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

Excise Appeal No. 85170 of 2013

(Arising out of Order-in-Appeal No. BR (68 to 72)/MV/2012 dated 03.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Mahindra & Mahindra Ltd. **Appellant**
3rd Floor, EPU Bldg., FES Gate No.4,
Akurli Road, Kandivli (E),
Mumbai 400 063.

Vs.

Commissioner of Central Excise, Mumbai-V **Respondent**
5th Floor, Utpad Shulk Bhavan, Plot No. C-24,
Block 'E', Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

WITH

Excise Appeal No. 85171 of 2013

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M/s. Mahindra & Mahindra Ltd. **Appellant**
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Excise Appeal No. 85173 of 2013

(Arising out of Order-in-Appeal No. BR (68 to 72)/MV/2012 dated 03.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Mahindra & Mahindra Ltd. **Appellant**
3rd Floor, EPU Bldg., FES Gate No.4,
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Vs.

Commissioner of Central Excise, Mumbai-V **Respondent**
5th Floor, Utpad Shulk Bhavan, Plot No. C-24,
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Bandra (E), Mumbai 400 051.

AND

Excise Appeal No. 85174 of 2013

(Arising out of Order-in-Appeal No. BR (68 to 72)/MV/2012 dated 03.10.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Mahindra & Mahindra Ltd. **Appellant**
3rd Floor, EPU Bldg., FES Gate No.4,
Akurli Road, Kandivli (E),
Mumbai 400 063.

Vs.

Commissioner of Central Excise, Mumbai-V **Respondent**
5th Floor, Utpad Shulk Bhavan, Plot No. C-24,
Block 'E', Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

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

Date of Hearing: 22.11.2022
Date of Decision: 22.11.2022

FINAL ORDER NO. A/86265-86269/2022

PER: SANJIV SRIVASTAVA

These appeals detailed in table below are directed against order in appeal No BR/68 to 72/MV/2012 dated 03.10.2012 of the Commissioner of Central Excise (Appeals), Mumbai Zone I.

Appeal No.	Division	Period	Provisional Assessment order		Final assessment Order
1	2	3	4	5	6
E/85170/13	Auto	2009-2010	V. Gen. (30) 12/2006/ dated 15.9.2009		01/PROV. ASSMT 2009-10/MLD/DC/ 2011 dated 30.11.2011
E/85171/13	Farm Equipment	2009 - 2010	V. Gen. (30) 10/2008/ 2486 dated 15.9.2009		02/PROV. ASSMT 2009-10/MLD/DC/ 2011 dated 30.11.2011
E/85172/13	Auto	2008 - 2009	V. Misc (30)27/08 dated 29.7.2008	V/Misc/(30)27/08/1700 dated 04.05.2009	74/21/AC/MLD2011 dated 31.03.2011
E/85173/13	Farm Equipment	2008 - 2009	V. Misc (30)10/08 dated 6.5.2008	V. Adj. (Ch 87, 84) 15B-139/M-02/2011/1641 dated 12.05.2011	190/44/DC/MLD/2011 dated 29.07.2011
E/85174/13	Auto	2008-2009	V. Misc (30)27/08 dated 29.7.2008	V/Misc/(30)27/08/1700 dated 04.05.2009	74/21/AC/MLD2011 dated 31.032011

1.2 By the impugned order following has been held:

"ORDER

(i) I set aside all the four impugned Orders and allow all the appeals of the Revenue. The assessment is to be finalised based on order of the Larger Bench of Hon'ble CESTAT in the case of Ispat Industries Ltd. vs Commissioner of C. Ex., Raigad 2007 (209) ELT 0185 Tri.-LB.

(ii) Since the order involved in the appeal No. (v) challenged by the assessee is covered above, the appeal is allowed only to that limited extent of setting aside."

2.1 Appellant is holding Central Excise Registration No. AAACM3025EXM 006 for Manufacture of Motor vehicles and their parts, falling under chapter sub-heading no. 8702, 8703, 8704, 8706, 8408, 8707, 8708, 8466, 8207, 8409, 9031 and C.I. Castings falling under chapter heading 7325 of the first schedule to Central Excise Tariff Act, 1985. Some of these parts are cleared by the appellant from Kandivali plant to their other units located at Nasik, Nagpur, Igatpuri, etc. on stock transfer basis for captive use, on payment of duty on cost price in terms of Rule 8 of Central Excise Valuation Rules, 2000.

2.2 The appellant, requested for the Provisional Assessment of goods cleared for captive consumption to their sister units from Kandivali Plant for the Financial Years 2008-09 and 2009-10, as they were not in a position to determine the value of the said goods accurately, since the actual expenses relating to manufacturing activities, R&D costs, if any, transportation and octroi costs, get finalized only after the account for the Financial Year are audited and finalized. The assessments were allowed to be made provisional as per the orders indicated in column 4 of the table above.

2.3 The provisional assessments were finalized by the jurisdictional Deputy/ Assistant Commissioner as per the final assessment order as indicated in the column 6 of the table. The details of the orders finalizing the assessments are reproduced below:

A. 74/21/AC/MLD2011 dated 31.032011

"Finally, the Independent Auditor had worked out the differential duty to the tune of Rs. 3.56 Crore and the record shows that assessee has paid Rs. 3,55,72692/- towards the differential duty which is as per the calculation made by the assessee after considering the R&D Expenses at 1.14%. Whereas, the total duty payable after considering R&D expenses at 1.30%, the total duty payable works out to Rs. 3,62,62,834/-.

Accordingly I pass the following order :-

<u>*ORDER*</u>

1. The differential conversion cost amounting to Rs.99.45 crores as specified in the show cause notice dated 04.05.2009 is not liable for addition to the conversion cost in totality.

2. The R&D expenditure @5.32% as proposed in the show cause notice is not liable to be added for arriving at the cost of production. However, R&D expenses @1.30% instead of 1.14% as determined by the assessee, is liable to be added up for the clearances of Kandivali Unit stand alone, for arriving at the Cost of Production and the differential duty of Rs.6,90,142/- (Rupees Six lakhs Ninety thousand one hundred forty two only) (i.e. CENVAT duty Rs.670041/-, Edu. Cess Rs. 13,401/-, S.H.E.Cess

Rs.6700/-) is to be paid by the assessee on receipt of this order along with the interest as may be applicable.

3. Bank Guarantee & Bond executed by the assessee stands discharged only after the payment of differential duty as above.

4. Provisional Assessment for the year 2008-09 is finalized as ordered above."

B. 190/44/DC/MLD/2011 dated 29.07.2011

3.1 I also find that the Independent Auditor in the matter of R & D expenses has observed as below, in the para 8 of the cost audit report :-

a). As reviewed, R & D factor considered in CAS-4 is 1.03% on Cost of Production.

b). The figures for R & D workings are based on 12 months period ending March, 09.

c). As on-going practice, the Company officials expressed that the R & D factor is being worked out every year by using normal production capacity instead actual production as a base.

d). Reviewing from 'Cost Audit Report - FES - F.Y. 2008-09', the R & D expenses as reported are Rs. 74.57 Crores, including existing new products & technology.

e). In absence of any R & D standards or guideline, the on-going or consistent practice of R & D treatment may be considered as normal.

f). As a classification of R & D loading on existing new products & technology, as a business decision, is being supported by an internal certificate of for computation, which may be considered as a practice

***Overview:-** In our opinion, the valuation process and the system in vogue may be expected in view of the 'Cost Audit Report' and Generally Accepted Cost Accounting Principles for the purpose of material valuation as per CAS 4 for the Financial Year 2008-09.*

The amount of only Rs. 35.21 Crores out of total expenditure of Rs. 74.57 Crores of R & D expenditure is required to be added *which has already been added by the assessee as per their letter dtd. 21.6.11.*

3.2. Duty Liability:

In this case, I find that there are about 1263 items which are under Provisional Assessment. It is practically not possible for me to work out product-wise duty liability. Further, as per law, assessee is supposed to discharge the duty liability on all the products cleared during any month, by 6th day of the subsequent month. Further, as recorded in the findings, there are no elements of cost which are to be loaded in the Assessable Value of any individual item (viz. R & D Expenses or Conversion cost). Therefore, I do not find it necessary to work out and discuss the duty liability on each individual item, as the same is not relevant in view of the above finding. I further find that, after finalizing the assessment, the assessee is required to pay the interest on the differential duty from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof. As such, it is imperative that the differential duty is to be worked out for each month for the relevant period. Accordingly, I decide to work out month-wise duty liability for all the various products cleared during the relevant months. Also, the interest liability is to be discharged by the assessee. Month-wise worksheet of the duty payable, duty paid & differential duty payable by the assessee, is attached here below (Annexure).

4. As shown in the said worksheet, it is seen that out of total differential payable i.e. Rs. 9,18,54,603-37, assessee have paid the differential duty of Rs. 8,24,29,817-06, vide R.G.23A Pt. II Entry No. 0290018851 dtd. 2.6.09, along with the interest in terms of Section 11AB, amounting to Rs. 82,66,723/-, vide G.A.R.-7 No. 00420 dtd. 4.6.09. Hence, the assessee have short paid duty Rs. 94,24,786-31, and the same is payable by them along with interest under the provisions of Section 11AB of the C.E.A., 1944.

Accordingly I pass the following order :-

ORDER

1. I confirm the short paid differential duty amounting to Rs. 94,24,786-31 (Rs. Ninety Four Lakhs Twenty Four Thousand Seven Hundred Eighty Six only). The same should be paid by the assessee immediately, along with the interest under Section 11AA of the C.E.A., 1944.

2. The differential conversion cost amounting to Rs. 53.74 Crores as specified in the SCN dtd 12.5.11 is not liable for addition to the conversion cost in totality.

3. The amount of only Rs. 35.21 Crores out of total expenditure of Rs. 74.57 Crores of R & D expenditure is required to be added which has already been added by the assessee as per their letter dtd. 21.6.11.

4. *Bank Guarantee & Bond executed by the assessee will be discharged only after the payment of differential duty, alongwith interest, as mentioned above.*

5. Provisional Assessment for the year 2008-09 is finalized as ordered above

C. 01/PROV. ASSMT 2009-10/MLD/DC/ 2011 dated 30.11.2011

"10. I have gone through the case records, reports of Dy. Director (Cost), Central Excise, Mumbai-l, Range Superintendent and submissions made by the assessee, the provisional assessment for the year 2009-10 ordered to be treated as finalised in respect of M/s. Mahindra & Mahindra Ltd. (Automotive Sector) with the Central Excise duty liability to the tune of Rs. 1,06,43,104/-(Rupees one crore six lakhs forty three thousand one hundred four only) (BED Rs.1,03,33,111/- + Ed. Cess Rs.2,06,662/- + SHE Cess Rs. 1,03,331/-) alongwith the interest at appropriate rate, which the concerned Range Superintendent has confirmed the payment of duty by M/s. MMAD through RG A Pt. II Entry No. 1211105173 TO 1211105187 dtd. 21.07.10 and interest in terms of Rule 7(4) of Central Excise Rules, 2002 amounting to Rs.8,07,321/- vide G.A.R.-7 No. 00568 dtd. 05.08.10 without any discrepancy noticed for the impugned period for the year 2009-10.

11. The Bank Guarantee & Bond executed by the assessee will be discharged only after the production of documents evidencing payment of differential duty alongwith interest."

D. 02/PROV. ASSMT 2009-10/MLD/DC/ 2011 dated 30.11.2011

"10. I have gone through the case records, reports of Dy. Director (Cost), Central Excise, Mumbai-l, Range Superintendent and submissions made by the assessee, the provisional assessment for the year 2009-10 ordered to be treated as finalised in respect of M/s. Mahindra & Mahindra Ltd. (Farm Equipment Sector) with the Central Excise duty liability to the tune of Rs.2,79,47,176-42 rounded off to Rs.2,79,47,176/- (Rupees two crores seventy nine Lakhs forty seven thousand one hundred seventy six only) (BED Rs.2,71,33,188/- + Ed. Cess Rs.5,42,656/- + SHE Cess Rs.2,71,332/-) alongwith the interest at appropriate rate, which the concerned Range Superintendent has confirmed the payment of duty and interest by M/s. MMTD, without any discrepancy noticed for the impugned period for the year 2009-10.

11. The Bank Guarantee & Bond executed by the assessee will be discharged only after the production of documents evidencing payment of differential duty alongwith interest."

2.4 Aggrieved by the order of finalization of assessment revenue filed the appeal before the Commissioner (Appeal) urging following grounds:

- *The adjudicator failed to take into consideration the Cost Audit Report of the respondent for the concerned years, which was in variance with the information furnished by the respondent under Rule 12 of the said rules. He also failed to take into consideration the report of inquiry dated 22.10.2010 conducted in the Commissionerate for similar assessment of the respondent for the year 2006-07 as per CESTAT's order dated 13.09.2010; the O/O No. 235/20/V/2009/COMMR/KS dated 22.09.2009 and No. 236/20/V/2009/COMMR/KS dated 24.09.2009 passed by the Commissioner, Central Excise Mumbai - V for the year 2006-07.*

- *The adjudicator erred in finalizing the assessment, as the final assessment should have been done product wise/month wise; that he took into the consideration only R & D expenses and ignored other costs including administrative overheads etc.*
- *Hon'ble CESTAT in the case of M/s Ispat Industries Ltd. Vs- Commissioner of C. Ex., Raigad 2007 (209) ELT 0185 Tri.-LB held that Rule 8 of the Central Excise Valuation Rules, 2000 will not apply when only part of the goods is captively consumed. In such cases Rule 4 of the said Rules will apply.*
- *The respondent assessee submitted their Cross Objection Memorandum for the appeals mentioned at Sr. No. (i) to (iv) above wherein they submitted that they had correctly determined the value of the goods as per CAS-4 Certificate and as per CBEC's instructions in the matter. The contentions of the appellant are not correct and are contrary to the provisions of law.*

2.8 Appellant also challenged the orders finalizing the assessment stating Deputy Commissioner erred in arriving at the R&D expenses @1.30% against @1.14% and directing them to pay differential duty of Rs. 6,90,142/- (which they have already paid along with interest) ignoring the opinion of the independent cost accountant appointed by the Department under Section 14 of the Central Excise Act, 1944.

2.9 All the appeals were decided by the Commissioner (Appeals) as per the impugned order. Aggrieved by the impugned order appellants have filed these five appeals.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the Appellant and Shri Deepak Bhilegaonkar, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that-

- The Show Cause Notice has been issued on the ground that the correct amount of certain costs (R&D cost and Conversion cost) had not been while computing the cost of production of the goods under assessment. There is absolutely no ground or allegation in the Show Cause Notice, Order-in-Original as well as appeal filed by the

Revenue for the FY 2008-2009 that the value should be determined based under Rule 4 read with the decision of the Larger Bench in the case of Ispat Industries and not as per Rule 8 of Valuation Rules. It is well settled that the appellate authority cannot make out a new case while deciding the appeal. Kindly refer:

- Toyo Engineering India Ltd. [2006 (201) ELT 513 (SC)]
- Ballarpur Industries Ltd. [2007 (215) ELT 489 (SC)]
- Warner Hindustan Ltd. Vs. CCE - 1999 (113) ELT 24 (SC)

- Clearances of parts to the appellant's own units on stock transfer basis does not involve sale. Hence, Rule 8 of the Valuation Rules 2000 alone will be applicable.
- CBEC Circulars dated 30.6.2000, 1.7.2002 and 25.11.2013 are binding on the authorities under the Act. Department cannot take a stand contrary to the Circular issued by the Board. Kindly refer: CCE Vs. Dhiren Chemical Industries - 2002 (139) ELT 3 (SC)
- Present issue is no longer res-integra, and has been decided in the following cases holding that in the case of captive consumption assessable value of the parts cleared to the sister units has to be determined in terms of Rule 8 only.
    - Surya Roshni Ltd [2017 (357) ELT 978 (T)]
    - Ultratech Cement Ltd [2017 (11) TMI 1385 CESTAT]
    - Solaris Chemtech Industries Ltd. [2019 (5) TMI 714 – CESTAT]
    - Kiran Global Chem Ltd. [2018 (5) TMI 819 - CESTAT NEW DELHI]
    - Diamond Cements [2018 (4) TMI 223 - CESTAT NEW DELHI]
- Rule 4 of Valuation Rules is not applicable in the present case. As the parts of motor vehicles and tractors in dispute are not sold to the independent buyers as such. The value of such goods sold to independent buyers is not available in the present case. Further, the value of goods determined under Section 4A by the spare parts division cannot be applied for determining value of parts in dispute

under Rule 4 of Valuation Rules. Therefore, Rule 4 value is not available in the present case. In fact, there is no suggestion in the impugned Order for availability of Rule 4 value. Hence, Rule 4 is not applicable in the present case.

- In view of the above impugned Order is liable to be set aside.

3.3 Arguing for the revenue learned authorized representative while re-iterating the findings recorded in the impugned order submitted as follows:

- In para 2 page 206 of the order of the Comm (A), reference has been made to O-in-O no 235-236 dtd 22 & 24.09.2009 and to report of enquiry dtd 22.10.2010 conducted by the Commissionerate. No cognizance of this report has been taken by the Deputy Commissioner (adjudicating authority) while deciding the case.
- Report of enquiry dtd. 22.10.2010 (Page 1-32 of my compilation)-
    - The actual value of the questioned goods could not be ascertained for the sole reason of deliberate non-cooperation of the appellant assessees to this inquiry;
    - The appellant assessees had a complete system in place, whereby, they had been determining the actual transaction value of the questioned goods at the time and place of their removal in the relevant period;
    - The appellant assessee, despite being asked by the jurisdictional central excise officer, the learned respondent remand adjudicating authority and this inquiry; have deliberately desisted from furnishing this information;
    - The demands of the differential payable central excise duty liability, computed in the issued show cause notices, and determined and re-determined by the learned original adjudicating authority and the remand adjudicating authority, under their orders, find further corroboration and support from the statutorily published annual financial statement of the appellant noticees for the relevant period;
    - The appellant assessees had deliberately masked and hidden the information, furnished on 21.09.2010, from the

learned remand adjudicating authority and the Honourable CESTAT; and

- The appellant assessees have, thus, not fulfilled the assurances, given by their learned counsel, to the Honourable CESTAT on 14.09.2010.
- The determined costs of the questioned goods, when used for captive consumption in their outlying factories form part of the costs of their final products. The improper determination of these costs of the questioned goods in contravention of Section 4 of the Central Excise Act, 1944 consequently has resulted in the cost of the finished excisable goods, resulting in non-payment of the appropriate duty of excise, at least in the cases of automotive vehicles. At the same time, it has not been the case of the appellant assessees at any point of time that for the said reason; they had also not been in a position to correctly determine the transaction values of these finished excisable goods.

➢ The observation made in the O-in-O (81/2012) indicates that there was sale to other units and hence para 12 of circular 01.07.2002 will come into force. This has been rightly discussed by the Commissioner (A) in his order and directed as such.

➢ CESTAT order in Appeal No. 846-847 of 2012 (page 35-41 of ARS compilation) gives detailed observations for remanding the case back to the adjudicating authority.

➢ After remand of the case, O-in-O No. 07 dtd 21.11.2017 and No. 08 dtd 21.11.2017 have been issued. Against these orders an appeal has been filed by the appellant bearing Appeal no. 86058 & 86057 in 2018. In my opinion these two appeals should also be heard with the present appeals since the same has a bearing on these five appeals.

➢ Commissioners (A) has ordered that the assessment be finalised based on LB order in the case of Ispat Industries.

➢ In the appellants own case decided in 2018 [2018(362) ELT 382 (Tri. Mum)] (page 93-94 of ARS compilation) and pertaining to the period 2003-2004 wherein the same issue was before this Hon'ble Court the issue had been decided in favour of revenue. (para 4 of the Tribunals order).

➢ The impugned order needs to be upheld.

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

4.2 In the impugned order Commissioner (Appeals) has recorded following findings:

"(5) Present issue to be decided in this case is whether the assessments were finalised by the adjudicator as per the provisions of the law and Central Excise duty payable on the goods captively consumed is properly determined and paid by the respondent for the period in question. It is observed respondent is engaged in the manufacture of Motor Vehicles and Parts thereof falling under Chapter 87 of the Central Excise Tariff Act, 1985 in there Auto Division and Tractors, IC Engine, Transmission Assemblies and other parts falling under Chapter 87 and 84 of the Central Excise Tariff Act, 1985 in there (Farm Equipment Sector). The respondent assessee sought for provisional assessment under Rule 7 of the Central Excise Rules, 2002 for the goods supplied to their unit situated at Nasik, Igatpuri, Zaheerabad, Haridwar, Farm Equipment Sector, Kandivali, MIPL Zaheerabad, MRL, Nasik, SPD, Khane, etc as the case may be on the ground that they were not in position to determine the value of the goods under Rule 8 of the Central Excise Valuation Rules, 2000 as the actual expenses relating to the manufacturing activity etc, get finalised only after the accounts for the Financial Year are audited and finalised. They accordingly furnished the Bond and Bank Guarantee for the specified amount. After finalization of their accounts they submitted the details that were considered by the adjudicator with the assistance of Deputy Director (Cost), Central Excise, Mumbai I. By taking into consideration the value as reviewed by the Deputy Director (Cost), the adjudicator finalised the assessment and the respondent accordingly paid the differential duty.

(6) The appeal has been preferred by the Department as well as by the assessee on the aforesaid grounds. By this time definitely the books of accounts of the respondent assessee would have been audited and finalised. The actual cost of production of the entire product would be available. The respondent assessee have relied heavily on the CBEC Circular No. 643/34/2002-CX., dated

1-7-2002 issued under F. No. 6/39/2000-CX 1 amongst others that the valuation in their case is required to be done as per Rule 8 of the Central Excise Valuation Rules, 2000. It is observed that the said Circular at Sr. No. 5 and 12 clarified that:

5.	*How will valuation be done in cases of captive consumption (i.e. consumed within the same factory) including transfer to a sister unit or another factory of the same company/firm for further use in the manufacture of goods?*	*For captive consumption in one's own factory, valuation would be done as per rule 8 of the Valuation Rules i.e. the assessable value will be 115% of the "cost of production" of the goods. If the same goods are partly sold by the assessee and partly consumed captively, the goods sold would be assessed on the basis of "transaction value" [provided they meet the conditions of Sec. 4(1)(a)] and the goods captively consumed would be valued as per Rule 8 of the Valuation Rules. This is because, as per new Section 4, transaction value has to be determined for each removal.* *Where goods are transferred to a sister unit or another unit of the same company valuation will be done as per the proviso to Rule 9.*
12.	*How will valuation be done when goods are sold partly to related persons and partly to independent buyers?*	*There is no specific rule covering such a contingency. Transaction value in respect of sales to unrelated buyers cannot be adopted for sales to related buyers since as per Section 4(1) transaction value is to be determined for each removal. For sales to unrelated buyers valuation will be done as per Section 4(1)(a) and for sale of the same goods to related buyers recourse will have to be taken to the residuary Rule 11 read with Rule 9 (or 10). Rule 9 cannot be applied in such cases directly since it covers only those cases where all*

		the sales are to related buyers only.

In the present case the issue is not that of the valuation of the goods captively consumed within the same factory but that which were supplied to their units. The goods in question are cleared to different units of the same manufacturer or related concerns.

7 (a) Hon'ble CESTAT in the case of Ispat Industries Ltd vs Commissioner of Central excise Raigad 2007 (209) ELT 0185 (T-LB)] after taking into consideration CBEC Circular No 643/34/2002-CX., dated 1-7-2002 issued under F. No. 6/39/2000-CX 1 had held that:

"7. We also agree with the submission of the assessee that even if both the rules, i.e. Rule 4 and Rule 8, were applicable, it would only be logical to read and apply the various rules in the Central Excise Valuation Rules in a sequential manner. Though the Central Excise Valuation Rules, 2000 do not specifically prescribe such sequential application of various rules, the same, in our view, is the only reasonable way to read these rules. Any other interpretation would only lead to confusion and chaos. Since the applicability of Rule 4 is not really in dispute, there was no need to look further and regardless of the applicability or otherwise of Rule 8, the assessable value should have been determined in terms of Rule 4 of the Valuation Rules.

8. The conclusion that we are drawing in the present case would lead to determination of a value which, in our view, will not only be reasonable but also consistent with the provisions of Section 4 of the Central Excise Act. We would, at this stage, draw support from the judgment of the Supreme Court in the assessee's own case, as reported in 2006 (202) E.L.T. 561, wherein the Court applied "The Gunapradhan Principle" in interpreting the Customs Valuation Rules. We have kept in mind the following observations of the Court in coming to our above conclusion:

"26. In our opinion if there are two possible interpretations of a rule, one which subserves the object of a provision in the parent statute and the other which does not, we have to adopt the

former, because adopting the latter will make the rule ultra vires the Act.

27.............

36. In our opinion, the Gunapradhan principle is fully applicable to the interpretation of Rule 9(2). Rule 9(2) is subservient to Section 14. We must, therefore, interpret it in such a way as to make it in accordance with the main object that is contained in Section 14 of the Customs Act. It may be that in isolation Rule 9(2) conveys some other meaning, but when it is read along with Section 14 of the Act, it must be given a meaning which is in accordance with the object of Section 14. The object of Section 14 is 'primary' whereas the conditions in Rule 9 (2) are the 'accessories'. The 'accessory' must, therefore, serve the 'primary'."

9. In view of what we have observed above, we answer the reference in the following terms:

(a) the provisions of Rule 8 of the Valuation Rules will not apply in a case. where some part of the production is cleared to independent buyers;

(b) the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944".

(b) Hon'ble CESTAT in the case of Daman Ganga Board Mills Pvt Ltd. vs Commr of C EX., Daman, Vapi 2012 (276) ELT 0532 Tri.-Ahmd had held that:

"5. After carefully going through the submission made by both the sides, we find that the issue is no more res integra and stands settled by the Larger Bench decision of the Tribunal in the case of Ispat Industries Limited v. C.C.E, Raigad - 2007 (209) E.L.T. 185 (Tri. LB). It stands held that where a part of the production is being transferred to another plant of the same assessee and balance production sold to independent buyers, the

goods transferred to other unit of the same assessee, will not be assessed in terms of Rule 8 of the Valuation Rules i.e. at 115% cost of the manufactured goods. We note that in the present case, there is no allegation that the value adopted by the appellants for transfer of the goods to their sister unit is less than the value at which the goods were being sold by them- to other independent buyers. If that be so, the ratio of law declared by the Larger Bench is fully applicable to the facts of the present case".

(8) The Larger Bench of Hon'ble CESTAT after taking into consideration CBEC Circular No. 643/34/2002-CX., dated 1-7-2002 issued under F. No. 6/39/2000-CX 1 had specifically held that the provisions of Rule 8 of the Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers; that the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944.

(9) The assessee in their appeal had prayed to set aside the impugned order and direct the adjudicating authority for the re-assessment of the goods. The issue involved is final assessment of goods that were provisionally assessed for the year 2008-09 and 2009-10. The method that was adopted by the adjudicating authority to finalise the assessment is disputed both by the assessee and the Department on some of the issue for the year 2008-09 and by the Department for the year 2009-10. The law laid down by the Larger Bench of Hon'ble CESTAT has to be followed and the same cannot be ignored as it is binding on the officers. The Larger Bench had passed the order on 02.02.2007. Since the period involved in the present appeals is 2008-09 and 2009-10. the adjudicating authority is bound by the same. Further, it is observed that the adjudicating authority has not only ignored the order of the Larger Bench of Hon'ble CESTAT

but also various aspects as specified in the appeal memorandum of the Revenue. The same is therefore, required to be set aside."

4.3 Commissioner (Appeals) has in para 6 of the impugned order concluded that the issue involved in the present case is in respect of the determination of the assessable value of the goods consumed captively or cleared to their sister concerns. After having concluded so instead of determining the value as per Rule 8 of the Central Excise Valuation Rules, 2000, he directed for the valuation as per Rule 4 following the decision of the larger bench of CESTAT in the case of Ispat Industries. Undisputedly the facts of the case under consideration are not identical to the case considered by larger bench. In case of Ispat Industries tribunal larger bench has recorded the facts as follows:

"2. We have heard both sides. ***It is an undisputed position that the assessees were transferring a part of its production (about 20%) of HR coils to its units at Taloja, Kamothe and Kalmeshwar and the balance production was being sold to independent buyers.*** *It is also not disputed that the value on which duty has been discharged by them at the time of clearance of goods to their units was the same at which duty was discharged by them in respect of clearances to independent third parties. Before the referral Bench, the assessees had placed reliance on the decision of the Tribunal in the case of Avon Tubes v. CCE, Ludhiana 2004 (117) ECR 616 wherein the Tribunal held that when the goods are partly sold to unrelated buyers and rest are captively consumed, the assessable value of the captively consumed goods should be determined based on the value at which the goods are sold to unrelated buyers. It was further held that Rule 8 of Valuation Rules is applicable only in a situation where all the excisable goods manufactured by an assessee are captively consumed by him or on his behalf in the production or manufacture of other articles. On the other hand, learned DR appearing for the Revenue had placed reliance on the decision of the Tribunal in the case of BOC (I) Ltd. v. CCE 2004 (168) E.L.T. 478 wherein the Tribunal had by referring to CBEC circular No. 643/34/2002-CX dated 1-7-2002, held that where goods are captively*

consumed within the same factory, valuation should be determined in terms of Rule 8 and where goods are transferred to a sister unit or another factory of the same company, valuation of the said goods should be done as per the proviso to Rule 9 of the Valuation Rules.

9. In view of what we have observed above, we answer the reference in the following terms :

(a) the provisions of Rule 8 of the Valuation Rules will not apply in a case where some part of the production is cleared to independent buyers;

(b) ***the provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944."***

4.4 In the present case there is no dispute that the entire goods were stock transferred to the sister concerns of the appellant on payment of duty (assessed provisionally) on determination of the value as per Rule 8 of the Central Excise Valuation (Determination of the Price of the Excisable Goods) Rules, 2000. Appellants have requested for the provisional assessment only for the reason that they were not in position to determine the certain cost components at the time of clearance and could have been determined only on finalization of the accounts for the financial year. Appellant had filed letter seeking provisional assessment which was allowed by the jurisdictional Assistant/ Deputy Commissioner. The letters seeking provisional assessment and letter according permission to make assessments provisional are reproduced below:

Mahindra & Mahindra Ltd. Mahindra

Farm Equipment Sector, Akurli Rd, Kandivali (E), Mumbai - 400 101, Tel No.: 29654000

Ref : M&M/FES/MFG-PARTS/PRO-ASS/2009-10 15h April' 2009

The Asst. Commissioner Central Excise,
Malad Division, Mumbai -V
2nd Floor, Takshashila Bldg.
Samant Estate,Goregaon (East)
Mumbai - 400 063.

Assistant Commissioner
17 APR 2009
C. Ex., Malad Dn, Mumbai-V.
Central Diary No.

Dear Sir,

Sub : **Provisional Assessment of goods cleared for captive consumption during the FY 09-10**

We are manufacturers of tractors, I.C. Engines & Parts thereof. We have our units at various locations where we also manufacture tractors.

We request permission for PROVISIONAL ASSESSMENT of the manufactured goods to be stock transferred by us on cost basis to our outlying units for captive use. Details required for grant of permission are given herein below.

a) Ground for seeking permission – At the time of stock transferring of I.C. Engines & manufactured parts to our own units on payment of duty on cost price in terms of Rule 8 of C. Ex Valuation Rules, 2000, for captive use, we are not in a position to accurately determine the value of the said goods, since the actual expenses relating to manufacturing activities, R&D cost, if any, and transportation & octroi costs get finalized only after the accounts for the Financial Year are audited and finalized.
b) Period for which Provisional Assessment is required –FY 2009-10.
c) **Rate of Duty** – 8% adv + Edn. Cess 2% on BED+ SHE Cess 1% on BED.
d) **Value** : At the time of clearance, duty would be paid on 110% of the value arrived by aggregating standard material cost as on 31st March'2009, with other expenses such as manufacturing related labour & overhead, Freight Octroi and R & D based on the previous audited figures of 2007-08.

We undertake to appear before the jurisdictional Asst. Commissioner of Central Excise within 7 days of such date fixed by him and furnish all relevant information and documents

21/4/09.
Smt. R. S. Shende
Inspector, Central Excise,
Range-02, Divn. Malad.

within the time specified by the Asst. Commissioner of Central Excise in his order, to enable the proper officer to finalize the provisional assessment.

In the circumstances, we request for grant of permission to **PROVISONALLY ASSESS** the goods being stock transferred by us, to pay the duty on provisional basis and finalize the assessment after audit & finalization of the accounts pertaining to the year 2009-10 sometime during Oct/Nov'2010.

On hearing from you, we shall execute the bond and submit the bank guarantee as specified under Rule 7 of the C.Ex.Rules, 2002. Alternatively, our existing Bank Guarantee executed towards provisional assessment for the year FY 08-09 can be extended for the further period towards provisional Assessment for the FY 09-10.

Please acknowledge receipt.

Thanking you,

Yours faithfully
For Mahindra & Mahindra Ltd.
Farm Equipment Sector

Ravi L. Ramanan
GM-Excise & Service Tax

CC: Supdt. of C.Ex. Range 02, Malad division, Mumbai-V

OFFICE OF THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE:MALAD DN.:MUMBAI-V
2nd Floor: Takshashila Building:Samant Estate: Goregaon(East):Mumbai- 400 063

2686

F.No.V.Gen(30)10/2008
Mumbai.15th September 2009.

To
M/s Mahindra & Mahindra Ltd (FES)
Akurli Road., Kandivali East.
Mumbai- 400 101.
Gentlemen,

Sub:- Provisional assessment of goods cleared for captive consumption for the year 2009-10- reg.

Please refer to your letter bearing No. M & M(FES)/Prov. Assmt/2009-10 dated 13.07.09 on the above subject.

Your request for provisional assessment of goods cleared for captive consumption during the year 2009-10 is hereby accepted.

You are requested to execute a general bond for Rs. Five Crores & twenty five lakhs. alongwith a bank guarantee of 25 % of the bond amount, as per the requirement of Rule 7 of Central Excise Rules 2002.

During the period of provisional assessment you are requested to clear the goods at the price declared by you in the list enclosed along with your above mentioned letter on payment of appropriate duty payable thereon. You are also requested to clearly mention (provisionally assessed) on all the relevant documents

(K.G.V.N.Surya Teja)
Assistant Commissioner
Central Excise: Malad Dn.: Mumbai-V

Copy to Supdt Central Excise Range 02, Malad Division , Mumbai-V for information.

Annexure-I

Assistant Commissioner
22 APR 2009
C. Ex., [illegible] Dn, Mumbai-V.

Mahindra & Mahindra Ltd.

Mahindra

Automotive Sector - Excise Cell
Akurli Road Kandivli (East), Mumbai 400 101, India. Tel: (022) 887 4601 / 8874620, Fax : (022) 887 63 68

Ref:ADC/C.EX/Prov.Ass./09/97

20TH April'09

The Assistant/ Deputy Commissioner of Central Excise
Division Malad, Mumbai V, Commissionarate
Takshashil Building, Samant Estate,
Goregaon (E)
Mumbai - 400 063.

Dear Sir,

Sub : Provisional Assessment of goods being cleared for captive Consumption.

We are manufacturing & clearing Motor Vehicles Parts, I.C. Engine, Gear Boxes ,Transmission, Axles , I.C .Engine parts etc to our sister units at Nasik, Igatpuri, Zaheerabad, Haridwar, Farm Equipment Sector, Kandivli, MIPL, Zaheerabad, MRL Nasik & SPD at Khane, on payment of duty on values arrived at as per Rule 8, Central Excise Valuation Rules, 2000. At the time of clearance, we are not in a position to accurately determine the value of the said goods, since the actual expense relating to manufacturing activities, R&D costs, if any, and transportation & Octroi costs, get finalized only after the accounts for the Financial Year are audited and finalized.

Provisional Assessment is required for the period 2009-10.
Rate of duty - 8% adv + E.Cess 2% of BED + SHE Cess 1% of BED.
We are enclosing herewith assessable value presently being applied for clearance of our ~~manufacturing parts~~ to our own units for captive use. The cost will be made applicable provisionally for clearance of goods for captive consumption during the year 2009-10 till we further revise the cost either during the same financial year or anytime subsequently.

We are furnishing below quantum of Central Excise duty paid on the manufactured goods cleared for captive consumption to our other manufacturing locations, during the financial year 2008-09

Clearance to our unit at	**Duty paid during the year 08-09**
Nasik	Rs. 391323750/-
Igatpuri	Rs. 116879787/-
Zaheerabad	Rs. 74267369/-
[illegible] Parts depot at Khane	Rs. 13492983/-
Haridwar	Rs31648606/-
FES kandivli	Rs. 1448910

Mahindra & Mahindra Ltd.

Automotive Sector - Excise Cell
Akurli Road Kandivli (East), Mumbai 400 101, India. Tel: (022) 887 4601 / 8874620, Fax : (022) 887 63 68

However the quantum of differential duty payable after finalization of Assessment would **depend** upon the increase in material cost & other overheads which we do not anticipate more than **10 %** during the year 2009-10.

We undertake to appear before the Assistant/ Deputy Commissioner, C.Ex. within 7 days or such date fixed by him, and furnish all relevant information and documents within the time specified by the Assistant/ Deputy Commissioner, C.Ex., in his order, so as to enable the proper officer to finalise the provisional assessment.

In the circumstances, we request that we may be permitted to **PROVISIONALLY ASSESS** the goods being removed, pay the duty on provisional basis and finalise the assessment after audit & finalisation of the accounts pertaining to the year 2009-10 sometime during Oct. / Nov. 2010.
On hearing from you, we shall execute the bond and submit the bank guarantee as specified under Rule 7 of ~~the C.Ex.~~ Rules, 2002.

Please acknowledge receipt.

Thanking you,

Your faithfully
For Mahindra & Mahindra Ltd.

(S.S. Chari)
Sr Manager - Excise

cc Supdt., C.Ex. Range 01, Malad Dn., Mumbai V Commissionerate

OFFICE OF THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE:MALAD DN.:MUMBAI-V
2ND Floor: Takshashila Building:Samant Estate: Goregaon(East):Mumbai- 400 063

F.No.V.Gen(30)12/2006 / 2488
Mumbai, 15th September 2009.

To
M/s Mahindra & Mahindra Ltd (AD)
Akurli Road., Kandivali East,
Mumbai- 400 101.
Gentlemen,

Sub:- Provisional assessment of goods cleared for captive consumption for the year 2009-10- reg.

Please refer to your letter bearing No. AD:EXT:PROVASS:2009:122 dated 11.08.09 on the above subject.

Your request for provisional assessment of goods cleared for captive consumption during the year 2009-10 is hereby accepted.

You are requested to execute a general bond for Rs. One crore & fifty lakhs alongwith a bank guarantee of 25 % of the bond amount, as per the requirement of Rule 7 of Central Excise Rules 2002.

During the period of provisional assessment you are requested to clear the goods at the price declared by you in the list enclosed along with your above mentioned letter on payment of appropriate duty payable thereon. You are also requested to clearly mention (provisionally assessed) on all the relevant documents

(K.G.V.N.Surya Teja)
Assistant Commissioner
Central Excise: Malad Dn.: Mumbai-V

Copy to Supdt Central Excise Range 01, Malad Division , Mumbai-V for information.

Mahindra & Mahindra Ltd. Mahindra

Automotive Sector Excise Cell
Akurli Road, Kandivli (East), Mumbai 400 101, India. Tel: (022) 887 4601 /8864165, Fax : (022) 887 6368

...Ex Provisonal Assessment/08/ 23 25.06.2008

The Dy. Commissioner of Central . Excise
Malad Division, Mumbai – V
2nd Floor , Takshashila Bldg.
Samant Estate , Goregaon (E)
Mumbai – 400 063

सहायक आयुक्त Assistant Commissioner 27 JUN 2008 के. उ. शु. मालाड प्रभाग, मुंबई-V

Dear Sir,

Sub : Provisional Assessment of goods cleared for captive consumption

We are manufacturers of Motor Vehicles , I.C.Engines & Parts thereof. We have our units at various locations where also we manufacture Motor vehicle . We are clearing I.C.Engines & manufactured parts to our own units on stock transfer basis for captive use on payment of duty on cost price in terms of the Rule 8 of Central Excise Valuation Rules, 2000.

As far as IC Engines and Parts of Vehicles manufactured and cleared by us to our own units at are concerned, these goods are cleared by us on payment of duty on values arrived at as per Rule 8, *ibid*. At the time of removal of the said goods, we are not in a position to accurately determine the value of the said goods, since the actual expenses relating to manufacturing activities, R&D costs, if any, and transportation & octroi costs get finalized only after the accounts for the Financial Year are audited and finalized. In the circumstances, we request that we may be permitted to PROVISIONALLY ASSESS the goods being removed, pay the duty on provisional basis and finalise the assessment after audit & finalization of the accounts pertaining to the year 2008-09 sometime during Oct / Nov 2009.

On hearing from you, we shall execute the bond and submit the bank guarantee as specified under Rule 7 of the C.Ex Rules, 2002.

Please acknowledge receipt.

Thanking you.

Yours faithfully,
Mahindra & Mahindra Ltd

(S.S.Chari)
Sr. Manager –Excise

Recd
27/6/08

... C.Ex. Range 01

... Apollo Bunder, Mumbai 400 001. Tel: (022) 202 1031 / 287 3388 Fax (022) 202 8708 / 8990.

OFFICE OF THE DEPUTY COMMISSIONER OF CENTRAL EXCISE : MALAD DIVISION : MUMBAI-V: TAKSHASHILA BUILDING : 2ND FLOOR : SAMANT ESTATE : GOREGAON (E) : MUMBAI- 400 063.

F.No V.Misc(30)27/08/ 1401 Dated 29.07. 2008

To,
M/s Mahindra & Mahindra Ltd. (AD),
Akurli Road, Kandivali(East),
Mumbai-400 101.

Gentleman,

Sub :- Provisional Assessment (PA) goods cleared for captive consumption -reg
Please refer to your application dated 25.06.2008 and subsequent letter dated 07.07.08 on the above subject.

2. In the letter dated 07.07.08 it has been informed by you that during the period 2006-07 the differential duty worked out to be 82,96,357/- crores hence th tentative differential duty liability that will be created during the financial year 2008-09 may be accepted as Rs. 1,00,00,000/- (Rupees one crore)

3. In this connection, the undersigned is pleased to accept your request for PA of the goods which are captively consumed and data for cost construction is not available.

4. However, as the prices of most of the raw materials including fuel, metal etc have gone up in the last few months and as the differential duty arrived at by you on this account for the financial year 2007-08 is Rs. 3,17,45,923/-, it would be appropriate that a bond for Rs. 5 crores along with the a Bank Guarantee of 25% of the said amount as security be executed.

5. During the period of PA you will clear the goods at the price declared by you in the list enclosed along with your letter dated 07.07.08 and on payment of appropriate duty there of. All the documents covered under the PA should be marked as "PROVISIONALLY ASSESSED".

6. After receipt of the Bond along with bank guarantee and its subsequent acceptance by this office, a computer generated sanctioning order will be issued to you.

Yours faithfully,

(S.P. RAO) 29
DEPUTY COMMISSIONER
CENTRAL EXCISE, MALAD DIV.

सहायक आयुक्त
Assistant Commissioner
31 MAR 2008
के. उ. शु मालाड प्रभाग, मुंबई-V.
C. Ex. Malad Dn., Mumbai-V.
केन्द्रीय डैनीकी सं.
Central Diary No.

M&M(FES)/Prov. Assmnt/2007-08 **March 31st, 2008**

The Dy. Commissioner,
C.Ex, Malad Dn.,
2nd Floor, Takshashila Building,
Goregaon (E), Mumbai 400 063.

Sir,

Sub : Provisional Assessment of goods cleared for captive consumption

We are manufacturers of tractors, I.C Engines and Parts thereof. We have our units at various locations where also we manufacture tractors.

We request permission for PROVISIONAL ASSESSMENT of the manufactured goods to be stock transferred by us on cost basis to our outlying units for captive use. Details required for grant of permission are given herein below.

(a) Grounds for seeking permission - At the time of stock transferring of I.C Engines & manufactured parts to our own units on payment of duty on cost price in terms of Rule 8 of C.Ex Valuation Rules, 2000, for captive use, we are not in a position to accurately determine the value of the said goods, since the actual expenses relating to manufacturing activities, R&D costs if any, and transportation & octroi costs get finalized only after the accounts for the Financial Year are audited and finalized.
(b) Period for which Provisional Assessment is required – FY 2008-09.
(c) Rate of Duty – 14% adv + Edn. Cess 2% of BED + SHE Cess 1% of BED
(d) Value – At the time of clearance, duty would be paid on 110% of the value arrived by aggregating standard material cost as on 31st March 2008, with other expenses such as manufacturing related labour & overhead, freight, octroi and R&D based on the previous audited figures of 2006-07.

We undertake to appear before the jurisdictional Deputy / Asst. Commissioner, C.Ex., within 7 days of such date fixed by him, and furnish all relevant information and documents within the time specified by the said Deputy / Asst. Commr., C.Ex., in his order, to enable the proper officer to finalise the provisional assessment.

In the circumstances, we request for grant of permission to **PROVISIONALLY ASSESS** the goods being stock transferred by us, to pay the duty on provisional

INSPECTOR OF CENTRAL EXCISE
Range-02, Malad Division
MUMBAI-V

basis and finalise the assessment after audit & finalization of the accounts pertaining to the year 2008-09 sometime during Oct / Nov 2009.

On hearing from you, we shall execute the bond and submit the bank guarantee as specified under Rule 7 of the C.Ex Rules, 2002.

Please acknowledge receipt.

Thanking you,

Yours sincerely,
For **MAHINDRA & MAHINDRA LTD (FES)**

(RAVI L. RAMANAN)
Gen. Manager (Excise)

cc : Supdt., C.Ex., Range 02, Malad Dn., Mumbai V Commissionerate

OFFICE OF THE DEPUTY COMMISSIONER OF CENTRAL EXCISE :
MALAD DIVISION : MUMBAI-V: TAKSHASHILA BUILDING : 2ND FLOOR : SAMANT
ESTATE : GOREGAON (E) : MUMBAI- 400 063.

F.No: V.Misc(30)10/08/ 891 Dated : 06.05. 2008

To

M/s Mahindra & Mahindra Ltd. (FES),
Akurli Road, Kandivali(East),
Mumbai-400 101.

Gentlemen,

Sub .- Provisional Assessment (PA) goods cleared for captive consumption -reg

Please refer to your application dated 31.03.2008 and subsequent letter dated 04.04.08 on the above subject.

2. In the letter dated 04.04.08 it has been informed by you that it would be difficult to calculate the cost of manufactured part and hence it is impossible to estimate about the differential duty likely to arise during the financial year on account of financial year and it has been requested by you to accept the same amount of the Bond as that of the last year.

3. In this connection, the undersigned is pleased to accept your request for PA of the goods which are captively consumed and data for cost construction is not available.

4. However, as the prices of most of the raw materials including fuel, metal etc have gone up in the last few months, it would be appropriate that a bond for Rs. 5.25 crores along with the Bank Guarantee of 25% of the said amount as security be executed.

5 During the period of PA you will clear the goods at the price declared by you in the list enclosed along with your letter dated 04.04.08 and on payment of appropriate duty there of. All the documents covered under the PA should be marked as "PROVISIONALLY ASSESSED".

6 After receipt of the Bond along with bank guarantee and its subsequent acceptance by this office, a computer generated sanctioning order will be issued to you.

Yours faithfully,

(S. P. RAO) 6.05.08
DEPUTY COMMISSIONER
CENTRAL EXCISE, MALAD DIV.
MUMBAI-V

4.5 From the above correspondences it is quite evident that the admitted position is that entire production of was either being captively consumed or cleared to sister concerns for captive consumption. Revenue has at no point of time pointed out that the same goods were being cleared to the independent buyers on the payment of duty. Even Commissioner (Appeals) does not point towards a single instance whereby during the entire period covered by the four finalization orders, i.e. 2008-09 & 2009-10, where the goods were cleared to independent buyers. For application of the Rule 4 of the valuation Rules, 2000, the sale to independent buyer at or about the same time is necessary, as the transaction value for the sale to independent buyer would have been adopted for the determination of the assessable value of the goods captively consumed. If the transaction value in respect of the clearance made to the independent buyer was available the value would have been determined under Rule 4, without resorting to provisional assessment. It is not understood, in absence of any sale to independent buyer, what value would be adopted for determination of value under Rule 4. Even para 9 (a) of the decision in the case of Ispat Industries say so. Further in case of Ispat Industries, only 20 % of the goods were captively consumed and 80 % of the goods were sold to independent buyer.

4.6 The issue in this respect has been clarified by the board;-

- At the time of enactment of the amended Section 4 with effect from 1.7.2000, CBEC vidé Circular No. F. No. 354/81/2000-TRU dated 30.6.2000 specifically states that the assessable value of captively consumed goods will be taken at 115% of the cost of manufacture of goods even if identical or comparable goods are manufactured and sold by the same assessee.
- CBEC vide Circular No.643/34/2002-CX dated 1.7.2002 once again specifically considered the situation of captive consumption of excisable goods and clarified that the assessable value of the goods captively consumed has to be determined only under Rule 8 of the Central Excise Valuation (Determination of price of Excisable Goods) Rules, 2000 even if part of the goods manufactured was sold by the assessee.
- CBEC vide Circular No. 975/9/2013-CX dated 25.11.2013 explained the scope of the substituted Rule 8 vis-à-vis the old Rule 8. The said Circular clearly states that even part of the excisable goods is sold, and part of the goods are captively consumed, the assessable value of the captively consumed goods have to be determined under Rule 8 only. It was clarified that the new provision was introduced which clearly state their application irrespective of whether the whole or a part of clearances of manufactured goods are covered by the circumstances given in the said rule. The Board further stated that these amendments in the rules addressed the issues clarified already vide Board Circular dated 1.72002.

These Circulars specifically considered the situation of clearance of excisable goods for captive consumption and clarified that the assessable value, of such goods has to be determined according to which Rule 8 of Valuation Rules, 2000.

4.7 Subsequently after finalization of the accounts appellant requested for finalization of assessment, on the basis of cost accountant certificate determining value as per CAS-4. For the year 2008-09 the matter was referred to independent cost accountant for verification, and for the year 2009-10 to Deputy Director (Cost). Deputy Director (Cost), after verification submitted his report. Relevant extracts from the report are reproduced here below.

"In this regard, the cost of production of various products of AUTO Division was verified from the SAP accounts as per CAS-4 Guidelines and the CAS-4 statements for the year 2009-2010 duly certified by M/s. Y.R. Doshi and co., Cost Accountants, were also reviewed and based on the clarifications and explanations furnished by the assessee on certain variation in cost of production between the value of clearance and cost as per CAS4 statements in respect of certain products/parts regarding material cost, Freight and percentage of R&D expenses, I state that the said certified CAS 4 statements for the year 2009-10 may be accepted as correct.

The verification was done on the basis of the Audited Accounts and the supporting working sheets for the year 2009-10, made available by the assessee and accordingly, you may finalize the assessment for the year 2009-10."

4.8 Range Superintendent agreed with the report and stated that Dy. Director (Cost) being an expert in the field, the same may be accepted. However, he suggested for minor modification in the allocation of cost towards R & D expenses. Thereafter taking into account the details as submitted by the appellant the assessments were finalized by the jurisdictional Deputy Commissioner of on the basis of the Cost Auditor Certificate and the Report of Deputy Director Cost. We do not find any mistake in the approach adopted by the jurisdictional Deputy/ Assistant Commissioner or the value as determined by him.

4.9 Accordingly we do not find any merits in the impugned order.

5.1 Appeal No E/85170, 85171, 85172, 85173/2013 are allowed.

5.2 Appeal No E/85174/2013 is dismissed as infructuous.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu