the show cause notice, the direction contained in para 10 and 11(b) of the impugned order of the Tribunal to the jurisdictional officer to determine and recover the duty from the appellant shall have to go. However, it is only if the Officer is satisfied that no demand was made in respect of aforesaid items while computing the demand."*

From the reading of the above order of the Hon'ble Apex Court it is quite evident that Hon'ble Supreme Court has not recorded any finding in respect of the issue of the inclusion of the value of the brought out items in the value of the boiler. On the contrary Hon'ble Supreme Court has not taken up the issue for consideration as that question was not raised in the show cause notice which was the foundation for the entire proceedings. Hon'ble Supreme Court order cannot be said to declaration of law on the subject, when Supreme Court itself observes for the deletion of the para 10 and 11 (b) if the there is no demand made in respect of the brought out items in the show cause notice. Commissioner has in the impugned order not recorded any finding in this respect in the impugned order, as to whether any demand was made in the show cause notice in that case or not. Hence we do not find any merits in the sole reliance placed in the impugned order on the said decision of the tribunal and Hon'ble Supreme Court.

4.11 In the case of Appellant Hon'ble Supreme Court has in order as reported at [1998 (99) E.L.T. 481 (S.C.)] held as follows:

"8. *Shri V. Lakshmikumaran, learned Counsel appearing for the appellants contended that the decision of the Tribunal as also that of the Assistant Collector insofar as they relate to the inclusion of drawing and designing charges in the assessable value of the Boiler are not challenged but the decision relating to the inclusion of erection and commissioning charges in the assessable value of the Boiler installed by the appellants at the customers' site is positively wrong and is liable to be set aside. It is contended by him that before manufacturing the Boiler, the officials of the appellants visit the site at which the Boiler is to be installed and, thereafter, they prepare the necessary drawings regarding the design of the Boiler according to the need of the customer and, thereafter, the Boiler and its parts are manufactured at the appellants' factory. Consequently, the expenditure incurred in drawing and design which is separately charged by the appellants from the customers can, it is conceded, be legally included in the assessable value of the goods.*

9. *The only question, therefore, with which we are left in these appeals is whether the erection and commissioning charges for which the appellants had separately charged from its customers could be legally included in the assessable value of the goods, namely, the Boiler manufactured and supplied by the appellants. Or, to put it differently, whether the installation and commissioning charges are exigible to excise duty? This controversy stands concluded by two decisions of this Court.*

10. *In PSI Data Systems Ltd. v. Collector of Central Excise, 1997 (89) E.L.T. 3 (S.C.), it was held that the charges for installation of computers and training of customer's personnel to operate and maintain it was not includible in the assessable value of the computer. The Court even went to the extent of saying that the value of softwares sold along with the computer was not includible in the assessable value of the computer.*

11. *In Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut, 1996 (88) E.L.T. 622 (S.C.) = (1997) 1 SCC*

203, Mono Vertical Crystallisers which were used in sugar factories for exhausting molasses of sugar were assembled, erected and attached to the earth at the site of the customers' sugar factory. The process involved welding and gas cutting as deep Mono Vertical Crystallisers had to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It was held that the erection and installation of a plant was not excisable.

12. In coming to this conclusion, reliance was placed on an earlier decision of this Court in *Quality Steel Tubes (P) Ltd. v. Collector of Central Excise 1995 (75) E.L.T. 17 (S.C.) = (1995) 2 SCC 372*, in which also it was held that erection and installation charges cannot be included in the assessable value of the goods. It was held thus :-

"erection and installation of a plant cannot be held to be excisable goods. If such wide meaning is assigned it would result in bringing in its ambit structures, erections and installations. That surely would not be in consonance with accepted meaning of excisable goods and its exigibility to duty."

13. In view of the above, the judgment passed by the Assistant Collector as also by the Tribunal that installation and commissioning charges have to be treated as assessable value of the goods supplied by the appellants are not correct and are liable to be set aside. Since we are disposing of these appeals on merits on coming to the conclusion that the installation and commissioning charges could not be included in the value of the goods, the question of limitation relating to the show cause notice issued under Rule 9(2) read with Section 11A of the Act for the period from 1982-83 to 1987-88 is not decided."

4.12 Further in the case of *S S Engineers [2019-TIOL-1124-CESTAT-MUM]*, in similar situation a coordinate bench of tribunal held as follows:

"6. We have carefully considered the submissions made by both the sides and perused the records. We find that some of the show cause notices were issued on the ground that the value of bought out items supplied by the Appellant is includible in the value of the contract price and duty was demanded on said contract/ agreement value after deducting the value of the

Appellant's own manufactured goods as appearing in ER-1 Returns. In another set of show cause notices it was alleged that the Appellant have produced the excisable goods during installation of plants and the same were installed in sugar plants and therefore liable for duty on goods viz. Mill House, Cane Unloader, Cane leveller, Cane feeding device, Cane- rake- Bagassee Carrier including Secondary rake Carriers, Juice Sulphiter, Juice Heaters, Evaporators, Vacum pans, Vacum filters, Sugar Elevators, condensers , Grass Hoppers, Feeder Table etc. However in such show cause notices also the duty was demanded on the Total Sales value reduced by the value shown in ER - 1 Returns filed by the Appellant. We are unable to comprehend as to what is the basis of such demands. The show cause does not specify as to what are the bought out goods and how they have been considered as critical goods and what is the basis of arriving at assessable value. Even in case of show cause notices wherein it was alleged that the goods manufactured on location were excisable, it is not forthcoming from the show cause notice as to how the duty computation was made on whole contract price. Notably many of the contracts entered into by the Appellant in this appeal are only for supply of goods and supervision of erection and commissioning and thus stands of different footing from the agreements where the Appellant themselves undertook the erection activity.

7. We find that the adjudicating authority has ultimately confirmed the demand against Appellant on whole agreement/ contract price by discussing and relying upon one of the Contract of Boiler of 80 TPH. The demand has been made considering the contract price as value of goods. We find from the agreement that the said agreement is for supply of goods for the 80 TPH Boiler and supervision of erection and commissioning. The Appellant themselves did not carry out erection or commissioning of the said Boiler but after supply of goods only supervised the erection. In such case no duty can be demanded from the Appellant as they are only supplier of goods. It is not the allegation of the department that the Appellant's own manufactured goods and the bought out goods when put together would result into emergence of new product i.e Boiler. The Appellant do not clear the Boiler in Complete knocked down

Condition or Semi Knocked Condition. The Appellant's own manufactured goods, at the time of clearance from the factory, have identity of individual components or equipments which has not been disputed by the revenue. Though the adjudicating authority held that the bought out items are critical components of the Boiler but we find that even not a single bought out component has been named as critical component which shows that the allegation has no basis. Simply by alleging that the value of bought out goods are liable to be included in the assessable value, duty cannot be demanded. Even though the show cause notice mainly alleged that the bought out items are liable for duty but in the impugned order the demand has been made on whole contract price which shows that the demand has no basis. Nevertheless we find that the 80 TPH Boiler on the basis of which demand has been confirmed against the Appellant is a huge structure which was erected at site and is permanently attached to earth. It was erected piece by piece and not by merely putting some goods together viz. the Appellant's own manufactured goods alongwith bought out components. We have gone through all the contracts/ agreements entered into by the Appellant during the impugned years as well as photographs of some of the contracts placed in the appeal. We find that all the contract were for either erection and set up of sections of the Sugar factory or the Sugar factory itself. All these Section are part of Power plant system of Sugar factory i.e Boiler or turbine system or the factory itself which are in huge set up of machinery and equipment embeded permanently to earth. None of these sections can be removed as such or in Knocked down condition or semi knocked down condition. It has to be dismantled and to be broken up into pieces if it is to be shifted which will lead to losing its identity of any goods. The impugned order has relied upon some instances where some goods were brought from other sugar factory and were used in installation at Appellant's factory. We find that these goods were brought to Appellant unit by dismantling the system of old sugar plants. However the adjudicating authority failed to appreciate that after dismantling into prices the identity of the goods did not remain as of goods which was recognizable in old sugar factory. It turned into individual components or goods since they were not

in the form of knocked down condition. We are thus of the view that by means of any imagination the agreements under which the goods were supplied by the Appellant or in case where the Appellant themselves erected the plants or their sections cannot be held to be any contract for manufacture of excisable goods. We are unable to comprehend that huge boilers erected on site piece by piece with the Appellant's manufactured goods and bought out goods which become immovable property are excisable goods. It cannot be removed in knocked down condition or semi knocked down condition. It has to be broken up into pieces which would not even be recognizable as boiler. What has come into existence at site are huge boiler systems which were part of power systems or whole sugar manufacturing sections or plants. Undoubtedly the whole property which came into existence are immovable property. Without dismantling these systems they cannot be shifted. Thus there is no reason to demand duty on the contracts undertaken by the Appellant. Further as far as demand of duty under the guise of bought out goods is concerned we find that when the bought out goods are not being part of any excisable goods at the time of their clearances in that case no duty can be demanded. In case of M/s Intech Surface Coating Pvt. Ltd. Vs. CCE, Pune – III, this bench on the issue of inclusion of bought out items in the assessable value has held as under :

"We have gone through the rival submissions. We find that it is not in dispute that the Revenue is seeking to include the cost of bought out items supplied directly to site for the purpose of charging Central Excise duty. It is not in dispute that no manufacturing activity in respect of such items has been done by the appellant. The liability to Central Excise duty arises only when there is a manufacturing activity undertaken and in the absence of manufacturing activity the liability of Central Excise does not arise. On a similar issue in the case of Acer India Ltd. (supra) observed as follows:

55. It must be borne in mind that central excise duty cannot be equated with sales tax. They have different connotations and apply in different situations. Central

excise duty is chargeable on the excisable goods and not on the goods which are not excisable. Thus, a goods which is not excisable if transplanted into a goods which is excisable would not together make the same excisable goods so as to make the assessee liable to pay excise duty on the combined value of both. Excise duty, in other words, would be leviable only on the goods which answer the definition of excisable goods and satisfy the requirement of Section 3. A machinery provision contained in Section 4 and that too the explanation contained therein by way of definition of transaction value can neither override the charging provision nor by reason thereof a goods which is not excisable would become an excisable one only because one is fitted into the other, unless the context otherwise requires.

4.1. Tribunal in the case of Emerson Network Power India P. Ltd. (supra) in a similar circumstance observed as follows:

"4. The entire duty demand on bought-out items pertains to installation of air-conditioning machines at site. From the perusal of the list of bought-out items such as floor grills, piping, cabling etc., it would be seen that they are not parts of air-conditioning machines manufactured and cleared, but items required purely at site. Therefore, the appellants are right in contending that the cost of bought-out items cannot be included in the assessable value."

Relying on the aforesaid decisions the appeal is allowed.

8. Drawing parallels from the above order we find that there is no reason to demand duty on the bought out goods as the Appellant has not manufactured any goods which are recognizable as excisable goods. Further we find that the same controversy arose in the earlier period and the matter travelled upto the Tribunal. The findings of the Tribunal as recorded in case of S.S. Engineers Vs. CCE, Pune – III 2008 (221) ELT 54 (TRI) are as under:

3. It is the case of the department that the disputed items were not supplied by the appellants as a whole at the site of the sugar factories but assembled out of the various

parts and components supplied by the sugar factories, as seen from the chart herein below :-

<i>Sr.No.</i>	<i>Description of Excisable Goods Manufactured</i>	<i>Parts/components brought at the site of M/s. Rajarambapu SSK and Mohanrao SSK for manufacture of excisable goods</i>
<i>A.</i>	<i>B.</i>	<i>C.</i>
<i>1</i>	<i>Cane Unloader</i>	<i>Gantry Girders, Ladders, Working Platforms, Railing Shed for Trolley, Two (Motion) Cane Unloader Bridge, Trolley (complete with CT Drive, Hoist & Holding Drums, Wire Ropes, Spur Gears Gear Boxes, Motors, Brakes, Trusters, Limit Switches etc.) with sling attachment, Electrical Control Panel, Operator's Cabin etc. including electrical hardware</i>
<i>2</i>	<i>Cane, Rake and Baggase Carriers</i>	<i>Columns, Side Plates, Runner Beams, Runner Hooks, Chutes, Rake, Staircase, all Sprockets & Shafts with Plummer Blocks, Bearings, Stretching Gear, Idler Pulleys with Shafts, Brackets, Bush Bearings, Chain for 1st Cane Carrier, Slats, Motor with variable speed drive, Reduction Gear Box, Spur Gear, Pinion Set, Starter. Base Frame. Foundation Bolts for Cane Carrier Drive. Troughs Rakes, Chain, Runners, Service Gangway, Tensioning Devices, Set of Bagacillo Collecting Hopper with Bagacillo Screens and Sliding Door for feeding bagasse to boilers</i>
<i>3</i>	<i>Cane Kicker</i>	<i>Central Shaft, Knives, Plummer Blocks & Bearings, Drive Base Frame, Motor with Starter Reduction Gear Box, Coupling etc.</i>
<i>4</i>	<i>Cane Leveller</i>	<i>Shafts & Hubs, Flywheels, Bearing &</i>

		<i>Plummer Blocks. Couplings, Set of nuts & bolts for knives, knives. Motor with starter, Rails, Rotor Assembly complete with hubs, Flywheels, Bearing Plummer Blocks, Nuts & Bolts for Hammer, Hammers, Deflector & Anvil Plate, Anvil Suspension Gear Hood Rear Chutes, 750 HP SPDP Slipring Motors</i>
5	<i>Cane Feeding Device</i>	<i>Assembly of Automatic Cane Feeding Devices complete in all respects.</i>
6	<i>Mill House</i>	<i>Head Stock with Wear Plate, Side Cap with pins Top Cap with pins, Side Bearing, Top Half of Top Bearing, Bottom Half of Top Bearing. Mill Roller with crown pinion, Trash Beam with bolts, Trash Plates, Scraper Plate Holder, Scraper Plate Massecheart Knife Holder with knives, Tail Bar. Service Gangway with staircase and railing. Hydro-pneumatic System Control Panel. Tank with pumps, Pipes & filings. Roller Movement Indicator, Hydraulic Accumulator Set of Forced Feed Lubricator with pipe & fittings, Set of Juice Troughs under the mills, Square Coupling for Tail Bar, Set of Base Frames for DC Motor of mill, set of Foundation Bolts & Anchor Plates. Under Feeder Roller complete with Brackets, Pinions, Donnelly type Chute, Level Sensing Device, DC Drive for Mills, Mill Reversing Arrangement complete in all respect, Slow Speed Gear Box, Gear Box complete with Oil Pump, Spur Gear for 1st motion, Spur Pinions for Mill Gearing, Shaft for 1st motion Gear - 2nd motion Pinions, Set of Gear Guards, Pedestal Bearing for Mill</i>

		<i>Gearing. Base Frames for Mill Gearing complete with foundation Bolts, Turbine complete with Base Frame. Enclosed Reduction Gear Box, Main & Auxiliary Panel and Safety Devices, Pressure Gauge, Steam Flow Meters. Tacho meter Panel complete with oil pipes & fittings, Alternator complete with Air Cooler. One Set of Battery AVR & Excitation Panels.</i>
<i>7</i>	<i>Juice/Water/ Molasses Weighing Scales</i>	<i>Registering Counter, Weighed Water Receiving Tank, Check Weighing Scale, Juice Weighing Scale, Weighed Juice Receiving Tank, Check Weighing Tank, Check Weigh Bridge - for "Juice Weighing Scale, Working Platform, Railing, Ladder, Weighed Molasses Receiving Tank, Molasses Diversion Arrangement.</i>
<i>8</i>	<i>Juice Heater</i>	<i>170 MS H.S.A. Juice Heater, 300 M2 H.S.A. Juice Heater, Condensate Receivers.</i>
<i>9</i>	<i>Juice Clarifier</i>	<i>Flash Tank Shell, Tray of the Clarifier, Set of Central Tubes with arms & scrappers, Drive Head complete with Drive, Mud Tank, Clear Juice Column, Set of Valves, Pipes, Wheels, Chairs etc., Working Platform, Railing, Ladders</i>
<i>10</i>	<i>Vacuum Filters</i>	<i>Vacuum Filter complete with drive, Filterate Receiver, Mud Belt Conveyer including supporting structure at the Mud Discharge End, Mud Mixer, Catchall installed in the line going to condenser.</i>
<i>11</i>	<i>Evaporators</i>	<i>Calandria with bottom saucer for 2000 M2 H.S.A, body semi-kestener (1st body). Calandria with, bottom</i>

		<i>saucer for 1000 M2 H.S.A. body semi-kestener (2nd A body), Calandria with bottom saucer for 600 M2 H.S.A. body semi-kestener (2nd B body), Calandria with bottom saucer for 450 M2 H.S.A. body semi-kestener (3rd body), Calandria with bottom saucer for 250 M2 H.S.A body semi-kestener (4th body). Body of Evaporator, Catchall for Evaporator. A set of incondensibles collecting coils, syrup/juice samples etc</i>
12	<i>Vacuum Pans</i>	<i>Calandria for 60 T. vacuum pan with bottom saucer. Body for 60 T vacuum pan, Catchall for vacuum pan. Pan Discharge Valve complete with operation mechanism, Set of pan washing coils, feeding headers and all other pan accessories</i>
13	<i>Grass Hopper</i>	<i>Plain Tray-Grass Hopper, Multi Tray Grass Hopper, Drive Motor for Grass Hopper with pulley starter, V Belt etc., Hot Air Blower with air heater, Cold Air Blower.</i>
14	<i>Sugar Elevators</i>	<i>Casing, chain, buckets, drive etc.</i>
15	<i>Feeder Table</i>	<i>Shafts, Sprockets, Plummer Blocks with bearing drive motor complete with variable speed drive, reduction gear box, starter etc.</i>
16	<i>Juice Sulphiter</i>	<i>Juice Sulphiter (with stirrer, drive etc.), SO₂ recovery tower with chimney. Lime proportionating device, syrup sulphitation unit, SO₂ recovery tower.</i>
17	<i>Condensors</i>	<i>Multi-jet condensor for 750 MM diameter (vapour) pipe including tail pipe, Multi-jet condensor for 1100</i>

		MM diameter vapour pipe including tail pipe.
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It is also the case of the department, as seen from the show cause notices and the impugned orders, that the items are huge items encompassing wide area and cannot be transported and installed as such in any other premises but require to be dismantled before transport and installation at any other site. In view of this admitted position, the ratio of the Apex Court in Triveni Engineering & Indus. Ltd. v. CCE, 2000 (120) E.L.T. 273 (S.C.) is directly attracted to the facts of this case. In paragraph 20 of that decision, the Apex Court held that the marketability test requires that the goods as such should be in a position to be taken to the market and sold. In that case, for taking turbo alternator to the market, it has to be separated into components, viz. turbine and alternator and then would not remain turbo alternator and therefore the turbo alternator cannot be excisable goods falling within the meaning of Heading 85.02. The Supreme Court set aside the finding of the Tribunal that the turbo alternator was excisable goods. The above decision has been followed by the Tribunal in the case of CCE, Chandigarh v. Bhagwanpura Sugar Mills, 2001 (134) E.L.T. 673 and Indica Chemical Indus. (P) Ltd. v. CCE, Meerut, 2005 (185) E.L.T. 67. We further note that vide Circular No. 58/1/2002-CX dated 15-1- 2002, the CBEC has clarified inter alia that if any goods installed at site are capable of being sold or shifted as such after removal from the base and without dismantling into its component parts, the goods would be considered to be movable and thus excisable and if the goods are incapable of being sold, shifted and marketed without first being dismantled into component parts, the goods would be considered as immovable and therefore not exigible to duty. The clarification has been issued in the light of the Apex Court’s judgment cited supra as well as in the case of Quality Steel Tubes Pvt. Ltd. v. CCE, 1995 (75) E.L.T. 17 (S.C.) and Mittal Engineering Works Pvt. Ltd. v. CCE, 1996 (88) E.L.T. 622 (S.C.).

4. *The Commissioner has relied upon the decision of the Tribunal in CCE, Chennai v. Binny Ltd., 2003 (151) E.L.T. 106, holding that similar items were excisable, however, as rightly pointed out by the learned counsel for the appellants, the assesseees did not challenge the Commissioner's order treating some of the sugar manufacturing equipment as movable and hence excisable, for the reason that the demand was dropped on the ground that it was barred by limitation and hence the finding of excisability was not contested by the assesseees.*

5. *In the light of the above discussion, following the ratio of the apex j court's decision in Triveni Engg. & Inds. Ltd. supra, on the basis of which CBEC Circular No. 58/1/2002-CX., dated 15-1-2002, which is binding on the Revenue authorities, was issued, we set aside the demands and penalties and allow both the appeals.*

The above order of the Tribunal has been upheld by the Hon'ble High Court as reported in Commissioner v. S.S. Engineers - 2008 (232) E.L.T. A200 (Bom.)]. We find that in the present case also the show cause notices alleged that the Appellant manufactured the same goods as above and duty demand has been made. Applying the above ratio of the Tribunal we are of the view that the demand of duty made against the Appellant on goods erected, installed at site are absolutely not sustainable. We also find from the Miscellaneous application filed by the Appellant that the jurisdictional Commissioner vide noting dt. 11.11.2008 viewed that the value of the bought out items cannot be included in the assessable value of the manufactured goods in view of the fact that the bought put items did not enter into the factory of the Applicant and no credit is being taken of the duty paid on such items. After this noting the Appellant were not issued show cause notice and thus the department itself appreciated the fact that the duty demand is not sustainable. Even otherwise also we find that if the revenue demands duty on bought out goods in that case it has not been disputed that the goods were itself duty paid and the Appellant did not avail any credit of the same. Further even the bought out goods have been used in erection of the Sugar plant or its sections at site which are non excisable.

Thus we are of the view that bought out goods which were taken directly to the site for erection/ installation does not invite any excise duty. The revenue has relied upon the judgments in case of Commissioner Vs. Thermax Bobcock & Wilcox Ltd. 2005 (182) ELT 336, Walchandnagar Ind. Ltd. Vs. CCE. Pune - III 2014 (311) ELT 274, CCE, Delhi Vs. Frick India Ltd 2007 (216) ELT 497 (SC), CCE, Aurangabad Vs. Lipi Boiler Ind. Ltd. 2011 (263) ELT 271 (Tri, Mum) amongst others. We find that in all these judgments the facts were altogether different whereas in the present issue the goods which came into existence and being immovable goods do not fall under the definition of excisable goods. Whereas in case of Thermax supra the bought out items were cleared from the factory and thus it was held that the boiler was cleared in unassembled condition. In the present case the bought out items were cleared to the customer's site directly and in turn was used in erection of immovable property. It itself is not clear as to what were the bought out items. Clearly the whole demand is fallacious. In case of Walchandnagar Industries supra the goods cleared were in assembled form and were excisable goods before their clearance from the factory. In case of Frick India Ltd., the issue involved was whether the value of bought items is includible in the value of Compressor whereas in the present case the issue is demand of duty under the guise of bought out goods which itself is not clear and even the goods coming into existence at site does not merit consideration as excisable goods. Thus we find that all the judgments cited by the Appellant does not have any effect on the present controversy. whereas the Appellant's case for the previous period stands decided in their favour. We also find that even if it is assumed that any duty is demandable from the Appellant, it would not be liable to be paid as the alleged activity of installation of goods took place at the factory of customer and hence they are eligible for exemption in terms of Notification No. 67/95 – CE.

9. The adjudicating authority has confirmed duty demand on the contract price. However since we have held that the goods which came into existence after using the bought out goods and the Appellant's own manufactured goods has resulted into immovable property i.e whole sugar plant or its part in the form of Power section or other sections, we do not find any reason to

demand duty on the same. In case of Kerala State Electronics & Controls Power Systems P. LTD. 2004 (171) ELT 281, the Tribunal held as under :

"5. On a careful consideration and perusal of the impugned orders, we notice that the bought out items were independently supplied to the site and they are in the form of junction boxes, signal heads and cables. They are not part of the traffic controller. All these items go to form traffic signal system, which according to the appellant is an immovable property. The authorities below have held that the value of the bought out items is to be added to the assessable value of traffic controller. On a perusal of the judgments cited by the Counsel we find that the value of the bought out items is not required to be added to the duty paid goods cleared by the assessee from their factory. These judgments clearly apply to the facts of the case while the citations relied by the SDR pertains to a situation where bought out items are essential parts of the items supplied by the assessee and hence its value was required to be added. The situation is not the same in the present case as all the bought out items are sent to the site for erection of traffic signal system. Hence, they become part of the immovable property and cannot be considered as part of the traffic controller unit cleared by the appellant. Therefore, respectfully following the ratio of the judgments cited by the Counsel, the impugned order is set aside and appeals allowed."

The above order was upheld by the Hon'ble Apex Court as reported in Commissioner v. Kerala State Electronics Development Corporation Ltd. - 2006 (199) E.L.T. A130 (S.C.)].

In case of India Tube Mills and Metal Industries Vs. CCE, Mumbai 2017 – TIOL – CESTAT – MUM this bench on the similar issue by relying upon the judgment of Hon'ble Apex Court in case of Triveni Engineering & Indus Ltd. - 2000 (120) ELT 237 (SC) = 2002-TIOL-14- SC-CX has held as under :

"2.1 As regards the bought out items, it is supplied directly from the supplier to the site and the same do not involve any manufacturing activity of LPG Bullets. All other activities such

as fitting out of the bought out items and erection & installation is taking place at the site of the customer. All these activities are carried out to make the LPG Bullets as immovable goods, therefore, all such activities are not part and parcel of the manufacturing activity of the appellant in respect of LPG Bullets. Therefore, inclusion of any amount over and above the price of the LPG Bullets adopted for clearing of the goods from the factory is incorrect and without authority of law. In support, she placed reliance on the following decisions:-

- a) Triveni Engineering & Indus Ltd. - 2000 (120) ELT 237 (SC) = 2002-TIOL-14-SC-CX*
- b) Milestone Aluminium Co. Pvt. Ltd. - 2007 (214) ELT 417 (T)*
- c) Sanmar Weighing Systems Ltd. - 2005 (190) ELT 228 (T) = 2005- TIOL-1298-CESTAT-MAD*
- d) Emerson Network Power India Pvt. Ltd. - 2004 (176) ELT 168 (T)*
- e) Fuse Base Eltoro Ltd. - 2000 &116) ELT 179 (T)*
- f) Goetze (India) Ltd. - 2004 (169) ELT 274 (T) = 2004-TIOL-366- CESTAT-DEL*
- g) Kerala State Electronic Dev. Corpn. - 2008 (224) ELT 88 (T) = 2007-TIOL-1558-CESTAT-BANG*
- h) BHEL Vs. CCE - 2001 (138) ELT 1223 (T)*
- i) Neycer India Ltd. - 2005 (192) ELT 620 (T)*
- j) Mahindra & Mahindra Ltd. - 2015 (321) ELT 513 (T)*
- k) Pace Marketing Specialities Ltd. - 2000 (119) ELT 77 (T)*
- l) Jai Hind Oil Mills & Co. - 1994 (71) ELT 902 (Bom).*

3. On the other hand, Shri V. K. Shastri, learned Asstt. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both sides. We find that the Revenue has not disputed the value of Rs.42 lakhs for each LPG bullets. However, the demand was raised only on inclusion of the value in respect of bought out items and certain activities taken place at the site for erection and installation of the said LPG bullets. We find

that all these elements such as bought out items are undisputedly supplied from the supplier to the site. It is not taking part in the manufacture of LPG Bullets. These bought out parts are used only for erection and installation of LPG Bullets at site and other activity at site are also related to erection and installation. The said activity of erection and installation in our considered view is not amount to manufacture. Moreover, after erection and installation of the LPG Bullets, it become immovable goods. For this reason also, if at all any activity by any imagination is amount to manufacture, by virtue of immovability of LPG Bullets, the activities at site cannot be charged to excise duty. With these undisputed facts, we are of the view that the value of Rs.42 lakhs adopted by the appellant in respect of LPG Bullets, which is not in dispute, no further addition can be made.

5. As per our above discussion, the demand does not sustain. Accordingly, the impugned order is set aside and the appeal is allowed."

On the identical issue this Tribunal passed various other judgments in favour of assesses which are reproduced below:

(i) Cheema Boilers Limited Vs. Commissioner of Central Excise & ST, Chandigarh-2018-VIL-235-CESTAT-CHD-CE-

"5. Heard the parties and considered the submissions. The facts of the case are not in dispute that appellants are having purchase orders for Erection, Commissioning and Installation of Boilers at site. The appellant is clearing parts from factory to the site and certain bought out items are also directly supplied to the site from various vendors, on payment of duty. It is a fact on record that boiler in question emerges at site which become an immovable property, which is not excisable goods therefore, not leviable for duty. As the Boilers on which the Revenue is demanding duty are not excisable goods therefore, the question of payment of duty does not arise. Further, we find that bought out items have never come to the factory of the appellant and the appellant is liable to pay duty only on the goods manufactured by them. In that circumstance, for the bought items, the appellant is not required to pay

duty. Therefore, we hold that demands in the impugned orders are not sustainable. Accordingly, the impugned orders are set aside."

(ii) Tycon Automation Pvt. Ltd. Vs. Commissioner of Central Excise, Noida- 2017 (357) ELT 861 (Tri.-All)

"6.Having considered the rival contentions. We find that it is an admitted case of Revenue that the appellant have not brought the bought out items in their factory of manufacture and it is further admitted fact that the control panels are not cleared along with bought out items from the factory of manufacture. Under such circumstances, we hold that there is no application of Rule 6 of the Valuation Rules, 2000. We further hold that there is no misdeclaration of the transaction value by the appellant. Under the facts and circumstances that the appellant have placed the orders on third-party vendors for supply of the bought out items directed to their customers and have paid the applicable sales tax/VAT, the same does not attract levy of excise duty. We also take notice of the fact that in para No. 27.14 of the impugned order the Adjudicating Authority observed as follows :- "I find that the bought out items have not been brought to the factory premises and have not been used in the manufacturing of the goods - control panels. The bought out items were directly sent to their customers and being essential and inseparable part of the control panel, they were installed at the site by them."

7. Thus we find that it is an admitted fact that the bought out items have never entered the factory premises of the appellant so as to become part of the manufactured control panel nor the same have been cleared along with the control panels. Accordingly, we allow these appeals and set aside the impugned order. The appellant will be entitled to consequential benefits in accordance with law including refund of amount deposited during investigation. Accordingly, the personal penalty on the Director Mr. Dinesh Kumar Bhardwaj is also deleted." From the consistent views of this Tribunal's in above judgments,

ratio of which squarely applicable to the present case, impugned order is not sustainable.

10. The appellant also raised the issue of Cenvat Credit on bought out goods. We agree with the submission of appellant that when revenue seeks to demand duty on the value of bought out goods the appellant shall be entitled for cenvat credit of duty paid on such bought out goods.

11. Regarding the issue of availability of Notification No. 67/95-CEdt. 16.3.1995 on the alleged excisable goods coming into existence at site, we find that if the contention of Revenue is accepted that the goods while erection/installation was manufactured at site, the same shall be eligible for exemption notification No. 67/95-CE dt. 16.3.95 which reproduced below:

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts -

(i) capital goods as defined in rule 57Q of the Central Excise Rules, 1944 manufactured in a factory and used within the factory of production;

(ii) goods specified in column (2) of the Table hereto annexed (hereinafter referred to as 'inputs') manufactured in a factory and used within the factory of production in or in relation to manufacture of final products specified in column (3) of the said Table;

from the whole of the duty of excise leviable thereon which is specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) :

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products (other than those cleared either to a unit in a Free Trade Zone or to a 100% Export Oriented Undertaking or to a unit in an Electronic Hardware Technology Park or to a unit in a Software Technology Parks), which are exempt from the whole of duty of excise leviable thereon or are chargeable to 'Nil' rate of duty.

Explanation. - For the purposes of this notification 'inputs' does not include -

(i) packaging materials in respect of which any exemption to the extent of the duty of excise payable on the value of the packaging materials is being availed of for packaging any final products;

(ii) packaging materials or containers, the cost of which is not included in the assessable value of the final products under section 4 of the Central Excises and Salt Act, 1944 (1 of 1944).

TABLE

S.No.	Description of inputs	Description of final products
(1)	(2)	(3)
1.	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under heading Nos. 36.05 or 37.06 of the Schedule to the said Act; (iii) goods classifiable under sub-heading Nos. 2710.11, 2710.12, 2710.13 or 2710.19 (except Natural gasoline liquid) of the Schedule to the said Act; (iv) high speed diesel oil classifiable under heading No. 27.10 of the Schedule to the said Act.	All goods falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the following, namely, - (i) goods classifiable under any heading of Chapter 24 of the Schedule to the said Act; (ii) goods classifiable under heading Nos. 36.05 or 37.06 of the Schedule to the said Act; (iii) woven fabrics classifiable under Chapter 52 or Chapter 54 or Chapter 55 of the Schedule to the said Act.

On reading of above notification it is clear that capital goods manufactured and used within the factory of production shall be exempted. As per the facts of the case the machines which undoubtedly capital goods falling under Chapter 84/85 erected and installed within the Sugar Mills product of which i.e. Sugar/ Molasses etc. is liable to duty. Thus all the conditions of Notification No. 67/95- CE stands fulfilled. Even though it is accepted that the Appellant have manufactured the goods at site but fact remains that the capital goods manufactured within the premises of Sugar Mills and used there in only. Ownership has no criteria in the Central Excise Act, for levy of duty and exemption therefrom. Though we have given finding that erection/ installation of machineries at site is not excisable goods having immoveable, however, even if it is assumed that revenue’s contention of excisability is correct, the goods coming into existence at site which is well within the Sugar Mills shall be eligible for exemption Notification No. 67/95-CE. Hence on this count also the demand does not sustain. Accordingly we hold that no duty is demandable from the Appellants on merits.

12. The Appellant has pleaded that the demand is time barred. We find from the records that the facts were in the

knowledge of the revenue since very beginning and even earlier to the demand confirmed against the Appellant which was eventually set aside by the Tribunal. The said order passed by Tribunal reported at 2008 (221) ELT54 was upheld by the Hon'ble Mumbai High Court. In such facts, we find that there is no ground to raise demand by invoking extended period of limitation as there is no suppression or mala fide intention on part of the Appellant. Thus in our above observations and findings on fact as well as on the basis of orders passed by the Tribunal, Hon'ble High Court and Hon'ble Apex Court supra we do not find any reason to demand duty from the Appellant. We thus hold that the demand and penalty confirmed against the Appellant are not sustainable on multiple counts as discussed above and requires to be set aside."

4.13 In the present case by the impugned order, revenue has not sought to add the value of the brought out items in the assessable value but has sought to add the some value which they have determined. Impugned order records that there is difference in value which has been shown by the appellant while raising the invoices on the customer and the value at which these brought out items had been invoiced by the supplier of the brought items. Further impugned order also has sought to add certain undetermined charges under the category of design and engineering head, in the garb of brought out items. The charge of undervaluation of the goods has been made even without reference to the supplier of these brought out items. If there was any undervaluation of these items then the demand of duty should have been made on the supplier of these brought out items. Admittedly and undisputedly these brought out items were not even brought into the premises of appellant. Tribunal has in the case of Thermal Systems Pvt Ltd. [2019 (3) TMI 787-CESTAT HYDERABAD] held as follows:

5. On careful consideration of the submissions made, we find that the adjudicating authority, in the case in hand, has considered the entire issue in its correct perspective. The adjudicating authority has clearly recorded the law involved in the case in hand and the decisions on which he relied upon seems to be appropriate in the facts and circumstances of the

case. The facts of the case, as recorded herein above, are not disputed that the respondent is a manufacturer of waste heat recovery boilers and he is engaged in supply of waste heat recovery boilers to various customers who places an order on them for supply of waste heat recovery boilers. The respondent herein is procuring few items from the market like valves, PLC based BMS panel, I.D. Fan for boiler, inlet/outlet cones, side frames, panel for soot blowers, soot blowers, aluminum cladding, silencers for boilers etc., which are directly supplied by the suppliers at the site and it is also undisputed that the said suppliers discharge the applicable central excise duty on these parts when directly supplied at the site and respondent is not availing any CENVAT credit on the said parts. On this factual matrix, we find that the judgment of the Tribunal in the case of Cheema Boilers Limited (supra) and followed in S.S. Engineer (supra) is comprehensive, covering the issue in the case in hand. In the case of S.S. Engineer, the Bench also considered the very same judgment of Hon'ble Apex Court in the case of Thermax Bobcock & Wilcox Limited and Lipi Boilers Industries Limited [2011(263) ELT 271 (Tri.-Mum.)] (on which case, learned Principal Commissioner (AR) has relied upon) and has distinguished the facts as stated herein above. In para 8, in the case of S.S. Engineer, the Tribunal (6) Appeal No. E/1456/2011 has brought out very clearly that in case of bought items which are cleared to the customers site directly and in turn used for erection of immovable properties, the demand becomes totally incorrect or fallacious. For this purpose, the Tribunal relied on the cases of Walchandnagar Industries Limited [2014(311)ELT 274] and Frick India Limited [2007(216)ELT 497 (SC), these we find that the same judgments which are relied upon by the adjudicating authority in this case and dropped the proceedings, initiated by the show cause notice. It is undisputed, in the case in hand, that after clearing the boilers from the factory premises and by assembling them at the site of customers along with bought out items, the waste heat recovery boilers become immovable. If that be the case, we find that the reasoning adopted by the adjudicating authority, in the case in hand, in the impugned order is correct, legal and does not require any interference.

4.14 We also note that in the case of Statfield Systems (Coating) Pvt Ltd. [1996 (87) ELT 510 (T)] following has been held in respect of adding of the design and engineering charges:

"9. We also find that the case of Indoprint Enterprises cited by the Learned DR is distinguishable. In that case what was supplied was a part of the machinery as a bought out item. Manufacturers supplied complete manufactured goods to the customer and it was sale value of the bought out item cleared by the respondents during the relevant period. In the case of Radiant Electronics Ltd., the Tribunal held that when bought out items are supplied besides manufactured articles value of such bought out items is not includible even if they are essential for the operation of manufactured goods provided they are not fitted or attached to the goods before clearance and no process is undertaken on such bought out items. Here the submission made before us is the bought out items are actually used in the fabrication of the plant at site. In our view, therefore, the value of these bought out items is not includible and we ordered accordingly. In regard to other items like packing and forwarding charges, surcharge and designing and drawing charges as indicated in annexure to the show cause notice placed at Page 25 of the paper book, we find no findings as such have been given by the Collector (Appeals). It is contended before us by the Learned Advocate that drawing and designing charges do not relate to the goods as manufactured in the factory but relate to designing of plant as such which is built at customer site. If the designing and drawing charges do not pertain to goods as are removed from the factory their value cannot be included in the value of the goods for the purpose of determining eligibility to exemption."

4.15 Undisputedly after erection of the goods manufactured and cleared by the appellant and other brought out items at the site of Customer, what emerges is a immovable property which as such is not excisable. Tribunal has in case of Babubhai Narottamdas & Co [2019 (8) TMI 256 – CESTAT Mumbai] held as follows:

"10. The Hon'ble High Court in the case of Larsen & Toubro (supra) was confronted with the question whether fabrication,

assembly and erection of waste water treatment plant at the site of the assessee resulted into manufacture of excisable goods, accordingly chargeable to duty. Analyzing the evidence on record, the Hon'ble Court observed as follows:-

"5. It need not be stated that the excise duty is not payable in respect of an immovable property. The plant when erected by embedding in the civil work becomes an immovable property and would not therefore attract any excise duty. The contention of the respondents, however, is that the plant came into existence in an unassembled form at site and became operational after it was embedded in the civil work. Though the civil work did not attract excise duty, excise duty was payable on the plant in an unassembled form. The relevant wording in the show cause notice in that regard is quoted below :-

"The plant already came into existence in an unerected form as per drawing and designs approved by M/s. B.P.C.L. before the same was installed erected and affixed to the ground with civil work. The civil work did not attract duty being immovable property." (Underlining supplied)

In our view, mere bringing of the duty paid parts in an unassembled form at one place, i.e. at the site does not amount to manufacture of a plant. Section 2(f) of the Central Excises and Salt Act, 1944 (for short "the Act") defines the word "manufacture" to include any process incidental or ancillary to the completion of a manufactured product. Any process by which an object becomes a new commercial goods would be included in the definition of "manufacture". However, simply collecting together at site the various parts would not amount to manufacture unless an excisable movable product (say a plant) comes into existence by assembly of such parts. In the present case, as the petitioner has stated that the waste water treatment plant does not come into existence unless all the parts are put together and embedded in the civil work. Waste water treatment plant does not become a plant until the process which includes the civil work, is completed. In our view, therefore, no commercial movable property came into existence until the assembling was completed by embedding different parts in the civil works." 11. Similarly, in Ion Exchange Ltd.'s case (supra),

by a majority, it has been held that manufacture of water treatment plant at the site by assembly and installation of various individual components would result into emergence of an immovable property, hence, not leviable to duty. The said judgment was later followed for the subsequent period. In Chemtec Water Conditioners' case (supra) also, the question was whether water treatment plant, which is firmly and permanently attached by way of civil construction to earth, is liable to excise duty or otherwise. Following the judgment of the Hon'ble Supreme Court, this Tribunal observed that after being permanently grouted/embedded to earth, it loses the character of movability and thus becomes immovable, accordingly, non-excisable.

12. In the present case also, no evidence has been placed by the Revenue that the chlorination plant erected and commissioned at site could easily be unassembled and shifted to other place without causing damage to the components and plant as a whole, hence, be considered as movable one.

13. The Ld. Commissioner has heavily relied upon the judgment of Hon'ble Supreme Court in Solid & Correct Engineering Works (supra). The facts of the said case is not relevant to the facts of the present case, in as much as in the said case, the very purpose of hot mixing plant was to was mix the coal tar at the construction of the Roads. After completion of the work, the hot mix plant is shifted to another site. Thus, the very purpose of the said plant was to make it movable. Hence it is held to be considered as movable and accordingly excisable. In the present case, BARC and other customers of the appellant have certified that the chlorination plant installed in their premises are fixed permanently to earth and not meant to be shifted/transferred. No contrary evidence is placed by the Revenue.

14. In these circumstances, therefore, we are of view that the chlorination plant installed at various sites out of the goods manufactured and cleared by the appellant from their factory on payment of excise duty and assembling with other bought out items at the site of the customer, resulted into an immovable property and hence not leviable to excise duty. Consequently,

the impugned order is set aside and the appeals are allowed with consequential relief, if any, as per law.”

4.13 As we find that impugned orders cannot be sustained on grounds of jurisdiction and merits, we do not consider the other grounds urged by the appellant in appeals and during course of argument.

4.14 In view of the discussions as above we do not find merits in the impugned orders so as to sustain them.

5.1 Appeals are allowed.

(Order pronounced in the open court on 12.12.2022)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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