

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

Excise Miscellaneous Application No. 92648 of 2017

(On behalf of Appellant)

Excise Appeal No. 672 of 2008

(Arising out of Order-in-Original No. 02/CEX/2008 dated 24.03.2008 passed by the Commissioner of Central Excise, Pune-II)

M/s. Kay Bouvet Engineering Pvt. Ltd.

Appellant

N-3, Additional MIDC, Satara 415 001.

Vs.

Commissioner of Central Excise, Pune-II

Respondent

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

AND

Excise Appeal No. 673 of 2008

(Arising out of Order-in-Original No. 02/CEX/2008 dated 24.03.2008 passed by the Commissioner of Central Excise, Pune-II)

Niraj Chandra

Appellant

Chief Executive of Kay Bouvet Engg. Pvt. Ltd.
N-3, Additional MIDC, Satara 415 001.

Vs.

Commissioner of Central Excise, Pune-II

Respondent

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

Appearance:

Shri Vikram Nankani, Senior Advocate with Shri Vipin Jain and Shri A. Sheerazi, Advocates 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: 16.11.2022

Date of Decision: 16.11.2022

FINAL ORDER NO. A/86287-86288/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 02/CEX/2008 dated 24.03.2008 of the Commissioner of Central Excise, Pune II. By the impugned order following has been held:

"ORDER

I. I confirm the demand of Rs. 3,73,39,200/- (Rs. Three Crore Seventy Three lakhs Thirty Nine thousand, Two hundred only) short paid on account of under-valuation of excisable goods manufactured and removed by M/s KBEPL during the period from 1.10.2000 to 31.3.2004, in terms of Section 11A(2) of the Central Excise Act, 1944 and direct the assessee to pay the same forthwith.

II. I confirm the demand of Rs. 1,02,67,856/- (Rs. One Crore Two Lakhs Sixty Seven Thousand Eight Hundred Fifty Six Only) and Education Cess of Rs. 1900/- (Rs. One thousand Nine hundred only) not paid by M/s KBEPL on the manufacture and removal of excisable goods from the Satara Unit but shown to have been received from Goa unit during the period from 1.10.2000 to 10.1.2005, in terms of Section 11A(2) of the Central Excise Act, 1944 and direct the assessee to pay the same forthwith.

III. I confirm the demand of Rs. 36,09,438/- (Rupees Thirty Six Lakhs Nine Thousand Four Hundred Thirty Eight Only) not paid by M/s KBEPL on the escalation bills raised by them in respect of excisable goods manufactured and removed by them during the period from 15/10/2000 to 31/03/2003, in terms of Section 11A(2) of the Central Excise Act, 1944 and direct the M/s KBEPL to pay the same forthwith.

IV. I direct M/s KBEPL to pay interest at the appropriate rate on the aforesaid confirmed demands in terms of Section 11AB of the Central Excise Act, 1944.

V. I impose a penalty of Rs. 5,12,18,394/- (Rs. Five Crores Twelve Lakhs Eighteen Thousand Three Hundred Ninety Four only) in terms of Section 11AC of the Central Excise Act, 1944.

VI. I impose a personal penalty of Rs. 2,50,00,000/- [Rupees Two Crore Fifty Lakhs Only] on Shri Niraj Chandra, Chief Executive of M/s. KBEPL, Satara in terms of Rule 209A / Rule 26 of the Central Excise Rules, 1944/2002."

2.1 Appellant 1 is registered with Central Excise and engaged in manufacture of excisable goods namely Sugar machineries and Special Products falling under Chapter 84 of the Schedule to

Central Excise Tariff Act, 1985. Appellant 2 is Chief Executive of the Appellant 1.

2.2 During the course of visit to the premises of Appellant 1, it was observed that CENVAT Credit utilization, was excessively high and disproportionate to the quantum of raw material consumption production & removal of excisable goods. Investigation undertaken revealed that:

- Appellant 1 was receiving orders for supply of sugar machineries and similar products on turnkey basis. They used to manufacture certain goods in their premises and would procure the other goods and supply them directly at the site of their customers.
- Appellant 1 was suppressing the value of the goods manufactured and cleared by them on payment of duty. They were overvaluing the price of the brought out items so that the total value of turnkey project would match with the value of the goods supplied together.
- Some of the brought out items were shown to be purchased from their group company namely Kay Chandra Iron Engineering Works Pvt Ltd., Goa. However in fact these goods were manufactured at the premises of Appellant 1 in Satara, and cleared from their premises to their customer without payment of any duty. There is primary blood relationship amongst the directors of the two companies as indicated in table below, and the profits earned are received by the members of same family.

S N	Company	Name of Director	Relationship
1	Kay Bouvet Engineering Pvt Ltd., Satara	Sushil Chandra	Father
		Niraj Chandra	Son
2	Kay Chandra Iron Engineering Works Pvt Ltd., Goa	Niraj Chandra	Son
		Usha Gupta	Mother

- The sale price of the brought out items from their group company was escalated by value addition of 230% and in case of other purchases by over 50% as is evident from table below:

Details of Purchases of brought out items	Purchase Price	Sale Price	Value Addition	% value Addition

Purchased from Group Company	5,69,42,110	19,10,56,707	13,41,14,597	235.52
Purchased from Other	15,58,62,285	23,84,15,963	8,25,53,678	52.96

- Noting the discrepancies as above, matter was referred to the Assistant Director (Cost) for the cost audit. It was revealed that the assessable value on which the duty was paid by the appellant 1, was much below the cost of raw material consumed and the value of brought out items was escalated as is evident from the table below:

Financial Year	Manufactured Goods		Brought Out Items			
	Raw Material	Finished Gods	Purchase	Sale	Escalation	% Escalation
2000-01	100518803	53777229	83457654	155931565	72473911	86.83
2001-02	68680284	25860648	77372987	153984994	76612007	99.01
2002-03	62555293	37243767	46749452	102564193	55814741	119.39
2003-04	92112457	92232510	5224300	16991918	1167718	225.24
Total	323866837	209114154	212804393	429472670	206068377	101.81

- On the basis of the report of Assistant Director (Cost) and subsequent investigations revenue was of the view that during the period 01.04.2000 to 31.03.2004, the appellant had short paid the duty to extent of Rs 3,73,29,200/- by suppressing the sale price of the goods cleared by them.
- Investigations also revealed that in respect of the brought items shown to be purchased from M/s K C Goa, their sister concern, no manufacturing activities were undertaken in Goa, but all the goods were actually manufactured and cleared from the premises of the appellant. This was done to avail the benefit of SSI exemption on the clearances made from GOA unit. These goods were cleared clandestinely in garb of brought out items. The duty so short paid in respect of the goods shown to be manufactured at Goa is about Rs 1,02,67,856/- + Rs 1900 (Edu Cess).
- Appellant 1 raised escalation bills including the duty, on customers for the manufactured goods and brought out goods supplied to their Customers but have not deposited

this duty on escalation charges. The duty not paid on such escalation charges worked out to be Rs 36,09,438/-.

- Therefore, a show cause notice alleging contravention the provisions of Central Excise Act, 1944 and rules made thereunder viz. erstwhile Central Excise Rules, 1944, erstwhile Central Excise Rules, 2001, erstwhile Central Excise (No.2) Rules, 2001 and Central Excise Rules, 2002 [CER 2002] read with Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 was issued to the appellant.
- Show Cause Notice dated 31.10.2005 asked them to show cause as to why-
 - CENVAT duty amounting to Rs. 3,73,29,200/= [Rupees Three Crores Seventy Three Lakhs Twenty Nine Thousand Two Hundred Only], as detailed in Annexure A-VI' and short-paid on account of under-valuation of excisable goods manufactured and removed by them during the period from 01/10/2000 to 31/03/2004 should not be demanded & recovered from them under the provisions of proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944;
 - CENVAT duty amounting to Rs. 1,02,67,856/= [Rupees One Crore Two Lakhs Sixty Seven Thousand Eight Hundred Fifty Six Only] and Education Cess amounting to Rs. 1,900/= [Rupees One Thousand Nine Hundred Only], as detailed in Annexure 'B' and not paid by them on the manufacture and removal of excisable goods in the factory of KBEPL at Satara but shown to have been received from KC Goa during the period from 01/10/2000 to 10/01/2005 should not be demanded & recovered from them under the provisions of proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944,
 - CENVAT duty amounting to Rs. 36,09,433/- [Rupees Thirty Six Lakhs Nine Thousand Four Hundred Thirty Eight Only) as detailed in Annexure 'C' and not paid by them on the escalation bills raised by them in respect of excisable goods manufactured and

removed by them during the period from 15/10/2000 to 31/03/2003 should not be demanded & recovered from them under the provisions of proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944;

- an interest at an appropriate rate should not be demanded & recovered from them on the aforesaid amounts of demand of CFNVAT duty under the provisions of Section 11AB of the Central Excise Act, 1944; and
 - penalty should not be imposed upon them under the provisions of Section 11AC of the Central Excise Act, 1944.
- Show cause notice also asked the appellant 2 to show cause as to why penalty should not be imposed on him under the provisions of Rule 209A of erstwhile Central Excise Rule 1944, Rule 26 of erstwhile Central Excise Rule 2001, Rule 26 of erstwhile Central Excise Rule (No 2) 2001, Rule 26 of erstwhile Central Excise Rule 2002 as the case may be.
- Show cause notice was adjudicated vide O- I-O No. 18/CEX/2006 dated 27-12-2006 and demand of duty amounts (a) Rs. 3,73,39,200/-, (b) Rs. 1,02,67,856/- and (c) Rs. 36,09,438/- was confirmed and a penalty of Rs. 5,12,06,494/- was imposed and also personal penalty of Rs. 02.50 Crore was imposed upon Shri Niraj Chandra, Chief Executive of M/s KBEPL, Satara. On the appeal filed by M/s KBEPL, Satara against aforesaid O-I-O, the Hon'ble CESTAT, West Zonal Bench at Mumbai, remanded the matter with certain directions.
- In the remand proceedings the matter has been again adjudicated as per the impugned order. Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Vikram Nankani, Senior Advocate along with Shri Vipin Jain and Shri A Sheerazi, Advocates for the appellants and Shri Deepak Bhilegaonkar, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned counsel submits that:

- *Respondent erred in holding that price break up was a "mere formality" and that merely because an item under price break up was not supplied under one excise invoice, said price break up could not be relied upon in determining transaction value. Further held that price break up was a formality, as customer had not identified manufactured and bought out items in the said break up, without appreciating that customer was concerned with delivery of a complete plant. Ought to have been appreciated that customer had awarded contract at a certain price and then approved price break up, after making changes, where necessary.*
- *As prices of the items were finalized by customers, question of the Appellant manipulating the price of any item, manufactured or bought out, did not arise. In this regard, attention was drawn to approval of the price break up by Markandeya as approved by the Karnataka State Federation of Co-operative Sugar Factories Ltd - See Page 175 of Volume I of Paper Book. Respondent failed to appreciate that all sugar manufacturers in the co-operative sector are subject to State control through Federations, who inter alia approve the price break up.*
- *Respondent erred in concluding that there had been a diversion of value from manufactured goods to bought out items without appreciating that in all the Contracts, taxes and duties including excise duty were to the buyers account and were payable by the buyers at actuals, who in turn were entitled to take Cenvat Credit. In view thereof, there was no incentive for the Appellant to undervalue the manufactured items.*
- *Respondent erred in comparing the price variations in the manufactured items with the bought out items, without appreciating that in the case of manufactured items, key inputs (such as steel) are vastly different from those used in bought out items (which are not custom made and are made in large volumes) in which the manufacturer enjoys economies of scale.*
- *Respondent ought to have appreciated that valuation had to be the "Transaction Value" in terms of Section 4 of the*

Act as invoice price at which the Appellant sold the goods manufactured by them constituted the transaction value.

- *Respondent ought to have appreciated that cost of production had no relevance to assessable value as held by the Hon'ble Supreme Court in Commr. V/s Guru Nanak Refrigeration-2003 (153) ELT 249. In any event, she ought to have appreciated that the reasons as to why cost exceeded selling price was on account of genuine and bonafide commercial considerations, primarily on account of time gap between estimation of prices and actual supply of the goods.*
- *Respondent ought to have considered the evidence on record including the manner in which the contracts were entered into and the finalization of the prices, which would establish that the conditions of Section 4 of the Act had been satisfied, meaning that the invoice prices constituted the transaction value.*
- *In view of the above, the Respondent erred in placing huge reliance on the Cost Audit Report. She ought to have appreciated that it was legitimate to earn super normal profits from a trading activity and the mere fact that trading resulted in profits whereas manufacturing resulted in losses could not lead to the inescapable conclusion that the manufacturer was diverting sales consideration from manufactured goods to traded goods.*
- *In any event, Cost Audit Report cannot be relied on as it seeks to determine the assessable value, on the basis of Balance Sheets, which are prepared yearly, which is wholly impermissible and illegal as contracts were executed over several years. Excise duty on ad valorem basis is levied on transaction value and not on the business of the assessee by reference to the Balance Sheets. No contract wise financial analysis is done in preparing the Balance Sheet.*
- *The Cost Audit Report has been prepared on the basis of assumptions and presumptions insofar as the calculation of both, the reasonable sale value of the manufactured goods and the bought out items is concerned and therefore the undervaluation arrived at to the extent of Rs.23.33 crores is baseless.*

- *The entire demand for duty in respect of goods manufactured by KCIE is without jurisdiction and without authority of law inasmuch as no SCN was issued to KCIE. KCIE was duly registered and assessed to excise duty and therefore the demand raised on this count is illegal. No inquiry was made with the jurisdictional central excise officer in Goa with regard to the manufacture of the goods by KCIE, though regular Monthly Returns were being filed with the jurisdictional authorities at Goa.*
- *Respondent ought to have appreciated that the finding of clandestine removal of goods alleged to be manufactured by Appellant (and not by KCIE) had not been discharged inasmuch as no excess procurement or consumption of materials, labour, transport etc. was shown to exist at Appellant's factory in Satara.*
- *KCIE has paid duty of Rs.95,01,741/- during the period April 2000 to March 2004 to the Goa Commissionerate. Respondent has erred in concluding that there was no requirement to pay such duty and therefore she was not inclined to give any benefit of duty paid at Goa for the actual excisable goods manufactured and it is submitted that excise duty, in any event, cannot be collected twice on the same goods, on the premise that the Appellant's factory at Satara have cleared without payment of duty.*
- *There is an inherent contradiction in the Departments case inasmuch as while the Cost Auditor treats the items obtained from KCIE as bought out items (See Pages 236-241 of the Cost Audit Report - items at Serial Nos.31 to 44, 62 to 68, 102 to 104 etc.), the Respondent has concluded that the said goods were manufactured by the Appellant.*
- *As the demand confirmed on this count is Rs.1,02,67,856/- and KCIE has admittedly paid duty amounting to Rs.95,01,741/-, the balance duty payable, if any, would amount to Rs.7,66,115/- only.*
- *Respondent erred in confirming a demand in respect of the Escalation Bills raised by the Appellant without appreciating that until and unless the said bills were duly accepted by the Customers, the same could not be*

included in the transaction value and there could be no levy of excise duty on the same and as a matter of fact, till date no money on account of the said Escalation Bills have been received by the Appellant.

- *Respondent has failed to follow the specific directions of this Hon'ble Tribunal in their Order dated 15-5-2007 vide which the matter was remanded to her for de novo adjudication, which has rendered the impugned Order, liable to be set aside.*

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submits that:

- The OIO at para 8 to 11 and at para 17, analyses all 37 Contracts/Purchase Orders/LOIS as submitted by the Assessee and finds how the price negotiated with their customers was a composite price without any break up for prices between manufactured and bought out goods. There was no separate list of bought out goods as part of these Contracts etc. These were bids for tenders floated by purchasers who were not interested in such break up of price.
- The Apex Court has in CCE Vs Fiat India Pvt Ltd. 2012 (283) ELT 161 (SC), in identical facts, held that where goods are claimed to be sold below the cost price, Revenue can on the basis of a report by a Cost Accountant, value the said goods, based upon best judgement under the Rules made under Section 4(1)(b). It held that no prudent business person would continuously suffer huge losses to remain in business.
- The Supply Contracts are composite Contracts for Supply and Erection. There is no trading activity involved in such a transaction. There is no sale involved in such a transaction.
- The Appellant Assessee claims that, the price of sale of bought out items as stated by them was approved by the Director of Sugar, a statutory Authority. Hence, it must be accepted. However, it is seen that, there is no requirement in any statute/ law for the approval of prices of such

procurement by any Statutory Authority. The Contracts etc. have been executed without any such manifest approval at a composite price.

- The Apex Court has in the case of Om Prakash Bhatia Vs.CC 2003 (155) ELT 433 (SC), in similar facts, negated such a claim of an importer. At para 19 of the decision, the Court states that, no prudent businessman would pay more than the prevailing market price of goods. The Review Petition against this decision was dismissed, as reported at Om Prakash Bhatia v. Commissioner - 2003 (158) E.L.T. A177 (S.C.)
- Hence, there is no 'sale' of the impugned goods and there is no 'transaction value' of such goods. The provisions of Section 4(1)(a) of the CEA, 1944 shall not apply and the goods have to be valued in accordance with the CEVR, 2000. Rules 3 to 7, 9 & 10 are not applicable to this case, because they apply only in case the goods are sold.
- The manufactured goods removed are not captively consumed by the Appellant or on his behalf, for the manufacture or production of other articles. Hence, Rule 8 will not directly apply.
- Reliance is placed on the following decisions wherein it has been held that goods need to be assessed on the basis of best judgement.
 - UTC Fire and Security India Ltd. [2015 (319) ELT 591 (SC)]
 - Mahindra Ugine Steel Co. Ltd [2015 (318) ELT 592 (SC)]
 - Coromandel Paints Ltd. [2016 (343) ELT 846 (T)]
 - Indian Hume Pipe Co. Ltd. [2015 (321) ELT 460 (T)]
- Black's Law Dictionary defines 'turnkey' as '1. (Of a product) provided in a state of readiness for immediate use...2. Of, relating to, or involving a product provided in this manner a turnkey contract and 'turnkey contract'. See engineering, procurement and construction contract under CONTRACT'
- Engineering, procurement and construction contract is defined as 'a fixed-price, schedule-intensive construction contract-typical in the construction of single-purpose

projects, such as energy plants-in which the contractor agrees to wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operating manuals; and to train people to operate the facility.-Abbr. EPC Contract also termed turnkey contract.'

- The Purchaser has contracted for Supply and Erection of Machinery and Plant. The warranty is given, by the Appellant, for the performance of the Machinery and Plant. The goods manufactured and supplied are of no use to the Purchaser without the bought out goods and vice versa.
- The entire exercise of apportioning prices to various manufactured and bought out items supplied is a colourable device to evade C.E.Duty. It has no basis in law. The Break up of prices of machinery and equipment supplied, if at all required, is only for the purpose of making a schedule of payments to the Supplier/Seller. This is evident from Clauses 2.2, 2.5, 3.3, 3.6, 12(a), 15.1.1 to 15.1.6, 15.2, 15.3
- The Karnataka State Federation of Cooperative Sugar Factories Ltd. is a Co operative Society set up in 1961 under the Karnataka Cooperative Societies Act 1959 and Karnataka Cooperative Societies Rules 1960 by Sugar Factories which came together to co operate. It is a syndicate. It is not a statutory body set up by law. It is not a Governmental Organization. In the State of Karnataka, the Director of Sugar administers the above said Act and Rules as functional Registrar of Cooperative Societies as far as Cooperative Sugar Factories are concerned.
- Hence, any price of goods supplied, if submitted to such an Organization, is not done in terms of any statutory mandate to any statutory authority.
- The Price Break up is not submitted for self manufactured or Bought out machinery and equipment for approval. The Price Break up is to be submitted for the major value equipment and machinery to be supplied, in terms of the Contract if any, only for the purpose of scheduling payments by the Purchaser to the Appellant.

- In any case, it is not shown that, such Price Break up was to be submitted for all the 37 Contracts during the impugned period.
- Clandestine Removal of goods:
 - Evidence on records show that the goods claimed to have been bought from KC, Goa by the Appellant, were not so bought, but were manufactured in the Appellant's premises at Satara.
 - This clever subterfuge by the Appellant helped them in evading C.E.Duty to the tune of Rs. 1,02,67,856/- . They utilised raw material on which CENVAT Credit was availed in their factory at Satara to manufacture such goods. However, they paid no duty on such goods which would be applicable @ 16% ad valorem.
 - On the other hand, KC, Goa availed CENVAT Credit on raw material which it diverted, but issued bogus invoices showing clearance of goods at concessional rate of duty, by availing SSI Exemption.
 - The plea taken by the Appellant that, KC, Goa, paid C.E.Duty of Rs. 40,14,559/- in PLA and Rs. 54,87,182/- through CENVAT Credit Account and hence, the clearances are genuine, is an eyewash.
 - They over valued these goods by 189% to 278% as bought out goods and hence, undervalued the other goods.
- Demand of Duty on Escalation Bills:
 - The two Contracts to which these Bills relate were to have been completed by 15.7.2001 and 31.7.2002. The details of Bills as appearing at Annexure 'C' to the SCN are dated 31.3.2003 and 30.6.2003.
 - The letter dt. 3.3.2008 of the Director of Sugar, Bangalore submitted by the Appellant clearly shows that, they had not fulfilled the Contract with M/s Dhanalakshmi SSKN, Belgaum and hence, the said Purchaser had invoked the Bank Guarantee given by the Appellant. The Appellant had sought to be relieved of its obligations under the Contract. Hence, the Appellant had sought to come to a settlement

with the Purchaser. The Appellant had filed a legal case against the Purchaser in the Court at Satara.

- The said letter dt. 3.3.2008 clearly indicates that, an amount of Rs. 7,08,565/- towards C.E. Duty is to be reimbursed to the Appellant on account of Rs. 29,88,940/- as certified Escalation payable to them. The Appellant has not paid any such amount to the Revenue in spite of having collected it from their Purchasers as C E Duty.

➤ Limitation:

- They have employed a colourable device to evade C.E.Duty. In Calcutta Chromotype Ltd. Vs CCE 1998 (99) E.L.T. 202 (S.C.), the Apex Court relying upon M/s. Mcdowel and Company Ltd. v. Commercial Tax Officer (1985) 3 SCC 230 = (1985) 154 ITR 148, held that 'Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties'
- Hence, the extended period of limitation is correctly invoked.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments. Tribunal had vide its order No A/353-354/07/WZB/C-I/EB remanded the matter back to the original authority observing as follows:

"5. We have considered the submissions. We find that the Commissioner's order is based solely on the cost audit report. There is no attempt to analyse the contract entered into by the appellants and there contention that the price break up of individual items is required to be approved by the statutory officers and cannot be changed. A plea was also raised that the cost of manufacture at the time of placing of bid on an estimated basis is more than the cost of manufacture at that time and it is on account of delay in execution of the order that there is an

escalation in the price as a result of which the cost of manufacture exceeds the selling price in some cases. A demand cannot be raised totally on the cost audit report and the finding on the contracts should have been given. The mechanism of entering into bid and providing piece meal price should have been looked into to see whether approval of price break up was just a formality or individual prices were required to be negotiated. The appellants plea that the cost of manufacture by them at the time of placing the order undergoes a change due to escalation in price and was less than the selling price at the time of accepting the bid should have been looked into. The contract should have been studied to know the duration in which the same was required to be executed and whether the estimation of prices takes into account the escalation in cost of raw material between the date of manufacture and date of supply and if not why, if there are escalation clause in the contract to provide for revised price in case there is a delay on account of the customer to accept the delivery of the goods, the extent of the engineering and designing charges whether they are charged separately or form part of the price break up given. Since all these factors are missing, the matter is required to be remanded back to the Commissioner with direction that she should look into all the contracts and submissions made by the appellants in respect of the same and to give a finding taking all circumstances into consideration. The appeals are therefore allowed by way of remand and all issues are kept open.”

4.2 Impugned order notes that the demand have been made against the appellant on three grounds:

- a. Whether the value shown on the Central Excise Invoices at the time of removal of excisable goods is 'transaction value' and whether KBEPL have under-valued excisable goods?*
- b. Whether KBEPL have clandestinely removed excisable goods manufactured at their Satara factory in the disguise of goods shown to have been manufactured by KC Goa?*
- c. Whether KBEPL are liable to pay CENVAT duty on escalation bills issued by them?*

4.3 Thereafter while determining the first issue the analysis of the Contracts/ Purchase orders, has been done as indicated in the paras below taken from the impugned order.

"3. The first and basic allegation of the Department is that KBEPL have under-valued excisable goods manufactured by them resulting in short payment of excise duty. I find that the customers of Sa KBEPL, many of whom are sugar factories, have placed composite orders by way of Contracts/Work Orders etc. for supply of various goods viz machineries, assemblies, sub-assemblies of Sugar Plant. I find that during the material period KBEPL have entered into the following 37 Contracts with customers:

S No	Name of Customer	Nature of Document
1	M/s. Jamkhandi Sugars Ltd., Jamkhandi	Contract
2	M/s. ICL Sugars Ltd., Chennai	LOI
3	M/s. Sahakar Maharshi Shankarrao Mohite Patil SSK Ltd., Akluj	Purchase Order
4	M/s. T.K. Warana SSK Ltd., Warananagar	Copy not furnished
5	M/s. T.K. Warana SSK Ltd., Warananagar	Supply Order
6	M/s. T.K. Warana SSK Ltd., Warananagar	Supply Order
7	M/s. T.K. Warana SSK Ltd., Warananagar	Supply Order
8	M/s. BHW Kessels International Corporation, New Delhi	Supply Order
9	M/s. Kay Pulp and Paper Mills Ltd., Borgaon	Contract
10	M/s. Shri Dhanalaxmi SSK Niyamit, Ramdurg	Contract
11	M/s. Shetkari Sakhar Karkhana, Chandpuri	Contract
12	M/s. Akkubai Mahila Sahakari Audyogik Utpadak C Sanstha Ltd., Asurle-Porle	Contract
13	M/s. The Thandava Co-op Sugars Ltd., Payakarao P Peta [A.P.]	Price Bid
14	M/s. Sahakar Maharshi Shankarrao Mohite Patil SSK Ltd., Akluj	Supply Order
15	M/s. Shri Vighnagar SSK Ltd., Junnar	Supply Order
16a	M/s. Kay Iron Works Ltd., Satara	Offer Letter
16b	M/s. Kay Iron Works Ltd., Satara	Offer Letter
16c	M/s. Kay Iron Works Ltd., Satara	Offer Letter
16d	M/s. Kay Iron Works Ltd., Satara	Offer Letter
17	M/s. The Markandeya Co-op Sugar Mills Ltd., C Kakati	Contract
18	M/s. Kirloskar Bros. Ltd., Kirloskarwadi	Purchase Order
19	Nuclear Power Corporation of India Ltd., Mumbai	Purchase Order
20	Nuclear Power Corporation of India Ltd., Mumbai	Purchase Order
21	Nuclear Power Corporation of India Ltd., Mumbai	Copy not furnished
22	Nuclear Power Corporation of India Ltd., Mumbai	Purchase Order
23	Nuclear Power Corporation of India Ltd., Mumbai	Purchase Order
24	M/s. Precision Automation and Robotics India Ltd., Pune	Purchase Order
25	M/s. Precision Automation and Robotics India Ltd., Pune	Copy not furnished
26	M/s. Precision Automation and Robotics India Ltd., Pune	Purchase Order
27	M/s. Precision Automation and Robotics India Ltd., Pune	Copy not furnished

28	M/s. Larsen and Toubro Ltd., Mumbai	Purchase Order
29	M/s. The Nandi Sahakari Sakkare Karkhane Niyamit, Bijapur	Letter of intent Agreement
30	M/s. Hallmark Technical Services Pvt. Ltd., Pune	Purchase Order
31	M/s. Sagar Sugars and Allied Products Ltd., Chittor [A.P.]	Purchase Order
32	M/s. Ispat Industries Ltd., Penn	Purchase Order
33	M/s. KSB Pumps, Pune	Purchase Order
34	M/s. Sahakar Maharshi Shankarrao Mohite SSK Ltd., Akluj	Purchase Order
35	M/s. Sahakar Maharshi Shankarrao Mohite SSK Ltd., Akluj	Purchase Order
36	M/s. Sahakar Maharshi Shankarrao Mohite SSK Ltd., Akluj	Purchase Order
37	M/s. Sahakar Maharshi Shankarrao Mohite SSK Ltd., Akluj	Purchase Order
38	M/s. Kay Iron Works Pvt. Ltd., Satara	Purchase Order
39	M/s. Kay Nitroxxygen Pvt. Ltd., Satara	Purchase Order
40	M/s. Kay Chandra Iron Engg. Works Pvt. Ltd., Goa	Purchase Order
41	M/s. Kay Pulp and Paper Mills Ltd., Borgaon	Purchase Order

I find that in four cases KBEPL have failed to furnish copy of contract/purchase order/LOI, as the case may be. I also find that there are only 6 contracts and rest are Purchase Orders/Supply Orders/LOI/Price Bid etc. I also find that KBEPL while raising CE Invoice under Rule 52A or Rule 11 of the Central Excise Rules for excisable goods manufactured by them have mentioned the Contract/PO reference in many cases but the same is not mentioned on a few invoices.

4. I have gone through the contract in respect of M/s. Shri Dhanlaxmi SSK Niyamit, Ramdurg and find that -

- a. Contract is entered into on 10th day of June 2000 and the contract is to be executed by 15/07/2001. [Para 1 and 5.1]
- b. KBEPL have to design, procure, manufacture, supply, transport, deliver to site Sugar Plant and Machinery detailed in Annexure [Para 2.1]
- c. Contract price is Rs. 2008.00 lakhs as per following break up

Rs in Lakhs			
		Group A Milling Plant	Group B Boiling Plant
1	Ex-works price of semi-gravity flow sugar plant and machinery according to the specifications and details given in Annexures	880	980

2	<i>Price of necessary facilities like supervision for erection & commissioning, packing/forwarding, freight, handling charges etc.</i>	3	3
3	<i>Insurance, Taxes and Duties of Excise, Customs, Sales Tax and other taxes</i>	57	85
<i>Total Contract Price</i>		<i>940</i>	<i>1068</i>

- d. If the delay is not due to non-payment by the Purchaser [Dhanlaxmi] the seller [KBEPL] shall not be entitled to any increase in price or statutory duties. [Para 3.3]*
- e. All the duties and taxes will be as on the date of negotiation and any statutory variation are acceptable by the Purchaser [Dhanlaxmi] [Para 3.4]*
- f. Any part found defective within 24 months from the date of commissioning of plant or till the performance trial is completed, whichever is later, shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Para 9.0.b]*
- g. Seller [KBEPL] shall indicate within 45 days of signing of the contract, the equipment-wise breakup prices for major items of equipments [Para 12.0.a]*
- h. Seller [KBEPL] shall not charge any escalation in any bill for value of materials (ex work) contract base price and to be supplied against each item as per Proforma A [Para 15.3.1]*
- i. The Sellers [KBEPL] shall not be entitled to claim any price escalation on any consignment without furnishing the detailed price break up of plant and machinery showing month wise value of materials {ex work} contract base price and to be supplied against each items as per Proforma A [Para 15.3.1]*
- j. Seller KBEPL] shall be liable to pay back all escalation amount drawn by him together with interest if break up of base contract price in Proforma A is not furnished. [Para 15.3.1]*
- k. If the Purchaser [Dhanlaxmi] orders expressly in writing for the supply and/or execution of work to be suspended for a substantial period of time for no fault of Seller [KBEPL], the Seller shall be entitled for reasonable extension of time. [Para 26.1]*

DURATION OF CONTRACT

I find that the contract is entered into on 10th June 2000 and was to be executed by 15th July 2001; however, the execution has extended upto May 2003 as seen from supply invoices of KBEPL. The condition of the Contract stipulates that if the work is suspended by order of Dhanlaxmi reasonable extension of time will be granted. If the work is delayed due to non-payment of bills by Dhanlaxmi, the increase in price is allowed. I find that KBEPL have not come forthwith reasons for delay in execution of contract.

ESCALATION CLAUSE

I find that the terms & conditions of Contract imply that escalation is allowed if the contract is delayed due to non-payment by Dhanlaxmi and/or suspension of work as per orders of Dhanlaxmi. I find that Escalation Bills are issued to Dhanlaxmi by KBEPL. This matter is discussed in detail in the later part of my findings.

5. I have gone through the contract in respect of M/s. The Markandeya Co-operative Sugars Ltd., Kakati and find that

- a. Contract is entered into on 25th day of May 2001 and the Contract is to be executed by 31/07/2002 [Para 1 and Para 5.1].
- b. KBEPL have to design, procure, manufacture, supply, transport, deliver to site Sugar Plant and Machinery detailed in Annexure [Para 2.1]
- c. Contract price is Rs. 3300.00 lakhs as per following break up [Para 3.1]

Rs in Lakhs		
1	Ex-works price of semi-gravity flow sugar plant and machinery according to the specifications and details given in Annexures	3030
2	Price of necessary facilities like supervision for erection & commissioning, packing/forwarding, freight, handling charges etc.	30
3	Insurance, Taxes and Duties of Excise, Customs, Sales Tax and other taxes	240
Total Contract Price		3300

- d. If the delay is not due to non-payment by the Purchaser [Markandeya] the seller [KBEPL] shall not be entitled to any increase in price or statutory duties. [Para 3.3]

- e. *The total contract price is inclusive of all the duties and taxes and any statutory variation is allowed by the Purchaser [Markandeya] [Para 3.4]*
- f. *Any part found defective within two crushing seasons from the date of commissioning of plant or till the performance trial is completed whichever is later shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Para 9.0 b]*
- g. *Seller [KBEPL] shall indicate within 45 days of signing of the contract, the equipment-wise breakup prices for major items of equipments [Para 12.0 a]*
- h. *Seller [KBEPL] shall not charge any escalation in any bill for the base prices of any consignment. [Para 15.1.4]*
- i. *The Sellers [KBEPL] shall not be entitled to claim any price escalation on any consignment without furnishing the detailed price break up of plant and machinery showing monthwise value of materials (ex work) contract base price and to be supplied against each item as per Proforma A [Para 15.3.1]*
- j. *Seller (KBEPL) shall be liable to pay back all escalation amount drawn by him together with interest if break up of base contract price in Proforma A is not furnished. [Para 15.3.1]*
- k. *If the Purchaser [Markandeya] orders expressly in writing for the supply and/or execution of work to be suspended for a substantial period of time for no fault of Seller [KBEPL], the Seller shall be entitled for reasonable extension of time. [Para 25.1]*

DURATION OF CONTRACT

I find that the contract is entered into on 25th May 2001 and was to be executed by 31st July 2002. The condition of the Contract stipulates that if the work is suspended by order of Markandeya reasonable extension of time will be granted. If the work is delayed due to non-payment of bills by Markandeya, the increase in price is allowed. I find that KBEPL have not disclosed any facts about completion of the project or otherwise and duration of completion.

ESCALATION CLAUSE

I find that the terms & conditions of Contract imply that Escalation is allowed if the contract is delayed due to non-payment by Markandeya and/or suspension of work as per orders of Markandeya. I find that Escalation Bills are issued to Markandeya by KBEPL. The matter is discussed in detail in the later part of findings.

6. *I have gone through the contract in respect of M/s. Jamkhandi Sugars Ltd., Jamkhandi and find that -*

- a. Contract is entered into on 25th day of November 1995 and further supplementary contract entered into on 09th day of October 2000. The Contract is to be executed by 15/12/2000. [Para 1 and 2]*
- b. KBEPL have to design, procure, manufacture, supply of the machinery and equipments as detailed in Annexure [Para 2.1]*
- c. The original Contract price was Rs. 810.00 lakhs but the supplementary contract has specified contract price as Rs. 895.75 lakhs as per following break up [Para 3.1]:*

		<i>[Rs. in lakhs]</i>
1	<i>Ex-works price of semi-gravity flow sugar plant and machinery according to the specifications and details given in Annexures</i>	850.00
2	<i>Additional Scope</i>	
	<i>supply of Cane Unloader and part of Feeder Table</i>	54.25
	<i>increasing capacity of Cane Unloaders</i>	08.00
	<i>increase in Clarifier Capacity</i>	02.00
	<i>Sub Total</i>	914.25
3	<i>Deletion of Scope of Supply</i>	
	<i>Spray Water Cooling System</i>	-17.00
	<i>Electrical Starters for Motors</i>	-01.50
	<i>Total Revised Contract Price</i>	

- d. The price is inclusive of Packing & Forwarding charges, Transportation charges, cost of all other necessary items, all tax, duties & Octroi paid, supervision of erection and commissioning, foundation bolts & packing plates [Para 3 1]*
- e. Any part found defective within two crushing seasons from the date of commissioning of plant shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Para 9.b]*

- f. Seller [KBEPL] shall indicate within 45 days of signing of the contract, the equipment-wise breakup prices for major items of equipments.[Para 12.a]

DURATION OF CONTRACT

I find that the contract is entered into on 25th November 1995 and further amended vide Supplementary Contract entered into on 09th October 2000. The contract was to be executed by 15th December 2000. I find that some of the pages of contract are missing and the conditions on escalation or extension of period of execution cannot be known. However, I find that the supply was continued to Jamkhandi till March 2001. I find that KBEPL have not raised any Escalation Bills on Jamkhandi.

7. *I have gone through the contract in respect of M/s. Shetkari Sakhar Karkhana, Chandpuri, Tal. Malshiras and find that*

- a. *Contract is entered into on 14th day of December 2000 and the Contract is to be executed within twelve months from the date of receipt of Rs. 200 lakhs. [Para 1 and 5.1]*
- b. *KBEPL have to design, procure, manufacture, supply of the machinery and equipments as detailed in Annexure [Para 2.1]*
- c. *Contract price is Rs. 1450.00 lakhs inclusive of design, procure, manufacture, supply and supervision of erection & commissioning, excise duties, sales tax. The price is excluding transit insurance. However, no break up is provided in the contract.*
- d. *Any part found defective before the end of one crushing season from the date of commissioning of plant shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Para 9.b]*
- e. *Seller [KBEPL] shall indicate within 45 days of signing of the contract, the equipment-wise breakup prices for major items of equipments [Para 12.a]*
- f. *If the Purchaser [Shetkari] orders expressly in writing for the supply and/or execution of work to be suspended for a substantial period of time for no fault of Seller [KBEPL], the Seller shall be entitled for reasonable extension of time. [Para 20.1]*

DURATION OF CONTRACT

I find that the contract is entered into on 14th December 2000 and was to be executed within 12 months from the date of receipt of Rs. 200 lakhs. It is not known from the Contract as to when the said amount was paid to KBEPL. However, I find that the supply was continued to Shetkari till October 2002. I find that KBEPL have not raised any Escalation Bills on Shetkari.

8. I have gone through the contract in respect of M/s. Akkubai Mahila Sahakari Audyogik Utpadak Sanstha Ltd., Asurle-Porle and find that -

- a. Contract is entered into on 10th day of October 2000 and the Contract is to be executed within twelve months from the date of agreement. [Para 1 and Article IV - Para 4.2]*
- b. KBEPL have to supply know-how, process design, engineering services, equipments and erection-cum-commissioning services for Cane Processing Plant consisting of Sectional Plants inclusive of 100 TCD Cane Milling Plant, 100 m³ Juice Sulphitation & Clarification Plant, Subtle Juice Concentration [65% brix] Plant and Steam Generation & Power Generation Plant [Para 1.2 & 1.3]*
- c. Contract price is Rs. 218.75 lakhs and shall be FIRM and FIXED till execution and completion of the entire project and shall not be entitled or eligible for the escalation of the contract price or any part thereof for any reason whatsoever. The contract price is inclusive of sales tax, excise duty, insurance, packing & forwarding, transportation to site and erection, supervision of erection & commissioning. However, no break up is provided in the contract. [Article VIII]*
- d. Any part found defective, within a period of 12 months from the date of takeover of the plant for commercial production or 18 months from the date of last supply, whichever is earlier, shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Article IV Para 4.8.1]*

DURATION OF CONTRACT

I find that the contract is entered into on 10th October 2000 and was to be executed within 12 months from the date of agreement. However, I find that the supply was continued to Akkubai till October 2002. I find that KBEPL have not raised any Escalation Bills on Akkubai.

CONTRACT PRICE & BREAK-UP

I find that the terms & conditions regarding contract price and break up are similar in the above 5 contracts of M/s. Dhanlaxmi SSK, M/s. The Markandeya Co-op Sugar, M/s. Jamkhandi Sugars, M/s. Shetkari SSK and M/s. Akkubai MSAUS Ltd. Therefore, I consider them together for discussion. I find that though the Contracts have specified lump sum price for supply of Sugar Plant and Machinery, Contracts have required KBEPL to furnish within 45 days equipment-wise breakup prices for major items of equipments. I find that KBEPL have furnished price breakup accordingly but the same is major equipment-wise and on going through Central Excise Invoices I find that for single equipment covered by price break up, KBEPL have issued more than one C. Ex. Invoice covering parts and components of the equipment. I also find that it is not clear from the price break up as to which equipments are to be bought out and which are to be manufactured by KBEPL. I find that the customers have also not mentioned in their Contracts as to which goods are to be bought out and which goods are to be manufactured. I find that KBEPL have clearly arrived at the contracted price only after negotiations and price breakup was required to be submitted later on. Since the price break up did not differentiate between bought out goods and manufactured goods, even after submission of price break up by KBEPL, customers are/were unaware or unconcerned about which goods are bought out and which are manufactured. This is because customers did not have to pay any amount over and above the quoted lump sum contracted price. I, therefore, find that the price breakup was a formality and individual transaction value of each of the item manufactured in the factory of KBEPL was not negotiated. I find that Contracts do not stipulate any approval of price break up from any statutory authority of State Government but KBEPL/customers may have submitted these figures to

Karnataka State Federation of Co-operative Sugar Factories Ltd. for some other legal requirement of Karanataka State Government to I find that the control the co-operative sugar factories in Karnataka. I find that Contracts have been negotiated as a whole and there is no correspondence or proof that the prices of individual items have been negotiated.

9. I have gone through the contract in respect of M/s. Kay Pulp and Paper Mills Ltd., Borgaon-Satara and find that -

- a. Contract is entered into on 05th day of March 1999 and the Contract is to be executed by the end of March 2000. [Page 1 and 2]*
- b. KBEPL have to design, manufacture, procure and supply the machinery and equipments for the proposed Co-Generation Power Project [page 2].*
- c. Contract price is Rs. 1225.00 lakhs and inclusive of design, procure, manufacture, supply and supervision of erection & commissioning, packing forwarding charges, transportation charges to site, cost of all necessary items, taxes, duties & octroi. [Page 6 & 7]*
- d. KBEPL shall submit price variation calculation as per standard variation formula for payment of price escalation. [Page 10]*
- e. Any part found defective, within a period of 12 months from the date of commissioning of the Plant, shall be replaced or satisfactorily rectified by the seller [KBEPL] free of charge [Page 12]*
- f. KBEPL shall submit within 20 days of signing of the Contract, the equipment-wise price break up for major items of equipments.*

CONTRACT PRICE & BREAK-UP

I find that though the Contract has specified lump sum price for supply of Plant and required KBEPL to furnish price break up of major items of equipments. I do not find any price break up attached to the Contract. I find that Kay Pulp also has not mentioned in their Contract as to which goods are to be bought out and which goods are to be manufactured. I find that KBEPL have clearly arrived at the contracted price only after negotiations and price breakup was required to be submitted

later on. I, therefore, find that the price breakup was a formality and individual transaction value of each of the item manufactured in the factory of KBEPL was not negotiated. I find that Contract does not stipulate any approval of price break up from any statutory authority. I find that Kay Pulp is group company of KBEPL. I find that the Contract has been negotiated as a whole and there is no correspondence or proof that the prices of individual items have been negotiated.

DURATION OF CONTRACT

I find that the contract is entered into on 10th October 2000 and was to be executed before March 2000.

10. I have also gone through Purchase Orders, Offer Letters, LOI, Price Bid etc. of M/s. Sahakar Maharshi Shankarrao Mohite Patil SSK Ltd., M/s. Shri T.K. Warana SSK Ltd., M/s. BHW Kessels International Corporation, M/s. The Thandava Co-op Sugars Ltd., M/s. Kirloskar Bros. Ltd., M/s. Nuclear Power Corporation of India Ltd., M/s. Precision Automation & Robotics India Ltd., M/s. Larsen & Toubro Ltd., M/s. The Nandi SSK Niyamit, M/s. Hallmark Technical Services Pvt. Ltd., M/s. Sagar Sugar & Allied Products Ltd., M/s. Ispat Industries Ltd., M/s. Kay Iron Works Pvt. Ltd., M/s. Kay Nitroxygen Pvt. Ltd., M/s Kay Chandra Iron Engg. Works Pvt. Ltd., M/s. Kay Pulp & Paper Mills Ltd. and find that the terms & conditions are broadly as under:

- a) KBEPL have to design, manufacture, supply and transport the equipment, machinery etc. to the site as well as undertake erection & commissioning of the said machinery.*
- b) Price is FIRM and FIXED without any escalation clause in some cases and there is no escalation clause in other cases.*
- c) Taxes and duties will be paid extra as applicable.*
- d) Any equipment found defective or not working properly to the satisfaction of the customer, KBEPL have to rectify or replace the respective equipment/component free of charge.*
- e) Packing and Forwarding Charges are to be paid extra by the customers in some cases and packing/forwarding charges are included in the price in other cases.*

f) *Price break up is not sought for by the customers but KBEPL have supplied such price break up to the customers. However, M/s. Kirloskar Bros. Ltd., M/s. Nuclear Power Corporation of India, M/s Larsen and Toubro Ltd., have fixed the prices for the individual items. However, these orders are of small amounts considering the turnover of KBEPL.*

CONTRACT PRICE & BREAK-UP

I find that Purchase Orders/Supply Orders/Price Bid have specified lump sum price for supply of equipments. In a few small orders, price break up is supplied by the customers and in rest of the cases KBEPL have prepared price break up. I find that Purchase Orders, Supply Orders etc. or price break up have not mentioned as to which goods are to be bought out and which goods are to be manufactured. I find that KBEPL have clearly arrived at the price only after negotiations and price breakup was submitted later on. I, therefore, find that the price breakup was a formality and there is no correspondence or proof that the individual transaction value of each of the item manufactured in the factory of KBEPL was negotiated. I find that Purchase Orders/Supply Orders do not stipulate any approval of price break up from any statutory authority. I also find that no escalation is allowed in many orders and KBEPL have also not claimed any such price escalations. KBEPL have not submitted any documents to show as to whether the order was fulfilled within specified time or not.

11. In view of above, I find that the contract price fixed by the customers of KBEPL was a composite one consisting of the manufactured and bought-out items and that there was no bifurcation of manufactured items and bought out goods. No correspondence has been produced to show that individual items have been negotiated.

ESCALATION CLAUSE IN CONTRACTS

12. I find that in three Contracts, there is express provision for escalation in Bills. However, KBEPL have raised Escalation Bills only in case of two contracts, for the contract as a whole with M/s. Shri Dhanlaxmi SSK and M/s. The Markandeya Co-op Sugar

Mills Ltd. These customers have also provided that KBEPL is entitled for Escalation Bills only if the detailed price break up of plant & machinery showing monthwise value of materials [ex-works] contract base price supplied and to be supplied against each item as per Proforma 'A' is submitted. It appears that in both of cases Proforma 'A' is supplied by KBEPL. I find that M/s. Akkubai Mahaila Sahakari Audyogik Utpadak Sanstha Ltd. and few other Purchase Orders have expressly provided for FIRM & FIXED price disallowing any kind of escalation in any circumstances. I also find that in some contracts as well as Purchase Orders, there is Escalation Clause but KBEPL have not raised Escalation Bills. I find that in many cases the execution of contract/order was delayed but it cannot be understood from the documents submitted by KBEPL as to why the delay was caused as also reasons for raising and also not raising Escalation Bills."

4.4 Tribunal has while remanding the matter to the original authority for de novo adjudication has specifically directed the authority to consider the contracts/ purchase order, for determining whether there was undervaluation. As per this direction Commissioner was required to consider the contracts and determine whether the charge of undervaluation made against the appellant on the basis of the cost auditor report can be sustained. Commissioner has noted the terms of conditions of the contracts/ purchase order etc., but has in not indicated as to what is undervaluation in respect of the any of individual contract/ purchase order. It is not the case that goods were supplied to a single entity but were supplied to various buyer, most of them being co-operative sugar mills. But supplies were made to public sector organizations like Nuclear Power Corporation and other public limited companies. It is not even the case of the department either in the show cause notice or in the impugned order that appellant have received any amount in the excess of agreed contract price. For the execution of the contract for the supply of the various items on turnkey basis the contracts itself provide that the contractor could either provide the goods manufactured by them or through their sub contractors. The contracts also provide for the manner of monitoring and dispatch of the goods and manner of payment of

the duties and taxes on the goods supplied through sub contractors. The contractual obligations in respect of the goods procured from sub contractors (bought out items) are reproduced on the sample basis.

I. Financial Bid for Equipment and machinery (For Group D: Boiling House) made to Shri Dhanlakshmi Sahakari Sakkare Karkhane Niyamit – dated 4th October 1999:

"10. Price offered:

10.1 i) Ex works (ex Tenderer's and sub Contractor's workshop or place of supply) price of the semi gravity: Rs 1495 Lakhs (Rupees Fourteen Crores Ninety Five lakhs)

ii) Price of following necessary facilities in respect of 10.1 (i) above

a) Paint- it shall include primer and final painting as per colour scheme to be given by purchaser
: Rs 45.00 lakhs

b) : Included in ii (a)
above

c) : Included in ii (a)
above

iii) : Included in ii (a)
above

iv) Insurance, taxes and duties:

a) Insurance : Rs
12.00 lakhs

b) Excise Duties @ 16% : Rs
248.32 lakhs

c) Customs Duties :

d) Sales tax @ 4% : Rs
72.01 lakhs

e) Other taxes :

v) Total cost of above items (10.1 (ii) to (iv)) : Rs
377.32 lakhs

*vi) Total Price Offered (Total from 10.1 (i) to (iv))
:Rs1872.32 lakhs*

It is to be clearly understood that the total price offered is inclusive of the cost of the following:

a) , b), c)

d) All taxes and duties paid by the sellers of their sub contractors on raw materials components and other raw materials for their own manufacture of finished equipments or assemblies

10.3 The total price offered at 10.1 (vi) above is inclusive of the total amount in respect of single point Central/ State Sales Tax, Excise Duty, Special Excise Duty, Custom Duty on Imported components and items and boiler quality/MS Plates, local taxes and any other taxes or duties and octroi at the destination point only imposed by law leviable on the plant and machinery supplied to the purchasers or bought out items supplied directly to site from sub-contractors works. All the above details of taxes, duties and special excise duty paid by the 'sellers' shall, be shown separately for own manufactured items and for brought out items claimed by the sellers' from the Purchaser as reimbursement of the same, in each invoice/Bill to be submitted by the sellers. The amount shown in Seller's bill for payment of all such taxes, surcharges and duties will be computed on the basis of relevant statutory provisions in force on date of dispatch and shall be actual amount as paid by the Sellers. The sellers shall furnish to the purchasers with their bills, excise duty gate passes in support of excise duty and special excise duty paid both for base price and price escalation bills.

Provided, always that the purchasers or their authorized representatives shall be shown all original documents and accounting records in support of excise duties, custom duties on imported components and items and boiler quality plates charged and original bills of sub contractors for satisfying that single point sales tax, Excise Duties and Special Excise Duties, as aforesaid has actually been paid to the sub contractors, including taxes and duties charged in all escalation bills."

II. In the **Agreement (Supply Contract) dated 10th June 2000, between the appellant 1 and Shri Dhanlakshmi Sahakari Sakkare Karkhane Niyamit** following has been provided:

"3.4) The total price offered at 3.1 (v) above is inclusive of the total amount in respect of Central / State Sales Tax, Excise Duty, Customs duty on imported components, items and boiler quality plates / MMS plates, local taxes and any other taxes or duties and octroi at the destination point only imposed by law leviable on the plant and machinery supplied to the PURCHASER. The total price offered is also inclusive of single point sales tax, excise duties and octroi at the destination point on finished bought out items supplied directly to site from sub-contractors works. All the above details of taxes duties and special excise duties actually paid by the SELLER shall be shown separately for own manufactured items and for bought out items and claimed by the SELLER from the PURCHASER as a reimbursement of the same in each invoice / bills to be submitted by the SELLER. The amount shown in SELLERS bill for payment of all such taxes, surcharges and duties will be computed on the basis of relevant statutory provisions in force on the date of despatch and shall be the actual amount as paid by the SELLER. The SELLER shall furnish to the PURCHASER with their bills excise duty gale pass in support of excise duty and special excise duty paid both for base price and price escalation bills All taxes and duties will be as on the date of final negotiation, any statutory variation in taxes and duties imposed are acceptable by the PURCHASER.

The SELLER shall within one month from the date of finalization of Agreement furnish the PURCHASER with an indication of the approx. incidence of Central/State Sales Tax, Excise Duty, Special Excise duties, Customs duty, Local taxes and any other taxes or duties and octroi payable by the PURCHASER under the contract based on the rates prevailing on the date of Agreement.

3.5 PROVIDED always that the PURCHASER or their authorized representative shall be shown all original documents, and accounting records in support of excise duties, customs duties on imported components and items of Boiler Quality Plates / MS

plates charged and the original bills of the sub-contractors for satisfying that the single point Sales Tax, Excise duty and special duties as aforesaid has actually been paid to the Sub-contractors including taxes and duties charged in all escalation bills.

.....

7.0 VISIT TO WORKSHOP AND INSPECTION

7.1 *The quality and design feature and workmanship of the sugar plant and machinery shall be strictly as per the Standard Specifications of 1987 of the Government of India read along with ANNEXURE's and standard engineering practices. **The PURCHASER shall have the right to appoint any person / agency of their choice to visit the place of manufacturer, assembly of the machinery and also PURCHASERS plant site and in respect of the same. The SELLER and their sub-contractors for bought-out items shall offer the plant and machinery for inspection during the course of manufacture as well as before dispatch.** Scheduled visits may be fixed by the Inspection Agency in case of major suppliers. The Suppliers shall give at least 15 days clear notice to the PURCHASERS or their nominees before the dispatch of machinery to the site in case of inspection before dispatch. In case the Inspection Agency feels that inspection will be delayed before dispatch, they will accordingly send a Certificate to the SELLER with an instruction to dispatch the material attaching the certificate itself. Such materials will be inspected at site. The SELLER shall supply necessary details of design with calculation and drawing wherever required by the inspection agency for the verification of the details of specification and for the purpose of inspection as incorporated in the Agreement. The PURCHASER or inspection agency shall send the SELLER within two months of signing the Agreement, the list of items of plant and machinery requiring inspection before dispatch. The PURCHASER or their Inspection Agency shall have the right to reject any material or assemblies or sub-assemblies if these are not of the specified quality and workmanship on the ground that they cannot be rectified.*

7.2 The PURCHASER or their nominees shall be within their right to bring to the notice of the SELLER any deviation observed from the standard specification or Standard Engineering Practices and the SELLER shall be required to rectify such defects and deviations if any at their own cost. Such inspection by the PURCHASER or their nominees shall not absolve the SELLER from their responsibility of supplying the plant and machinery in accordance with the ANNEXURE and terms of the agreement. SELLER shall provide necessary facilities to the inspecting agencies for proper inspection and testing of the equipment at SELLER or his sub-contractors works.

PROVIDED that incase of major change in procedure, the Inspection Agency shall give sufficient advance intimation to the SELLER, The SELLER shall also provide inspection facilities normally available at the plant site for the machinery inspection.

7.3) The SELLER or their sub-contractors shall also satisfy the PURCHASER and/or their Inspection Agency that adequate provisions have been made (i) to carryout instructions of the PURCHASERS/or the Inspection Agency and fully with promptitude to ensure that parts or materials required to be inspected are not used before inspection and (ii) to prevent rejection of materials or parts from being used.

7.4) Where part assemblies or sub-assemblies not approved/passed by the Inspection Agency have been rectified or altered, such parts, assemblies or sub-assemblies shall be segregated for separate inspection and approval before being incorporated in the plant and machinery.

7.5) The PURCHASER or their Inspection Agency shall have the right to give their inspection mark on all items inspected by them."

III. Similar conditions are specified in the Commercial Bid (Price Bid) for Equipments & Machinery (for all Groups i.e. Group A to Group D) And Associated Service for a complete New Sugar Plant of 2500 TCD suitable for expansion to 4000 TCD capacity on Turnkey Basis for The Markandeya Cooperative Sugar Mills Ltd, dated 3rd November 2000 and the Agreement between The

Markandeya Cooperative Sugar Mills Ltd and Appellant 1 dated 25th May 2001 for Supply of Equipments & Machinery of 2500 TCD suitable for expansion to 4000 TCD Sugar Plant.

4.5 From the plain reading of the above conditions it is evident that seller – appellant 1 was under contractual obligation to provide to the purchaser the original copies of the invoices/ gate passes and other duty paying documents to the purchaser in respect of the brought out items, that the seller received from the sub contractor. Further the contract also provided that the purchaser could have at any time visited and inspected the manufacturing facilities during the course of the manufacture not only at the place of seller but also those all the sub-contractors providing who are supplying the bought item. The items supplied were to be inspected and cleared by the inspection agencies of the purchaser before the same were dispatched from the site of manufacture. It is not even the case of the revenue at any time that the said condition of the contract has not been satisfied. While recording the above conditions which are the part of contractual agreement, impugned order has failed to record any findings in respect of these conditions. It is also noted that contract also provided for the quantum of excise duty that would be paid on the items supplied under the contractual agreement. That being so, what gain the appellant will have if they suppress the value of the goods supplied by them either directly or through their sub contractors. Without considering the conditions as laid down in the contract, the charge of undervaluation of the goods manufactured by the Appellant 1 cannot be sustained.

4.6 Undisputedly the appellant 1, has entered into contract for supply of goods with its customers on turnkey basis. The contract on the turnkey basis as entered are not limited to supply of the goods but start from design to erection and commissioning of the goods at the site of the Customers. The fact that these contracts were on turnkey basis and were not merely for the supply of goods, but were for the various activities such as design, procurement, manufacture and supply of goods, erection and commissioning thereof has been recorded by Commissioner in the impugned order. Further Commissioner has also recorded that these Contracts were for the lump sum

price of various goods to be supplied under these contracts/ agreements, but also indicated the quantum of "*Insurance, Taxes and Duties of Excise, Customs, Sales Tax and other taxes*" and quantum towards "*Price of necessary facilities like handling supervision for erection & commissioning, packing/forwarding, freight, handling charges etc.*" In some of the agreements the lump sum price inclusive of all the charges, duties and taxes have been indicated.

4.7 From the facts and the findings as noted in the impugned order, it is evident that appellant are not in business of supply of the off the shelf goods or consuming the goods captively or supplying the goods through the any of their related person. Admittedly in all the case the appellant have supplied the goods to their customer against contractual agreement and the goods have been tailor made as per the requirements/ specifications of the Customer. In the present case after analyzing the Contracts impugned order adopts the value as determined by the cost auditor, for the demanding the duty. It is settled preposition in law that in case of the supplies made under the contractual agreement the contract price is the basis for determination of the assessable value as per section 4 of the Central Excise Act, 1944. In case of *Guru Nanak Refrigeration* [2003 (153) E.L.T. 249 (S.C.)], Hon'ble Supreme Court has observed as follows:

"4. From a perusal of clause (a) of sub-section (1), quoted above, it is clear that the duty of excise is chargeable on any excisable goods with reference to value which shall, subject to the provisions of that section, be deemed to be normal price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal provided that the buyer is not a related person and the price is the sole consideration for the sale. It is not in dispute that the buyer is not a related person and the price is the sole consideration for sale. It is also the common case that the respondent-assessee sold the refrigeration machinery parts in wholesale trade at the price which was approved by the Excise authorities. Where normal price within the meaning of clause (a) of sub-section (1) is ascertainable. The provisions of clause (b) cannot be resorted to. The show cause notice was issued to the

assessee on the ground that the cost of production of the goods was more than the cost of wholesale price, so why the differential duty on the basis of costs of production of the goods should not be recovered from it. The reasoning in the show cause notice was adopted by the Assistant Collector in confirming demand as well as by the Collector in rejecting the appeal. But the Tribunal set aside the order of the Collector and allowed the appeal by the order impugned in the appeal before us by the Revenue.

5. A perusal of the show cause notice shows that it does not contain an allegation that the wholesale price to the buyers was for consideration other than the one at which it purported to be sold or that it was not at arms length. There is also no allegation that there was any flow back of the money from the buyer to the assessee. In the absence of these factors it cannot be contended that normal price was not ascertainable. There is no valid reason to doubt the genuineness of the sale price. It can therefore be safely be concluded that the goods were sold at the normal price within the meaning of Section 4(1)(a) of the Act. In our view, the Tribunal is right in accepting the wholesale price as the correct price following the judgment of the Court in Union of India & Ors. v. Bombay Tyres International Ltd. etc. [1983 (14) E.L.T. 1896]. We hold that clause (b) of sub-section (1) of Section (4) of the Act would not be attracted to determine the nearest ascertainable equivalent of the normal in price of the goods for assessment of excise duty in the facts of this case. We do not find any illegality in the order of the Tribunal in setting aside the order of the Collector. The appeal is therefore dismissed. No costs."

4.8 In the paras as below impugned order refers to the cost auditor report and concludes that the goods supplied against the contracts/ Purchase order have been undervalued:

"13. I also find that the CENVAT credit utilization of the assessee was excessive and so the cost audit of the factory was carried out by the Department to arrive at correct assessable value of excisable goods and to find out the reasons for excessive availment of CENVAT Credit. The Cost Audit Report prepared and certified by the Assistant Director [Cost] concluded that KBEPL

have over-valued the bought out goods supplied to the customers and under-valued the excisable goods almost to the extent of over-valuation of bought out goods. This has resulted in evasion of payment of appropriate excise duty on the excisable goods manufactured in the factory of KBEPL at Satara. I find that the Cost Audit Report certified by the Assistant Director [Cost] is based on Audited Annual Accounts of M/s KEBPL, and that, Assistant Director (cost) has followed the principles of costing as follows:

(a) **Cost of material:** Cost of material is taken as actual as per figures available in the Audited Annual Accounts and General Ledger.

(b) Overheads:

- **Manufacturing Expenses:** Manufacturing expenses are taken from Audited Annual Accounts and allocated to manufacturing items, as no such expenditure is related to bought out items.
- **Depreciation:** Depreciation is taken from Audited Annual Accounts and allocated to manufacturing items, as no such expenditure is related to bought out items.
- **Employee Cost:** Employee cost is taken from Audited Annual Accounts and out of this 90 per cent amount is allocated to manufacturing items and 10 per cent amount is allocated to bought out items.
- **Interest:** Interest is taken from Audited Annual Accounts and allocated between manufactured items and bought out items on the basis of material consumption * 2 of manufacturing and material consumption 1 of bought out, as working capital and other fund requirement for manufacturing is more than the bought
- **Administrative, Selling, Distribution & Other expenses:** These expenses are taken from Audited Annual Accounts and allocated between manufacturing and bought out items on the basis of material consumption.

14. The Cost Audit Report has stated that KBEPL are mainly engaged in the manufacture, supply and erection commissioning of Sugar Mill Machineries. KBEPL gets orders from various sugar factories for supply of sugar machineries. For executing these

orders KBEPL used to supply bought out as well as manufactured goods. As KBEPL hardly paid any duty through PLA, the matter was taken up for Cost Audit for determination of cost of production vis-à-vis sale value. On study of duty payment by KBEPL, Cost Audit Report has observed that there was a negative value addition in the excisable goods manufactured. The Cost Audit Report also revealed that in case of Bought Out items, price charged was much higher than its purchase cost and in case of manufactured items the price charges was much less than the cost.

15. The Cost Audit Report observed that in case of Manufactured Goods, during the period from 01/04/2000 to 31/03/2004, against the reasonable sale price of Rs. 44,24,21,660/-, the actual clearance value was only Rs. 20,91,14,154/-, resulting in under-valuation to the extent of Rs. 23,33,07,506. The Central Excise duty on this amount @ 16% comes to Rs. 3,73,29,201/-. Further, in case of Bought Out items, against the reasonable sale price of Rs. 24,04,11,155/-, the actual sale price was Rs 47,50,31,019/-, thus there was over-invoicing of Rs. 23,46,19,864 The Cost Audit Report thus concluded that as the orders were composite, KBEPL have shifted the price of Manufactured Goods to Bought Out Goods with intention to reduce not only Central Excise duty, but also sales tax.

16. I find that the Cost Auditor has taken into consideration the cost of inputs for manufactured goods from General Ledger of KBEPL. The Cost Auditor has then added to it the manufacturing expenses incurred, employees cost, depreciation of plant, machinery etc., interest, administration, selling, distribution and other expenses as also profit margin. The Cost Auditor has taken all these expense figures from Audited Annual Accounts. Accordingly, the Cost Auditor has arrived at reasonable Assessable value of the excisable goods manufactured by KEBPL. I also find that the Cost Auditor has similarly taken into consideration the purchase cost of bought out goods from General Ledger of KBEPL. The Cost Auditor has added to it Employee Cost, interest, administration, selling and distribution and other expenses as also profit margin. The Cost Auditor has taken all these expense figures from Audited Annual Accounts.

The Cost Auditor has distributed the common expenses for manufactured items and bought out items following the principles of costing as mentioned above. Accordingly, the Cost Auditor has arrived at Reasonable Sale Price of bought out goods. On comparison of Reasonable Sale Price of Bought Out Goods and Reasonable Assessable Value of Excisable Goods manufactured by KBEPL, it emerges that M/s. KBEPL have shifted the price of Manufactured Goods to Bought Out Goods with intention to evade payment of proper Central Excise duty on manufactured excisable goods.

17. In view of findings & dictat of Honourable CESTAT, the contracts entered into with various customers and as submitted by KBEPL have been analysed in depth; especially with reference to period/ duration of execution, escalation clause, contract price, estimation of cost increase, cost of drawing, designing & engineering etc. I find that the facts which emerge from these contracts actually support the stand of the Department, I find that in many cases the delivery schedule has exceeded the contracted time limit. However, it appears that the same is due to difficulties at the customers' end. In many cases there is inclusion of escalation clause to mean that KBEPL are allowed to escalate the price due to market changes. Accordingly, KBEPL have raised Escalation Bills on M/s. Shri Dhanlaxmi SSK Niyamit and M/s. Markandeya Co-op Sugar Mills Ltd. It is found that drawing, designing and engineering charges are included in the total contract amount quoted by the customers but the said charges are not included in the assessable value of excisable goods manufactured by KBEPL as their price break up is done without following any costing/valuation norms. However, the Cost Audit Report has considered all the expenses incurred on manufacturing by KBEPL, and therefore, the assessable value proposed by the Department in this demand include expenses on drawing, designing and engineering. As regards escalation of prices of raw materials contended by KBEPL it is found that though KBEPL have pleaded that there was steep rise in the prices of raw materials for workshop items, there does not appear increase in the prices of bought out items purchased at the same time of removal of excisable goods from the factory.

There is no answer as to how the price increase in the market adversely affected only excisable goods manufactured in the factory of KBEPL-Satara and not the bought out goods including those goods purchased from M/s. Kay Iron Works, Satara, their own group company. If the cost of raw materials went up due to market variations, the cost of manufacture of excisable goods also should have gone up.) But in this present case, surprisingly, the assessable value of the excisable goods is reduced/under-valued though the contracted amount is received by KBEPL Satara. As regards price break-up prepared by KBEPL and accepted by their customers, I find that the price break up was a formality for the customers; they have not negotiated prices of individual items. It is pleaded by KBEPL that the cost of manufacture at the time of contract or bidding was more than the cost of manufacture at the time of execution or delivery of goods. From the Balance Sheets of the relevant years, the Cost Auditor has pointed out that the manufacturing costs are considerably more than what KBEPL have earned. As the costs have been worked on the purchase invoices of M/s. KBEPL, it has to be concluded that the costs as worked out by the Cost Auditor are correct. Moreover, its authenticity cannot be doubted as it is supported by the company's own Balance Sheet. M/s. KBEPL have sought to explain this by stating that the cost of manufacture worked out at the time of contract or bidding was on estimation basis. It is not understood as to how cost of manufacture has reduced due to delay in execution of contract when it should have gone up considerably. On one hand KBEPL say that there is steep rise in the prices of inputs and on the other hand they say that cost of manufacture was more at the time of bidding and has reduced at the time of delivery of goods due to delay in execution of the contract. This is contradictory. It is noticed that KBEPL have made various contradictory arguments in the present case in such a manner as to mislead the proceedings. The prices of excisable goods cannot go down due to escalation in prices.⁷KBEPL has also argued that they have to give performance guarantee of bought out goods and consider retention money. There is no force in this argument as it is noticed that in case of bought out goods the suppliers of KBEPL have given written guarantee [though in all cases it is not

in writing, guarantee factor is prevalent as a normal market practice] and still KBEPL have over-valued bought out goods exorbitantly for just passing on performance guarantee received from the suppliers. In following sample cases the Guarantee Certificates given by suppliers of KBEPL were verified:

<i>Sr No.</i>	<i>Invoiced No. & Date</i>	<i>Name of the Supplier</i>
<i>1.</i>	<i>428 dated 09/09/2000</i>	<i>M/s. EPE Process Filters Accumulators Pvt. Ltd., Gandhinagar, Hyderabad.</i>
<i>2.</i>	<i>AP/40/2000-01 dtd. 24/11/2000</i>	<i>M/s. A.P. Engineering Works, Howrah</i>
<i>3.</i>	<i>AP/44/2000-01 dtd. 12/12/2000</i>	<i>M/s. A.P. Engineering Works, Howrah</i>
<i>4.</i>	<i>BB/2000-01/159 dtd. 15/12/2000</i>	<i>M/s. Barmecha Brothers, Kolkata.</i>

As regards retention money the same is bound to be received by KBEPL after completion of contract.

18. Though all the contracts have been verified, a sample study in case of 9 contracts/Purchase Orders/Supply Orders/Price Bids etc. was undertaken and prices of bought out goods and excisable goods are worked out each contract-wise and enclosed in Exhibit 'A' to this Order. On going through the said worksheet, it can be seen that even in case of individual contracts there is over-valuation of bought out goods at the expense of an apparent loss on manufactured items. Therefore, there is no strength in the contention of KBEPL that the figures arrived at in Cost Audit Report by considering Balance Sheet figures in totality are not correct. The investigations have conclusively proved that KBEPL have under-valued excisable goods and have received the reasonable price of these excisable goods by way of over-valuation of bought out goods.

19. I find that KBEPL have issued Central Excise Invoices as required under Rule 52A or 11 of the Central Excise Rules 1944 or Central Excise Rules, 2002, as the case may be, for excisable goods manufactured by them. However, KBEPL have not issued such Central Excise Invoices under Rule 52A or Rule 11 of the

Central Excise Rules in the case of bought out goods to any customer.

20. KBEPL has contended that it is not uncommon in turnkey industry to place a composite order but later billing break up is approved by the customer. Further, the customers are entitled for CENVAT credit of the duty paid by KBEPL and so there is no inducement to keep the prices deliberately low. However I find that M/s.KBEPL have raised their commercial bills against supply of bought out items and in such commercial bills no details are forthcoming in respect of Central Excise duty for the purpose of availment of CENVAT Credit by the customer. Therefore M/s.KBEPL's above plea is not correct. In this context, I find that the Department has not made any allegation that KBEPL have recovered any amount over & above the contracted price. The Department's case is that KBEPL have manipulated price break up in such a way that the prices of bought out goods have been inordinately over-valued at the expense of the assessable value of excisable goods manufactured by them.

21. KBEPL Satara have further pleaded that it was necessary on the part of the Department to have looked into each contract rather than coming to the conclusion on the basis of overall figures as per balance sheet when the fundamentals of valuation and Section 4 deals with transaction value. I have gone through all the contracts and have studied 9 contracts/Purchase Order/Supply Orders etc. in depth as mentioned in Exhibit 'A' to this O-I-O. The contracts have required KBEPL to design, manufacture, procure, supply, transport and deliver on site the goods covered by the contract. The contracts have not specified separate list of manufactured goods and bought-out goods. I find that the contracts have not mentioned separate transaction value of each of the manufactured excisable goods as well bought out goods. I would like to quote an example of contract price mentioned in the contract in respect of M/s. The Markandeya Co-op Sugar Mills Ltd., Kakati, Taluka & District Belgaum [Karnataka] as under:

Rs in Lakhs		
1.	Ex-works price of semi-gravity flow sugar plant and machinery according to the specifications and details	3030

	<i>given in Annexures</i>	
2	<i>Price of necessary facilities like handling supervision for erection & commissioning, packing/forwarding, freight, handling charges etc.</i>	30
3	<i>Insurance, Taxes and Duties of Excise, Customs, Sales Tax and other taxes</i>	240
	<i>Total Contract Price</i>	3300

There is escalation clause in many of the contracts. I also find that the Cost Audit Report has taken into consideration all the fundamentals of valuation, and that, the same is certified by qualified statutory authority in this regard viz. Assistant Director [Cost]. The Cost Audit Report has revealed that KBEPL have split up the contract amount in such a way that bought out goods are over-valued at the cost of proper assessable value of excisable goods and in turn at the cost of excise duty. In such a situation it was proper on the part of the Department to take recourse to the provisions of Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Valuation [Determination of price of excisable goods] Rules 2000 to determine proper assessable value of the excisable goods. Accordingly, the Cost Audit Report based on the Audited Annual Accounts of KBEPL has given correct assessable value of the excisable goods manufactured in the factory of KBEPL Satara.

22. KBEPL Satara have pleaded that the exercise undertaken to fix the assessable value for a sale transaction by considering the overall cost involved from the balance sheet is incorrect and lacks authority. KBEPL have further pleaded that the selling price of product in terms of bought out goods and workshop supplies are determined and fixed at the beginning of the supplies and the same are approved by the customers as well as submitted to the statutory authorities, and therefore, cannot be altered even if there is increase in the price of raw materials. KEBPL have further pleaded that the pricing of bought items cannot be the matter of reference as profit element to be loaded cannot be dictated by the Department: I find that what the KBEPL are pleading to be a price break up is the break up done by KBEPL in a manner convenient to them without following any costing or valuation standards notified in this regard by Institute of Cost

and Works Accountants of India and which are legally accepted in India. Since the contract has not even specified as to what items are to be bought out and what items are to be manufactured by KBEPL, the KBEPL were well aware of the items to be manufactured and bought out. It was therefore possible for them to manipulate the price cleverly to inordinately increase the price of goods to be purchased from outside and decrease the price of the goods to be manufactured in their factory. I find that in case of sugar factories situated in Karnataka State, the price break up is submitted to Technical Officer of the Karnataka State Federation of Co-operative Sugar Factories Bangalore. But it is not known as to what is the purpose of such submission or what use this information was put to by these agencies. However, even if the 'KBEPL submit any wrong split up of the contract amount to any other statutory authority, that cannot be binding on Central Excise Department for computation of correct assessable value under the provisions of Section 4 of the Central Excise Act, 1944 and Valuation Rules 2000. The Departmental stand is that KEEPL should correctly and legally arrive at the assessable value of the excisable goods manufactured in their factory and pay appropriate excise duty thereon. I find that there is a great amount of contradiction in the submissions of the KBEPL. When the KBEPL say that there was steep rise in the prices of raw materials for workshop items, there does not appear increase in the prices of bought out items purchased at the same time of removal of excisable goods from the factory. There is no answer as to how the price increase in the market adversely affected only excisable goods manufactured in the factory of KBEPL Satara and not the bought but goods including those goods purchased from M./s. Kay Iron Works, their own group company. Further, if the cost of raw materials was increased due to market variations, the cost of manufacture of excisable goods also should have gone up. But in this present case, surprisingly, the assessable value of the excisable goods has gone down though the total contracted amount is received by KBEPL Satara. I also find that, as discussed in foregoing para on Escalation Clause in the Contracts/Purchase Orders/Supply Orders/Price Beds etc., even where Escalation was allowed by the customers, M/s KBEPL: have no raised Escalation Bills when

they say that there was steep rise in the prices of raw materials. I also find that it is not known as to why KBEPL have not taken into consideration expected price rise in the raw materials till the completion of contract order. Therefore, KBEPL cannot say that at the time of contract/bidding, they quoted less price and subsequently the same went up. I also find that the Balance Sheets of KBEPL for the concerned period are not showing losses to the company though the profit may be lower than the expectations of company. Further, an exercise to ascertain contract-wise pricing of excisable goods and bought out goods was made and a worksheet of such computation is enclosed as 'Exhibit A' to this OIO. The working shows results similar to those revealed by Cost Audit Report which is based on their own Balance Sheet which reflects the financial performance done by the company during a particular year. It is felt that all the variations in raw material/finished goods market and their impact on the business of a company during particular year are depicted in the Balance Sheet. The questions raised by KBEPL about the method of costing adopted by: the Department may merit discussion if this methodology had not been based on the Balance Sheet. But when details of all the contracts and performance of the company during particular year are reflected in the Balance Sheet, KEBPL, cannot disown their own Balance Sheet. While the department has no say on the reasonable & legitimate profit earned by KBEPL Satara on bought out goods, this profit cannot be at the expense of an apparent loss in the company's own manufactured items. The Department has carried out Cost Audit of Bought-out goods to bring forth the fact that KBEPL have received the portion of reasonable price of excisable goods in the disguise of profit on bought out goods to evade payment of appropriate excise duty on excisable goods. KBEPL Satara is basically not a trading company and has undertaken an industrial turnkey job and while fulfillment of the said job KBEPL Satara have procured few bought out goods. Therefore, these transactions cannot be isolated from the composite contract to term it as trading business; especially when the prices of such bought out goods are enriched at the cost of deficit in the assessable value of excisable goods and excise duty due thereon. I find, the Department is not

attempting to charge duty on the traded items. The demand for duty is based on the actual manufacturing cost of the items manufactured by KBEPL.

23. KBEPL Satara have pleaded that Central Excise Invoice for sale of manufactured items represents transaction value under Section 4(1)(a) of the Central Excise Act, 1944 and there was no question of resorting to determination of value under Section 4(1)(b) or Valuation Rules 2000. KBEPL have further pleaded that it is not the finding of the Department that KBEPL's price is influenced to the extent of price paid or payable on account of certain factors which involves price additionally recovered for supply of certain goods or services not considered in the price. KBEPL have also pleaded that there is nothing in Central Excise Law which gives the basis for ascertaining the price of bought out items and then balancing the price of the manufactured item in such turnkey jobs. I find that there is no separate transaction value. What we have is a composite price, within which the assessee has on his own undertaken a break up of price between manufactured and bought out items; which is not supported by the expenditure incurred as reflected in the Company's books of account, and which also does not have any relation to the actual cost of the bought out items as seen from the invoices of the manufacturers of the bought out items. I find that the price mentioned on Central Excise Invoice by itself cannot be treated as 'transaction value' for the purpose of valuation in the present case when the customers have not quoted any transaction value or price for each of the excisable goods manufactured by KBEPL. Thus, what KBEPL are pleading to be a price break up is the break up done by KBEPL in a manner convenient to themselves without following any costing or valuation standards prescribed by Institute of Cost and Works Accountants of India which in fact are legally accepted in India and which is not backed by their own figures in the Balance Sheets. Since the contract has not even specified what items are to be bought out and what items are to be manufactured by KBEPL, the assessee was well aware of the items to be manufactured and bought out and so have manipulated the price very cleverly to inordinately increase price of goods to be purchased from outside and decrease the price of

the goods to be manufactured in their factory. It is pertinent to note here that the customers, even after submission of price break up by KBEPL Satara, are/were unaware and also unconcerned about which goods will be manufactured by KBEPL and which will be bought out from the market. This is because the customers did not have to pay any amount over and above quoted lump sum contract amount. Therefore, the acceptance of the price break up proposed by KBEPL cannot become 'transaction value' of the excisable goods manufactured by KBEPL. In this situation, the price break up prepared by KBEPL, Satara, in respect of excisable goods cannot be treated as 'transaction value' under Section 4 (1) (a) of the Central excise Act, 1944. Further KBEPL have issued more than one Central Excise invoice for parts/ components of plant, machinery or equipments when the price break up is given only for major equipments. Though KBEPL have pleaded that in some jobs they have to suffer loss and the same has to be made good in other ones, it has not emerged from the study of the contracts as mentioned in Exhibit 'A' that KBEPL have incurred losses. They also have not brought before me any concrete case duly certified by Chartered/Cost Accountant to show the losses. It is observed that KBEPL have not maintained their inventories and store records for issue of raw materials contract-wise, and therefore, it is believed that in the middle of any financial year, it is not possible for KBEPL to ascertain contract-wise profit or loss. It automatically follows that one has to rely on the Balance Sheet to know the costing, profit and loss in the business. The Department has, therefore, rightly relied on the facts and figures declared in the Balance Sheet of KBEPL and the Company's books of accounts. It is also observed that provisions of Section 4 of the Central Excise Act, 1944 read with Central Excise Valuation [Determination of Price of Excisable Goods] Rules 2000 are quite competent to take care of any type of transaction and price pattern and it cannot be accepted that there is no method or guideline prescribed for valuation of manufactured goods by turnkey contractor.

24. I have also considered various other similar submissions made by KBEPL. The case of KBEPL cannot be considered beyond

the provisions of Section 4 read with Valuation Rules 2000. The fact remains that customers of KBEPL have not quoted 'transaction value' of each of the excisable goods manufactured by KBEPL. The customers do not know or even do not specify as to which goods are to be manufactured by KBEPL and which goods are to be bought out from the open market. The customers are concerned with the only fact that the billing of the KBEPL does not exceed the lump sum contract amount prescribed. The price break up prepared by KBEPL without support of any cost or valuation standards prescribed in this regard cannot be accepted. The valuation method adopted by the Department is consistent with the provisions of Section 4 of the Central Excise Act, 1944 and Central Excise Valuation [Determination of Price of Excisable Goods] Rules 2000. The reasonable assessable value of excisable goods is arrived at and certified by the competent authority viz. Assistant Director (Cost] of the Department. Further, the duty demand is not merely based on the Balance Sheet but is based on a plethora of evidence and the Cost Audit Report which has gone into the actual purchases of the company.

25. It is stated by KBEPL that there are fundamental errors in cost computation by the Department as various expenses have been loaded excessively while arriving at reasonable assessable value. KBEPL have submitted some cost computation sheets vide Exhibit 'G' and 'H' said to be duly supported by Chartered Accountant's Certificate. However, the computation sheet does not bear any certification by Chartered Accountant. In fact cost computation is to be certified by a qualified Cost Accountant. I find that there are many discrepancies and errors in the Cost Computation Sheets submitted by KBEPL during personal hearing as Exhibit 'G' and 'H'; and few of these errors are illustrated below:

Sr No.	Year	Material Consumed	Manufacturing Expenses	Labour expenses included in Mfg. expenses required to be deducted	Therefore, net Mfg expenses as per KBEPL
1	2000-01	100228896	49,67,340	11330528	-63,63,188
2	2001-02	62522293	36,90,193	3279306	4,10,887

3	2002-03	92112457	28,38,075	4653234	-18,15,159
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The above. computation shows that in the year 2000-01 and 2003-04, KBEPL have incurred negative manufacturing expenses. It is doubtful as to whether it can happen so. It is very difficult to understand as to how the manufacturing expenses for processing raw materials worth Rs. 6.25 Crores could be just Rs. 4.11 lakhs. I find that in the said cost computation sheets KBEPL have loaded depreciation component on bought out goods to increase their sale price. It is not understood when no plant, machinery etc. is required for bought out goods to be supplied to customers, how depreciation and that too to a considerable extent like Rs. 25.28 lakhs, Rs. 29.57 lakhs, Rs. 25.15 lakhs and Rs. 7.45 lakhs can be loaded in the years 2000-01 to 2003-04 respectively. Further, in the year 2002+03 the cost computation sheet has loaded exorbitant Admn, Selling and Distribution expenses on bought out goods to the extent of Rs. 71.79 lakhs. Therefore, I find that these Cost Computation Sheets which are not signed or certified by Cost Accountant and which bear fundamental grave errors as mentioned above, cannot be accepted. In contrast to these Cost Computation Sheets, the Department has relied upon Cost Audit Report, which is based on KBEPL's Balance Sheets/Audited Annual Accounts, duly certified by competent authority. In view of this, I conclude that it is proper and correct to rely upon the Cost Audit Report of the Department to arrive at reasonable assessable value of the excisable goods. :

26. It is stated by KBEPL that there is no reference in the impugned Show Cause Notice to individual excise invoice, description of individual goods and quantum of inputs used. It is not correct to say that Cost Audit Report has not considered invoices issued, excisable goods manufactured and inputs consumed to arrive at assessable value of goods manufactured. On going through Cost Audit Report it will be seen that the Report has very well considered every single excise invoice issued during the period of Show Cause Notice, excisable goods: removed and inputs used for arriving at correct and reasonable assessable value of the excisable goods. Without prejudice to this finding, even if an exercise to relate over-valuation & under-

valuation on one to one: basis for each & every single Central Excise Invoice is to carried out, KBEPL will have to furnish the details of raw materials purchased and issued to workshop floor each manufactured item-wise, details of manpower engaged on each of the item manufactured & man+hours spent, their time-sheets, details of small consumable inputs consumed [like welding electrodes; grinding wheels, cutting blades etc.] in each item, electricity consumed: for each item manufactured & all other related micro details for verification by Cost Accountant; which will be an impossible: exercise. Further, service Cost Audit Report is based on Annual Audited Accounts the above said exercise cannot reveal different results. Therefore, the argument of KBEPL in this regard is not tenable.

27. It is also stated by KBEPL that the prices of manufactured items as quoted by them and approved by customers at the relevant time are well above the cost of manufacture of the goods. This is utterly false statement devoid of facts and misleading as well. The following figures of assessable value and raw material consumption leaving apart any other overheads, shows that the assessable value is not more than the cost of manufacture: customers at higher price and made profit out of it. The profit so obtained in the trading activities should also go to enhance the value of turbines according to the Department and duty was assessed accordingly. This view of the Department cannot be sustained in view of the law stated by their Lordships of the Supreme Court in Baroda Electric Meters Ltd Vs. CCE 1997 (94) ELT 13 (S.C.) M/s KBEPL have placed reliance on the bold lines of this para which is inappropriate inasmuch as the alternators and turbines are fixed to earth upon which they become immovable property and consequently not liable to duty; whereas the spares in question which are supplied are detachable/removable and can be sold independently and secondly the value addition is under dispute in this case, therefore, this ruling is out of context.

iii. In the case of CCE, New Delhi Vs Guru Nanak Refrigeration Corpn. 2003(153)ELT 249(SC), the issue involved was Valuation(Central Excise)- Normal Price-Refrigeration machinery parts sold by assessee in wholesale trade at the

price which was approved by the Excise Authorities-Show cause notice issued on the ground that the cost of production of the goods was more than the cost of wholesale price, so differential duty be paid on the basis of costs of production of goods- No allegation that the wholesale price to the buyers was for consideration other than the one at which it purported to be sold or that it was not at arms length-No flow back of money from the buyer to the assessee- In absence of these factors it cannot be contended that normal price was not ascertainable- Where normal price within the meaning of clause(a) of sub-section (1) of Section 4 of C.Excise Act, 1944 is ascertainable, the provisions of clause (b) ibid cannot be resorted to determine the nearest ascertainable equivalent of the normal price of the goods-Tribunal's Order upheld. The present case is for valuation of excisable goods under the provisions of Section 4(1)(b) of the Central Excise Act, 1944 and there is no allegation made for receipt of additional consideration by the assessee except for escalation bills which is a separate matter. Therefore, the ruling in this case is not applicable here.

- iv. In the case of Pushpam Pharmaceuticals Company Vs CCE, Mumbai 1995(78) ELT 401 (SC); the issue of computation of value of exempted goods in the value of clearances of all excisable goods was discussed and elaborated, and the scope of extended period was examined especially in light of the fact when mere omission to disclose the correct information not a suppression of facts unless it was deliberate to escape from payment of duty. M/s KBEPL have specifically relied upon para 4 of this ruling which read as, "Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in*

various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the context in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression. In the instant case, there is no necessity of computation of value of clearances and the deliberate actions on the part of M/s KBEPL namely issuance of Central Excise invoices when nil returns are filed with the Department and forging the signatures of the transporter as deposed by one of the transporters, as also non-maintenance of records is sufficient evidence to prove the intent of M/s KBEPL. Therefore, the present ruling is not of utility.

- v. In the case of Hindalco Industries Ltd. Vs CCE, Allahabad 2003(161) ELT 346 (Tri- Delhi), the issue involved was Notional interest on advances shown in balance sheet alleging gain from advances, having been made without considering relevant factors, and ignoring the much bigger debit balance entries in same balance sheet is not sustainable. It was also alleged that the report of Assistant Director was introduced into the issue at a later stage and violative of principles of natural justice. Also, extended period could not be invoked on the basis of the information appearing in balance sheet which was a public document and hence not sustainable. The facts of the present case are totally different and ruling of this case law is not relevant here.*
- vi. In the case of Kirloskar Oil Engines Ltd. Vs CCE, Nasik 2004(178) ELT 998 (Tri-Mumbai); extended period is not invocable as information appearing in the balance sheet is document which is openly available to public and hence*

suppression cannot be charged. The more specific issue was credit not deniable on inputs lying in the factory though components were written off in the books of account on the presumption that input cannot be used, when there was no time for consumption. No such situation is arising in our case and hence this ruling is also out of context.

- vii. In the case of CCE, Indore Vs. Syncom Formulations (I) Ltd 2004 (172) ELT 77 (TRI-Delhi); the facts were within the knowledge of Department, subsequent verification as to whether products mis-declared as pharmacopial medicines and demand was issued after lapse of 4 years was not sustainable as the facts are known to the Department. In this case there is no such issue of mis-classification, or proposal to reclassify the goods. Further, the contracts and price break up made by KBEPL were not in the knowledge of the department and hence this verdict is also not applicable in the present case.*
- viii. In the case of Asoka Spintex Ltd V/s. CCE, Ahmedabad 2004 (171) ELT59 (TRI-Mum); it was held that if mis-declaration is known to Department, extended period cannot be invoked as statutory records filed by assessee were made basis of demand. If Cost Accountant certificate for price of captively consumed in the material case was erroneous, it was not a ground to proceed against assessee and would not be basis for their mensrea unless those errors were used for evasion of duty. The price declarations based on Cost Accountant certificate approved by the Department and the periodical returns reflected the relevant facts explicitly or implicitly to the Department at appropriate stages. Even if Cost Accountant certificate may have been erroneous, suppression of facts could not be invoked. Price declaration for captive consumption including administrative overhead and worker salaries- if not enquired by the Department could not be raised at a later date. In this ruling a multitude of factors are deliberated upon but the main plank is the Cost Accountant's report which was stated to be erroneous but M/s KBEPL have not adduced any evidence to disprove the*

cost accountant's report nor produced any certified calculations so as to deliberate. The other issues of this ruling are case specific. Therefore, the ruling is out of context"

4.9 During the course of arguments revenue has relied upon the decision of the Hon'ble Supreme Court in the case of Fiat India Pvt Ltd [2012 (283) E.L.T. 161 (S.C)]. It is not the case that the appellant was selling the goods at price lower than the cost of production and incurring loss. Even the cost auditor has not concluded that the appellant was selling the goods and earning loss. Hence the ratio of this decision cannot be directly applied to the present case. However the para's which enunciate the principles in law are being reproduced below:

51. Excise is a tax on the production and manufacture of goods and Section 4 of the Act provides for arriving at the real value of such goods. When there is fair and reasonable price stipulated between the manufacturer and the wholesale dealer in respect of the goods purely on commercial basis that should necessarily reflect a dealing in the usual course of business, and it is not possible to characterise it as not arising out of agreement made at arms length. In contrast, if there is an extra-ordinary or unusual price, specially low price, charged because of extra-commercial considerations, the price charged could not be taken to be fair and reasonable, arrived at on purely commercial basis, as to be counted as the wholesale cash price for levying excise duty under Section 4(1)(a) of the Act.

58. From a conspectus of decisions and dictionary meaning, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'sole', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case.

59.

60. Since under new Section 4(1)(a) the price should be the sole consideration for the sale, it will be open for the Revenue to

determine on the basis of evidence whether a particular transaction is one where extra-commercial consideration has entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty and that is what exactly has been done in the instant cases and after analysing the evidence on record it is found that extra-commercial consideration had entered into while fixing the price of the sale of the cars to the customers. When the price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then according to Rule 5 of the 1975 Valuation Rules, the equivalent value of that additional consideration should be added to the price shown by the assessee. The important requirement under Section 4(1)(a) is that the price must be the sole and only consideration for the sale. If the sale is influenced by considerations other than the price, then, Section 4(1)(a) will not apply. In the instant case, the main reason for the assesseees to sell their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra commercial consideration and not the sole consideration. As we have already noticed, the duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value, provided : (1) the buyer is not a related person and (2) the price is the sole consideration. These twin conditions have to be satisfied for the case to fall under Section 4(1)(a) of the Act. We have demonstrated in the instant cases, the price is not the sole consideration when the assesseees sold their cars in the wholesale trade. Therefore, the assessing authority was justified in invoking clause(b) of Section 4(1) to arrive at the value of the exercisable goods for the purpose of levy of duty of excise, since the proper price could not be ascertained. Since, Section 4(1)(b) of the Act applies, the valuation requires to be done on the basis of the 1975 Valuation Rules.

61. After amendment of Section 4 :- Section 4 lays down that the valuation of excisable goods chargeable to duty of excises on ad-valorem would be based upon the concept of transaction value for levy of duty. 'Transaction value' means the price

actually paid or payable for the goods, when sold, and includes any amount that the buyer is liable to pay to the assessee in connection with the sale, whether payable at the time of sale or at any other time, including any amount charged for, or to make provisions for advertising or publicity, marketing and selling, and storage etc., but does not include duty of excise, sales tax, or any other taxes, if any, actually paid or payable on such goods. Therefore, each removal is a different transaction and duty is charged on the value of each transaction. The new Section 4, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 ('the Rules 2000' for short) which is also made effective from 1st July, 2000. Since the price is not the sole consideration for the period even after 1st July, 2000, in our view, the assessing authority was justified in invoking provisions of the Rules 2000."

4.10 Similar issue was considered and clarified by the Board after the decision of Hon'ble Supreme Court in case of FIAT and taking the note of the clarifications issued by the Board, tribunal has in the case of T & T Metals Pvt. Ltd. [2021 (376) E.L.T. 545 (Tri. - Kolkata)] observed as follows:

7. In the instant case, we find that the Department has rejected the transaction value under Section 4(1)(a) of the Act merely on the ground that the cost of manufacture is higher than the price at which goods have been cleared by the appellant. There is no dispute that the goods have been sold to the unrelated buyers and there is no flow back of additional consideration, as also have been specifically admitted by the Learned Pr. Commissioner in para 27 and para 30 of the impugned order.

7.1 We have perused the clarifications issued by the CBEC vide Circular dated 15-1-2014 (Supra) issued aftermath the decision in the case of Fiat India (supra), which is reproduced below :-

2. The first issue is whether the declared transaction value can be rejected in all cases where the transaction value is lower than the manufacturing cost and profit. The Hon'ble Supreme Court has not ruled that transaction value can be rejected in all cases where the declared value is lower than the manufacturing cost and profit. At paragraph 66 in the FIAT judgment, the Hon'ble Court has declined to hold its earlier judgment in case of Collector of Central Excise, New Delhi v. Guru Nanak Refrigeration Corpn. [2003 (153) E.L.T. 249 (S.C.)] per incuriam, distinguishing it on the basis of the facts of the case, though the transaction value in case of M/s. Guru Nanak Refrigeration Corpn. was less than the manufacturing cost and profit. The Hon'ble Supreme Court has cautioned against drawing general conclusions and inferences quoting the truism stated by Lord Halsbury that "a case is only an authority for what it actually decides and not for what may seem to follow logically from it."

2.1 Further, in paragraph 50, the Hon'ble Supreme Court has cited two instances where a manufacturer may sell goods at a price lower than the cost of manufacture and profit and yet the declared value can be considered as normal price. These instances are when the company wants to switch over its business or where a manufacturer has goods which could not be sold within a reasonable time. The Hon'ble Court has further held that these examples are not exhaustive. Therefore, mere sale of goods below the manufacturing cost and profit cannot be taken as the sole basis for rejecting the transaction value.

Verification of payment of duty

3. The second issue is regarding the procedure to be adopted by the field officers to identify cases where the ratio of the judgment would apply. It may be noted that, under the self-assessment procedure, there is a legal obligation on the assessee to correctly assess and pay the duty in terms of the Central Excise Act, 1944 read with the Valuation Rules, 2000. Verification of this aspect may be conducted by the Central

Excise officer during the audit of units. Aspects such as the percentage of loss at which sale has taken place, the period for which such loss making price has prevailed, reasons for sale at such loss making price, whether such sales are contrary to the standard and accepted business practices, and whether such sale is leading to erosion of capital of the company, may be looked into. In addition, due care may be taken at the level of the Commissioner to see whether the case at hand is similar to the facts and circumstances of the FIAT case....”

7.2 The Board vide subsequent Circular No. 983/7/2014-CX., dated 10-7-2014 has also clarified as below :-

4. The matter has been examined in the light of the facts in the case of M/s. Fiat India (P) Ltd. vis-a-vis the facts in the case of fertilizers. The facts in the case of M/s. Fiat India (P) Ltd. were that the company had declared an assessable value for Uno model cars at a price which was substantially lower than the cost of manufacture, and the company continued to sell the cars at a loss making price for nearly five years. The company admitted that the purpose of doing so was to penetrate the market and to compete with the other manufacturers of similar cars. It was under these circumstances that the Hon'ble Supreme Court held that such sales could not be regarded as sales in the ordinary course of sale or trade, nor could the declared value be accepted as the normal price for sale of cars. As the main reason for selling cars at a lower price than the manufacturing cost and profit was to penetrate the market, the apex court held that this would constitute extra-commercial consideration and not the sole consideration. Since the price was not the sole consideration for sale of cars, the Court held that the Department was justified in invoking the provisions of Valuation Rules for the purpose of levy of excise duty.

On perusal of the above clarifications, it is noted that the Board has accepted that mere sale of price lower than the manufacturing cost cannot be made the criterion to reject the transaction value unless the aspects such as the percentage of loss at which such sale takes place and the period for which such loss takes place, reasons of sale at such loss, etc. are examined to ascertain if there was any "extra commercial consideration".

The Board has also accepted the fact that the Apex Court in its judgment has observed that selling of final products below the manufacturing cost was intended to penetrate the market which also constitutes extra commercial consideration in the hands of the manufacturer. We find that no enquiry or investigation has been undertaken by the Department to reject the transaction value as nothing is appearing in the impugned order and that merely the decision in the case of Fiat India has been mechanically relied to raise the impugned demand, which is basically a reiteration of the proposal in SCN. We also note, as submitted by the Learned Advocate for the appellant, that the loss in their case has been around 10% but that cannot be made the sole criterion to disregard the valuation adopted by the appellant under Section 4(1)(a), as also clarified in para 2 of the aforesaid Circular. In view of the same, the decision in the case of Fiat India (Supra) is clearly distinguishable and has no application to the facts of the present case."

4.11 Commissioner has in the impugned order nowhere concluded that appellants had in case of any contract received any amount over and above the agreed contractual value. That being so there cannot be any reason for the rejection of the transaction value/ contractual value. Commissioner has in the impugned order referred to 41 contracts against which the supplies were made by the appellant to their customers, but have no where concluded to this effect in a single case. Interestingly it is seen that such a conclusion has not been arrived in the impugned order even in the cases where the supplies were made to the group companies. The demand seem to be made on the basis of the presumptions only contrary to values determined as per the contract/ agreement entered into by the purchaser and seller. The said approach is totally contrary to the concept of transaction value introduced from 2000. While clarifying the scope of amendments made in the year 2000, following was clarified by J S TRU, vide letter issued from F No 354/81/2000-TRU dated 30.06.2000:

"4. "Transaction Value" includes receipts/recoveries or charges incurred or expenses provided for in connection with the manufacturing, marketing, selling of the excisable goods to be

not be part of the price payable for the goods sold. In other words, whatever elements which enrich the value of the goods before their marketing and were held by Hon’ble Supreme Court to be includible in “value” under the erstwhile section 4 would continue to form part of section 4 value even under new section 4 definition. It may also be noted that where the assessee charges an amount as price for his goods, the amount so charged and paid or payable for the goods will form the assessable value. If, however, in addition to the amount charged a price from the buyer, the assessee also recovers any other amount by reason of sale or in connection with sale, then such amount shall also form part of the transaction value for valuation and assessment purposes.”

The entire demand made by the impugned order on the basis of the cost of production as per the cost auditor report is contrary to the concept of transaction value introduced from 2000. In light of the decisions referred above, after introduction of the concept of “transaction value” in the scheme of Section 4 of the Central Excise Act, 1944, revenue had could have rejected the transaction value between the buyer and seller only after demonstrating that the price charged is not the sole consideration and has been influenced by some additional commercial consideration. Impugned order seeks to reject the contract value/ transaction value without even showing what was additional commercial consideration flowing from the buyer to seller for the sale of the goods. The impugned order nowhere concludes that appellant has received any amounts over and above the declared transaction value for the payment of duty. The demand thus made contrary to the settled position in law cannot be sustained.

4.12 The charge of undervaluation has been made against the appellant on the basis of the cost auditor report who has concluded that appellant was supplying the bought out items bought from various entities. To establish the undervaluation the Cost Auditor has drawn three statements in the report which are reproduced below:

Computation of Profit Margin					
S N	Particulars	2000-01	2001-02	2002-03	2003-04

1	Sales	2304.07	1934.74	1488.01	1453.66
2	Excise Duty	92.44	49.32	51.52	147.57
3	Sales net of Excise Duty	2211.63	1885.42	1436.49	1306.09
4	Profit Before Tax	38.63	51.4	30.68	37.53
5	Cost of Sale	2173	1834.02	1405.81	1268.56
6	% of Profit to Cost of Sale	1.78	2.8	2.18	2.96
Statement I					
Table Showing the Calculations of Total Cost, Reasonable Sale Value on the basis of average profit margin and actual sale value of Manufactured Goods					
S N	Particulars	2000-01	2001-02	2002-03	2003-04
1	Material Consumed	100518803	68680284	62555293	92112457
2	Manufacturing Expenses	4967349	5991924	3690193	2838075
3	Depreciation	5368786	554667	5665386	5766950
4	Employee Cost	3771249	4840578	4886610	5631127
5	Interest	8299183	8430441	6508353	8310224
6	Adm, selling and Distribution Expenses	3604125	3168390	4101098	5412820
7	Other Expenses	281967	241663	294346	486464
8	Total Cost	126811462	91907947	87701279	120558117
9	Profit Margin (%)	1.78	2.8	2.18	2.96
10	Profit Amount	2257244	2573423	1911888	3568520
11	Reasonable Sale Price Excluding Taxes	129068706	94481370	89613167	124126637
12	Actual assessable Value	53777229	25860648	37243767	92232510
13	Undervaluation	75291477	68620722	52369400	31894127
Total Undervaluation					228175726
Statement II					
Table Showing the Calculations of Total Cost, Reasonable Sale Value on the basis of average profit margin and actual sale value of Bought Out Goods					
S N	Particulars	2000-01	2001-02	2002-03	2003-04
1	Material Consumed	83457654	77372987	46749452	5224300
4	Employee Cost	419028	537842	542957	625681
5	Interest	3413704	3413704	2427636	234599
6	Adm, selling and Distribution Expenses	2964970	3569628	3059446	305610
7	Other Expenses	231963	272267	219584	27466
8	Total Cost	90487319	85166428	52999075	6417656
9	Profit Margin (%)	1.78	2.8	2.18	2.96
10	Profit Amount	1610674	2384660	1155380	189963
11	Reasonable Sale Price Excluding Taxes	92097993	87551088	54154455	6607619
12	Actual sale Value (Net Erection Charge)	167467442	157713328	111448399	38401850
13	Overinvoicing	75369449	70162240	57293944	31794231
Total Overinvoicing					234619864

The entire analysis done in the three table above is not as per any prescribed standard of The Institute of Cost and Work Accountant of India and is also not based on the CAS-4, standard prescribed for determining the cost of production. As per SCA 109 Standard on Cost Auditing - "Cost Auditor's Responsibility relating to Fraud in an Audit of Cost Statements",

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"4.3 Cost Audit: Cost audit is an independent examination of cost statements, cost records and other related information of an

entity including a non-profit entity, when such an examination is conducted with a view to expressing an opinion thereon.

4.4 Cost Auditor: "Cost Auditor" means an auditor appointed to conduct an audit of cost records and shall be a cost accountant within the meaning of The Cost and Works Accountants Act 1959. "Cost Accountant" is a cost accountant as defined in clause (b) of sub-section (1) of section 2 of The Cost and Works Accountants Act, 1959 (23 of 1959) and who holds a valid certificate of practice under subsection (1) of section 6 and who is deemed to be in practice under subsection (2) of section 2 of that Act and includes a firm of cost accountants.

4.5 Cost Audit Report: Cost Audit Report means the report duly audited and signed by the cost auditor on an independent examination of the cost statements, cost records and other related information of an entity including a non-profit entity, expressing his opinion thereon. It includes any statement, annexure, qualifications, observations, etc. attached to the cost audit report, or that is required by law or regulation.

4.6 Cost Records: "Cost Records" means books of accounts relating to utilization of materials, labour and other items of cost, to facilitate calculation of true and fair cost of production or cost of operations, cost of sales, and margin for each product or service or activity, produced or provided by an entity including a non-profit entity, for any period, in compliance with Cost Accounting Standards issued by the Institute.

4.7 Cost Statements:-Cost Statements, in relation to an entity, includes plant-wise, factory wise or service Centre wise:

- i) quantitative details of capacity, production, trade purchases, sales and stock;*
- ii) quantitative, rates and value details of consumption of materials, utilities, and other inputs;*
- iii) cost sheet showing element-wise, total as well as per unit, cost of production of goods or provision of services, cost of sales and margin for each product or service;*
- iv) reconciliation of profits, or in case of an entity carrying on any activity not for profit, of surplus, as per cost accounts and as per financial accounts;*

- v) reconciliation of indirect taxes showing details of total clearance of goods/services, assessable value, duties/ taxes paid, CENVAT or VAT or Service Tax credit utilized, duties/taxes recovered and interest / penalty paid;*
- vi) statement of value addition and distribution of earnings;*
- vii) details of purchases and sales of goods and services with related parties showing transfer price vis-à-vis normal price; and*
- viii) any explanatory note annexed to, or forming part of, any document referred to in (i) to (vii) above.”*

The cost auditor report relied upon being bereft of the analysis of the cost records and the cost statement cannot have much sanctity in law. The costing studies could have been done either contract wise or the project wise, in case of company undertaking turnkey projects, whereas the cost auditor has in general determined the quantum of undervaluation only by referring to the total cost of sales and sales revenue. How do these sale revenue compare with the contract values is not coming out. Institute of Chartered Accountant has issued the guidelines for accounting in case of turnkey projects. The cost auditor report do not point to any accounting standard and the accounting policies of the appellant which are the part of Financial Statements of the company. Accordingly the reliance placed on the Cost Audit report in the impugned order, is contrary to the specific direction given by the tribunal while remanding the matter back to original authority.

4.13 The show cause notice not only makes the demand by alleging the undervaluation of the manufactured goods by overvaluing the brought out items, it also alleges that appellant has removed the clandestinely removed the bought out items as per the cost auditor report from their premises clandestinely. Interestingly the as per Annexures to Show Cause Notice show that during the relevant period the value of bought items vis a vis those procured from the sister concern is as follows:

S No	Financial Year	Bought out goods from KC Goa to total			Sale Price
		Total	K C Goa	%	
1	2000-01	8,34,57,654	1,43,84,500	17.24	15,59,31,565
2	2001-02	7,73,72,987	2,12,27,300	27.44	15,39,84,994
3	2002-03	4,67,49,452	1,31,93,500	28.22	10,81,02,168

	Total	20,75,80,093	4,88,05,300	23.51	41,80,18,727
4	2003-04	52,24,300	1,47,75,000		3,36,04,701
5	2004-05		5,93,800		
	Grand Total	21,28,04,393	6,41,74,100		45,16,23,428

The difference between the selling price and purchase price is claimed to be trading profit by the appellant. The total value of the bought out items as per the show cause notice which have been purchased by the appellant from their sister concern as percentage of the total purchase value of bought out items is in range of 17% to 28% for the three years where the data is free from defect. In the year 2003-04 and 2004-05 the purchases from sister concern exceed the total purchase value of bought out item hence left out from the analysis. Further from the figures as above it is observed that constantly from the year 2000-01 to 2003-04 the purchase value of bought out items have declined. It is the submission of the appellant that prices of the bought out item or the manufactured goods supplied by them is also approved by the was approved by the Director of Sugar, a statutory Authority. Commissioner while analyzing the contracts has also noted that appellants in respect of the supplies made under the contracts entered into with the sugar industries has given the breakup of the prices for the individual item to the purchasers and the prices have been agreed to. Further as per the terms of contract, appellant were required to produce the invoices/ gate passes of the sub vendor to the purchaser to claim the duty paid against the said supplies and the goods/ the sub vendor facilities were open for inspection by the purchaser before dispatch. The findings recorded in the impugned order go contrary to this extent as provided in the contract. No instance has been pointed out where the purchaser has raised any query for non fulfillment of said conditions.

4.14 During the course of the arguments, authorized representative relied upon the following decisions to buttress the findings recorded in the impugned order:

- Calcutta Chromotype Ltd. [1998 (99) E.L.T. 202 (SC)], the Apex Court relying upon M/s. Mcdowel and Company Ltd. vs. Commercial Tax Officer [(1985) 3 SCC 230], holding that Colourable devices, however, cannot be part of tax planning. The argument advanced by the authorized

representative is without merit as the composite contract for supply of the goods involving supply of the goods and services between the independent purchaser and seller cannot be said to be colourable device for the purpose of tax evasion.

- The other decisions relied upon only state that the best judgement assessment to be adopted in certain cases. However said decisions which are relied would apply only if the transaction value is rejected. In the present case once the conclusion is that sale price between the seller and purchaser is at arms length same cannot be rejected and best judgement assessment resorted too.

4.15 For upholding the charge of clandestine clearance impugned order observes as follows:

"CLANDESTINE REMOVAL

30. The second allegation of the Show Cause-cum-Demand Notice is clandestine removal of excisable goods from KBEPL Satara in the disguise of bought-out goods from KC Goa. In this regard, I find that the Department has proved that no manufacturing activity was carried out in the factory of KC Goa on the basis of following facts which emerged during the course of investigations:

- a. There were only fourteen machines available in the factory of KC Goa in rusty and unused condition for couple of years. These were not capable of manufacturing goods said to have been manufactured at KC Goa which are of a value of Rs. 6,41,74,100/-.*
- b. One Mr. S.A. Mirza with his family and brothers is residing within the factory campus of KC Goa. The industrial electricity connection is used only for their domestic purposes limiting the consumption to 250 to 400 units per month supported by electricity bills issued by Electricity Department of Goa during the concerned period.*
- c. The diesel generator set installed in the factory was rusted and in unusable condition. KC Goa have not incurred any expenditure on purchase of diesel for the said generator set during the Show Cause Notice period.*

- d. No registers were maintained at KC Goa to record production of excisable goods. This has been corroborated by Shri Mirza in his statement dated 27/01/2005.*
- e. KC Goa has not maintained any Store Books or Issue Slips for raw materials, dispatch list for finished excisable goods but such record is found in KBEPL Satara for the said goods.*
- f. There is no qualified staff with KC Goa to manufacture precision machinery required for sugar plants.*
- g. During Panchanama no finished excisable goods similar to those said to have been manufactured and sold by KC Goa were found in the factory of KC Goa.*
- h. During Panchanama no stock of raw materials was found except 1MT of MS Flats.*
- i. No office copies of Central Excise Invoices issued by KC Goa were found during panchanama nor blank copies of Central Excise invoices for current/future usage were also found during panchanama at KC Goa.*
- j. Shri Mirza who is residing in the factory campus of KC Goa has stated that KC Goa had not maintained any Central Excise records pertaining to production of excisable goods, receipt of raw materials since April 2000 except for the records of welding electrodes, red oxide, turpentine and thinner.*
- k. Shri N.C. Kamat in his statement has stated that he was working as Manager with KC Goa but no production and clearance of excisable goods were effected from KC Goa.*
- l. Shri Kamat has stated that Shri B M Mujawar, employee of KBEPL had obtained his signatures on two blank books of Challan and bills. According to his knowledge no excisable goods were cleared from Kundaim Goa and he does not know what type of goods have been removed on the said blank but signed challans/bills.*
- m. Shri Mirza has stated that KC Goa has also not got manufactured any excisable goods on job work basis from any other manufacturer.*
- n. Central Excise invoices of KC Goa are written in the handwriting of Shri N.S. Nipane, Purchase Officer of KBEPL Satara who has written Central Excise invoices of KBEPL*

Satara also on the same dates showing that Central Excise invoices of KC Goa were issued from Satara only and not from Goa. This has been accepted by Shri N.S. Nipane in his statement recorded on 07/04/2005 which has not been retracted till date.

- o. KBEPL Satara's Stores Section has issued Issue Slips for raw materials supplied to their workshop floor for the manufacture of excisable goods on account of KC Goa. Further, in such cases their Production Department has issued Dispatch List for the finished goods manufactured out of such raw materials. This fact has been confirmed by Shri S.V.Paramane, Assistant Store Keeper and Shri S.K. Doshi, Production Manager of KBEPL Satara.*
- p. Shri B.M.Mujawar, Accountant of KBEPL Satara has stated that heavy machinery like Pan Calandria, Juice Heater, Molasses Storage Tank, Condensor, Crystallizer etc. were manufactured in KBEPL Satara and cleared from Satara but C.Ex. invoices of KC Goa were issued. He had obtained signature of Shri N.C. Kamat on blank Bill Books and said to be C.Ex. Invoices and handed over the same to his higher authorities.*
- q. The excisable goods said to be manufactured by KC Goa were shown to have been transported under Lorry Receipts of M/s. Vishwas Transport Co. but the same is denied by owner of the said Transport Company, Mr. V.R. Kulkarni. He has also confirmed that there is no other transport company by the same name in Goa. Shri B.N. Agarwal, Assistant Manager Accounts of KBEPL also could not show any evidence of freight/transportation charges paid to M/s. Vishwas Transport Co.*
- r. It is found that Shri Nipane has written the Lorry Receipts of M/s. Vishwas Transport Co. and the same were given to him by Factory Manager of M/s. Kay Iron Works, Satara. Therefore, it is observed that the Lorry Receipts of M/s. Vishwas Transport were fabricated by KBEPL Satara.*
- s. The other transporter M/s. Bhosale Tempo Service has also stated that he has not transported any goods from KC Goa to Satara and vice versa.*

- t. *In case of transportation shown to have been done by M/s. Siddhakala Transport Co., he has denied to have transported goods from KC Goa to KBEPL Satara but he has transported the goods of KBEPL Satara to their customers. He has stated that blank Lorry Receipts of his transport company were taken by KBEPL.*

In case of transportation of goods said to be manufactured at KC Goa, KBEPL argue that they had engaged some Commission Agent for transport of consignments, who procures trucks on day to day basis, to whom they had made cash payments and he might be like nomads and has gone away. I do not find any truth in this argument and the same is not acceptable. It is proved that they had direct business with M/s. Siddhakala Transport Co. and so the theory of nomad like commission agent is clearly a concocted story. Moreover, this defence has not been supported with any documentary evidence.

31. *KBEPL has made a half hearted submission that K C Goa ... KBEPL have not brought forward any evidence to support the contention of job work. On the contrary, Mr. S.A. Mirza of KC Goa has stated that they have not got manufactured any excisable goods on job work basis from any other manufacturer. Further, even if the goods of KC Goa were manufactured on job work basis, the Central Excise duty should have been paid by that job worker and not KC Goa. This defence, is not convincing in the least.*

32. *I find that all the above listed evidence collected by the Department shows that the goods said to be bought out from KC Goa were manufactured by KBEPL Satara in their factory and removed without payment of CENVAT duty.*

33. *KBEPL have argued that the Department has not taken into account duty payment made by KC Goa in Central Excise Goa Commissionerate, issued Central Excise invoices and have filed returns. I find that duty payment in the name of KC Goa is made availing the benefit of concessional rate of duty under SSI Exemption Scheme. I also find that in case of goods shown to have been purchased from KC Goa lesser assessable value is considered for payment of duty at Goa and showing the said goods as bought-out items, KBEPL Satara have over- valued the*

same by 189% to 278%. An illustration of over-valuation of goods shown to have been purchased from KC Goa is as under:

Inv No of KC Goa	Date	Description of Goods	Ass Value	Non excisable Inv No of KBEPL	Date	Party	Inv. value	% of over Valuation
11	15/10/00	Gantry for EOT	458128	93	15/10/00	Dhanlaxmi SSK	1325453	189
15	16/10/00	Cheg Plate for pan	217008	97	16/10/00	Dhanlaxmi SSK	640867	195
69	30/01/02	Pan Caland eria	43500	177A	30/01/02	Dhanlaxmi SSK	157740	263
70	30/01/02	Pan Caland eria	43500	178A	30/01/02	Dhanlaxmi SSK	157740	263
1	12/04/02	Gross Hopper	57540	1	01/04/02	Dhanlaxmi SSK	217342	278
2	13/04/02	Shell for vaccum Pan	274000	2	14/04/02	Markendya sugar	1034960	278

I find that as per KBEPL's submissions, KC Goa has paid Central Excise duty worth Rs. 95,01,741/- [PLA Rs. 40,14,559/- + CENVAT Rs. 54,87,182/-] during the period from April 2000 to March 2004, in Goa Commissionerate. However, I find that KC Goa has availed benefit of SSI exemption and concessional rate of duty on the goods shown to have been manufactured by them and KBEPL have saved Excise Duty thereon as the goods, in fact, have been manufactured by KBEPL at Satara and were liable to duty @ 16% ad valorem. Further, the motive for this manipulation done by the company is clearly the flexibility it provided to further manipulate the prices between the manufactured items and the bought out items. But for this reason, there could be no logic as to why the goods were shown to have been manufactured in KC Goa. Since it was illegally showing the goods to have been manufactured at Goa and paying duty, such payment cannot be taken to be the payment of duty on those goods since there was no requirement to pay that duty at all. Excise duty payment is not a matter of whim and fancy. It should be paid where it is required to be paid and on the correct value after properly accounting for the same. Therefore, I am not inclined to give any benefit of CENVAT duty

paid at Goa for the actual excisable goods manufactured at satara and cleared without payment of excise duty

Therefore, KBEPL are liable to pay Excise Duty as demanded by the Department.

34. Following rulings were also cited by KBEPL in their defence: Martin & Harris Laboratories Ltd. Vs CCE, Gurgaon 2005(185)ELT 421(Tri-Del); Pahwa Chemicals P LTd. Vs CCE Delhi 2005(189)ELT 257(S.C.); CCE Vs Samatha Metal Industries 1996(83)ELT A110 (S.C.); CCE Vs HMM Ltd 1995(76)ELT 497(S.C.); Nizam Sugar Factory Vs CCE, AP 2006(197)ELT 465 (SC); Mistry Extrusion Pvt. Ltd. VS CCE, Surat 2000(117)ELT 495 (T).

- i. In the case of Martin & Harris Laboratories Ltd. Vs CCE, Gurgaon 2005(185)ELT 421 (Tri-Del); the issue involved was discrepancy between production figures in RT-12 returns and balance sheet prepared in head office resolved by assessee and no other evidence existing either of clandestine removal of goods or excess of inputs and it was decided that balance sheet could not be taken as a sacrosanct document to prove clandestine removal. In our case the clandestine charge proved without taking recourse to the balance sheet and other corroborative evidence is built up. Therefore, this ruling is of no help.*
- ii. In the case of Pahwa Chemicals P LTd. Vs CCE Delhi 2005(189)ELT 257(S.C.); the crux of the issue was affixing of labels and Department was in knowledge of the same, then there was no wilful mis-declaration. The unit had complied all the Central Excise procedural formalities and, therefore, extended period could not be invoked. This case does not have relevance here.*
- iii. In the case of CCE Vs Samatha Metal Industries 1996(83)ELT A110 (S.C.); the Apex Court upheld the tribunals order wherein it has been held that when returns have been assessed and entire proceedings have been done with the knowledge of the Department, removal of goods cannot be regarded as clandestine. But in our case, only after the completion of the investigations, it is*

established that the clandestine activity has taken place and prior knowledge to the department was not there.

- iv. In the case of CCE Vs HMM Ltd 1995(76) ELT 497 (SC); it has been held that limitation for extended period not invocable unless show cause notice puts assessee to notice specifically as to which of the various commissions and omissions are committed. The specific problem related to non-declaration of waste/bye-product which is not the contention in our case. Hence the case does not merit consideration here.*
- v. In the case of Nizam Sugar Factory Vs CCE,AP 2006(197)ELT 465 (SC); the Apex Court has ruled that when all relevant facts are in knowledge of authorities when first show cause notice issued, while issuing second and third show cause notices, same or similar facts could not be taken as suppression of facts on part of assessee as these facts already in knowledge of the authorities. In the present show cause notice, all the allegations are being levelled for the first time and the show cause notice is not second or third one and therefore, the facts have been brought to the light for the first time and the show cause notice in the present case is sustainable in the eyes of law. The reference of the ruling is not warranted.*
- vi. In the case of Mistry Extrusion Pvt. Ltd. VS CCE, Surat 2000(117) ELT 495 (T); it was held that relevant information including delivery challans, invoice numbers, gate pass numbers etc. disclosed by appellant thereby establishing fact of payment of duty on goods. When facts are known to the department, no demand is sustainable. In the present there is no such usage of challans or records etc. and in fact as corroborated there is no maintenance of records itself. Goods cleared under cover of certain delivery challans on which goods have been cleared illicitly without payment of duty, therefore, the demand is sustainable. The other instances in this ruling are case specific, but the major thrust of this case is that demands are maintainable when the clandestine charge is proved conclusively. In fact since the clandestine charge*

has been proved beyond doubt in the present case, the demand raised on this count is maintainable.

4.16 In respect of the alleged clandestine clearance of the goods, by showing them as manufacture of Kay Chandra Goa, it is observed that undisputedly Kay Chandra Goa was registered with the Central Excise Authorities at Goa. They were filing the returns with the authorities as required under law and were also paying the Central Excise Duty on the goods manufactured and cleared by them . It is also observed that that the records of M/s Kay Chandra Goa were also subject to Audit. Appellant have produced Audit Report for E.A. 2000 of the audit conducted by the Goa Central Excise Officers on 26-6-2008 in respect of that unit for the period from April 2003 to Feb, 2008. Though there is overlap in the said audit report and the period for which the demand is under consideration, the said audit report is totally silent in respect of the activities under taken during the period 2003 to 2005, which is subject matter of the present proceedings. Also no notice has been issued to M/s Kay Chandra Goa in the present proceedings also. Undisputedly the goods in respect of which the demand has been made stating to be clandestinely cleared by Appellant 1, the duty was paid by M/s Kay Chandra, Goa and the said goods were dispatched against the duty paying documents issued by them. As per the contract referred to above the premises of the sub contractor were also open for inspection and verification by the purchaser. Further interestingly, in the period of dispute itself in the impugned order itself reference has been made to Purchase Order, of Goa unit against which the goods were supplied by the Appellant 1 (SI No 39 in table in para 3 of the impugned order).

4.17 It is also the case of the revenue while alleging undervaluation, that the Appellant 1, was overvaluing the value of bought items from M/s Kay Chandra Goa, while issuing the invoices in respect of these goods to the purchaser (table in para 39 of the impugned order). Cost auditor report also notes that these were the bought out items by the appellant. That being so, do revenue not admit that the goods were actually manufactured and cleared by the Goa Unit. Moreover while alleging the goods to be clandestinely cleared by the Appellant the duty is being

demand on the purchase value of the goods from Goa Unit and not on the sale value indicated in the invoices issued by the appellant. If these goods were manufactured at Satara unit, then the transaction value between the appellant and its customer at the time and place of clearance as per section 4 of the Central Excise Act, 1944 would be the sale price of the impugned goods and CENVAT duty paid on the purchase price would be available as CENVAT Credit to the appellant.

4.18 At the time of considering the stay application filed by the Appellant, tribunal has vide order No S/436 to 437/ 08/C-II/EB dated 17.09.2008 observed as follows:

"6. As regards the issue at para 4(ii) above is concerned, the allegation is about the clandestine removal of excisable goods from KBEPL, Satara in the guise of bought out goods from K.C. Goa. The Commissioner, on the basis of the detailed evidences recorded in para 30 of the findings portion of the Order, has come to the conclusion that no manufacturing activity was carried out in the factory of KC Goa and that the goods said to be bought from KC Goa were, in fact, manufactured by KBEPL, Satara in their factory and removed without payment of duty. It has been observed that lesser assessable value is considered for payment of duty at Goa and showing the said goods as bought out items, KBEPL, Satara have overvalued the same by 189% to 278%. The motive for this manipulation is due to the flexibility it provided to further manipulate the prices between the manufactured items and the bought out items.

6.1 *KBEPL have, however, contended that no notice has been issued to KC Goa and in the absence of KC Goa being party to the show cause notice, the allegations are unilateral and one sided and cannot be sustained. They stated that to show the clandestine removal of goods, the onus is on the Department to show excess consumption and procurement of raw material, actual manufacturing activity with reference to the labour employed, transport and removal of goods so manufactured etc. According to them, none of these factors have been shown to exist in their (KBEPL's) case, whereas KC Goa have shown purchase of raw material, manufacture of goods with the existence of the plant and machinery installed in their factory*

*and the removal of the said goods on payment of excise duty. They maintained that no duty can be demanded from them once again in respect of same goods. They also filed the Audit Report for E.A. 2000 of the audit conducted by the Goa Central Excise Officers on 26-6-2008 in respect of KC Goa for the period from April 2003 to Feb, 2008 in which the 'Gist of Objection' has been shown as nil. We, however, note that the demand relates to the period from 1-10-2000 to 10-1-2005 whereas the audit period is from April 03 to Feb, 08. Thus only the part period is covered by the Audit and not full period. We have also perused the evidences as recorded in para 30 of the findings portion of the Order of the Commissioner. No satisfactory rebuttal is prima facie forthcoming against these evidences, in the appeal memorandum filed by KBEPL. **The Commissioner has observed that since KBEPL were illegally showing the goods to have been manufactured at Goa and paying duty, such payment cannot be taken to be the payment of duty and, therefore, the benefit of Cenvat duty paid at Goa is not admissible. This defies logic. Once payment at Goa is not denied, whether it is duty or not, it has to be offset against the duty payable at KBEPL, Satara.***"

4.19 Even if the charge of clandestine clearance of the goods in garb of the goods manufactured at Goa is to be upheld, tribunal has categorically held that the amounts paid at Goa need to be offset against the duty payable by the appellant at Satara. There is no challenge to the above by the revenue and accordingly in our view the amount paid at Goa needs to be offset against the amount payable by the appellant in respect of the goods alleged to be cleared clandestinely. Undisputedly against the impugned order records that an amount of Rs 95,01,741/- has been paid by K C Goa against the clearance of the said goods. A demand of Rs 1,02,69,756/- , has been made and confirmed against the appellant. Thus after offsetting the amount paid in the name of K C Goa registered with Goa Commissionerate during the relevant period an amount of Rs 7,68,015/- is demandable from the appellant 1.

4.20 On the issue of the demand made on the escalation bills, impugned order observes as follows:

35. The third charge pertains to non-discharging of duty in the escalation bills raised by M/s KBEPL who have contended that only on acceptance of escalation claim does the excise duty become payable and it is not that certain elements of price of materials or services have remained to be billed but it is only request for additional claim which has been made in the escalation bills and the transaction value will get affected only to the extent of escalation bill is paid by the customer upon which they would be paying the excise duty. The escalation bills cannot come under the purview of transaction value which is already available under Section 4(1)(a) on which appropriate excise duty has already been paid at the time of removal. If the escalation bills are not honoured or honoured for lesser amount, then the recovery of duty component is at stake as there are no provisions and hence the charge fails. In this regard, I find that the assessee has raised escalation bills due to increase in prices of input costs. I find that the excisable goods are liable to duty upon their manufacture or coming into existence and only the point of collection of duty is deferred till removal of excise duty; and M/s KBEPL are bound to pay duty after removal of excisable goods irrespective of the fact as to whether they receive amount from the customer or not. I am of the firm opinion that the escalation bill is an extension of Central Excise Invoice and M/s KBEPL are bound to pay duty on invoiced price. I also find that KBEPL have not produced any evidence in support of their claim that the said bills have not been honoured or have been rejected by the customers though a period of about five years is over. I also find that the escalation bills have been raised on two sugar factories, namely, M/s. Shri Dhanlaxmi SSK Niyamit and M/s. The Markandeya Co-op Sugar Mills Ltd.; who have agreed and provided the scope for escalation in the contracted price. Therefore, the plea of the KBEPL in this regard cannot be accepted. I find that Section 4 has clearly provided that the price for the goods whether payable at the time of sale or at any other time forms part of assessable value on which Central Excise duty is required to be paid. The assessee has relied upon the ruling of KCP Ltd Vs. CCE, Chennai. The issue involved was that evidence produced by appellants to prove duty paid items purchased from outside and sent to site - appellants not liable to pay excise duty

on escalation cost in respect of bought out items, demand not sustainable in respect of bought out items. In the present case, the Department has proved that the price of the bought-out goods is already over-valued and so the question of further escalation of bought-out goods does not arise. In view of this, the ruling is not applicable to the present case.

36. In this regard, I am supported by case law in the case of M/s. Pre-stressed Concrete Poles V/s Collector of C.Ex. Chandigarh [1998(102) ELT-237 (Tribunal) Para 3]. The Tribunal has observed that "Appellant in the present appeal has no case that the buyer had objected to the debit note on the ground that the escalation clause could not be invoked or there was error in the debit note. Appellant having raised the debit note therein it must be ordinarily follow that the amount covered by the note would be part of the assessable value. Since the appellant has no case that the buyer had objected to the bill on the ground of non application of the escalation clause or on account of any error in the note it: should be held that the amount covered would be the part of the assessable value. The mere fact that the buyer does not pay the price wholly or in part does not mean that unpaid part of the price is to be disregarded and is not to be included in the assessable value. If any part of the price is paid it is the duty of the manufacturer to pay duty, and take steps to recover the unpaid part from the buyer. Postponement or non-payment of the price wholly or in part will not lead to depression of assessable value to the extent of the amount not paid. The appellant has no case on merits." I find that the above case-law is perfectly applicable to the present case. In the cases of M/s. Shri Dhanlaxmi SSK and M/s. The Markandeya Co-op Sugars, there is no evidence; that buyers have objected to the Escalation Bills raised by KBEPL on the ground of non- application of escalation clause. Rather, I find that as discussed above, there is express provision in both the Contracts for escalation in prices. Even KBEPL have not pleaded that the Escalation Bills have been rejected by the customers. Therefore, I find that the plea of postponement of or non-payment of bill for the purpose of non-payment of excise duty cannot be accepted.

4.21 In respect of the escalation bills, it is observed that Appellant 1 have issued the escalation bills showing the duty demanded from the purchaser as per the escalation clause. Appellant do not deny that these escalation bills have issued. However what is stated by them in their defence that they have not received any payment against these escalation bills till date from their purchasers. Undisputedly the claim of escalation made by the appellants from their buyer was one-sided and has not been agreed to by the receiver of the goods. Commissioner has in the impugned order in para 35 specifically observed to this effect, however taking after taking note of this she concluded that the appellant should have paid the duty at the time of raising the escalation bills without awaiting the receipt of the escalation amount claimed. In the same para it has also been recorded that appellant has raised the escalation bill only in respect of two sugar factories namely Shri Dhanalaxmi SSK Niyamit and M/s markandeya Coop Sugar Mills Ltd., as per Annexure C to the Show Cause Notice reproduced below:

S no	Invoice No and Date	Name of Customer	Escalation Bill raised (Rs.)	CENVAT duty @16% (Rs.)
1	KBE/307 31.03.2003	M/s Shree Dhanlaxmi SSK	5946197	951392
2	KBE/28A 30.06.2003	M/s Shree Dhanlaxmi SSK	11837111	1893938
3	KBE/28B 30.06.2003	M/s Markandeya Coop Sugar Mills Ltd	4775672	764108
	Total		22558980	3609438

4.16 Extract of Annexure to show cause notice – “Statement Showing the Sale Price of Bought Out Items Vis a Vis Purchase Price in R/O M/s Kay Bouvet Engg Pvt Ltd Satara” is at cost of repetition reproduced below:

S N		2000-01	2001-02	2002-03	2003-04
A	Sale Price	15,59,31,56 5	15,3984,99 4	10,81,02168 *	3,36,04,701 *
B	Purchase Cost	8,34,57,654	7,73,72,98 7	4,67,49,452	52,24,300
C	Margin (A-B)	7,24,73,911	7,66,12,00 7	6,13,52,716	2,83,80,401
*	Includes Escalation Charges				

From the above statement which is the part of show cause notice it is evident that the escalation bills have been raised against the supply of the bought out items, and not in respect of the items manufactured and cleared by the appellant. Evidently the appellant has not paid any duty on these bought out items. That being so if the appellant have not paid any duty at the time of clearance of these goods then can any duty be demanded on the escalation claimed by the appellant from their customers in respect of the traded goods. The duty in respect of the these goods have been paid by their sub-vendors and no demand has been made from the sub vendor in respect of these escalation bills. Further it is also not on record as to whether any escalation bills were raised by the sub-vendors on the appellant for which the appellant was required to compensate the sub-vendor on the escalation amount billed by them in terms of the contract with their customers.

4.22 Undisputedly the observations made by the Commissioner need to be examined with reference to the term of contracts entered with the two sugar factories. At 15.3 in the contract/ agreement made with the said sugar factories following have been recorded:

"15.3 PAYMENT OF PRICE ESCALATION

The Sellers shall submit FOR price variance calculations as per variation formula provided in annexure IV of the agreement of actual despatches made and received at the Purchasers sugar plant site in good condition and order along with the following relevant documentary evidence within 90 days of the publication of RBI bulletin for the relevant month.

- 1. Photostat copy of the relevant RBI indices*
- 2. Photostat copy of the relevant prices of iron & steel materials as per SAIL*

Any amount so determined and found payable by the Purchasers to the Sellers shall be paid by the former (Purchaser) to the Sellers within 60 days of receiving detailed calculations with all documentary evidence as stated above. If the Purchasers fail to remit the payment due to the Sellers as stated above and the Sellers do not hear from the Purchasers even within 60 days, the

Sellers may draw the correct amount of escalation as per escalation clause due to them through Letter of Credit. In the same manner, if the Purchasers is entitled for refund of the price due to de-escalation, the Sellers shall deduct the same from their subsequent bills within 60 days from the publication of RBI bulletin and send to the Purchasers details thereof immediately within 45 days from the publication of the RBI bulletin. Otherwise the Purchasers shall have the right to recover the said amount drawn in excess by the Sellers in any lawful manner.

Excise duty and sales tax also will be charged on final escalation amount checked and passed by the Purchasers. The Sellers shall provide all documentary proof in support of payment of excise duty and sales tax on escalation. Payment of excise duty and sales tax should be made in the same manner as mentioned above. The documents for escalation claims should be sent through registered post.

PROVIDED FURTHER THAT

- 1. The Sellers shall not be entitled to claim any price escalation on any consignment without furnishing the detailed price breakup of plant and machinery showing month-wise value of materials (ex-works) contract base price and to be supplied against each item as per Proforma 'A' forming part of this agreement under clause 3.1(i).*
- 2. If the Sellers draw any escalation amount without furnishing breakup of base contract price in Proforma 'A' of this agreement, the Sellers shall be liable to pay back all such escalation amount drawn by him together with interest from the date of such drawals to the date of returning the escalation along with the interest at the prevailing bank lending rates.*
- 3. The Sellers shall not be entitled to draw any amount through Letter of Credit being the difference between the amount claimed by him in any escalation bill and amount actually passed for such bill and communicated to the Sellers for drawing through Letter of Credit or amount of such bill actually paid by the Purchasers.*
- 4. The Sellers shall be liable to pay interest at prevailing bank lending rate, if he (Sellers) draws any amount of escalation in*

excess of the correct amount of escalation in contravention of (2) above, which may be detected at any later date by the Purchasers from the date of drawing such excess payment of escalation till such date the excess amount is refunded by the Sellers to the Purchasers together with interest.

EXPLANATION

1. In drawing against the amount by the Letter of Credit, for and in respect of any part of the consignment of the plant and machinery, the Sellers shall always deduct therefrom 15% received by them under clause 15.1.1, 15.1.2 and 15.1.3.

2. All Bank charges for retiring the documents through the Letter of Credit or any other means for payment of the balance contract price, shall be borne by the Purchasers.

3. The Sellers shall not adjust any amount of advance paid to him against any escalation bill(s)."

4.23 From the said clauses as reproduced above the terms of contract specifically provide for determination of the escalation amount by the purchaser and the Excise Duty and Sales Tax to be charged on the final escalation amount checked and passed by the purchaser. The contract/ agreement itself reserves the right of the purchaser for determining the final amount which has to be allowed for escalation. In the present case revenue has not adduced any single evidence to show that appellant have received any amount against the escalation bills issued by them to the purchaser. The escalation bills are not even finalized till today. On the contrary applicant has produced the letter dated 03.03.2008 from the Commissioner for Cane Development and Director of Sugar Bangalore. Against the escalation bills raised by the appellant as reflecting in Show Cause Notice to M/s Shree Dhanalaxmi SSK for an amount of Rs 1,77,83,308/- having duty component of Rs. 28,45,330/- as per the letter dated 03.03.2008, the escalation amount allowed is Rs. 29,88,940/- having the component of duty and taxes of Rs 7,08,565/-. This clearly establishes that the escalation amount as claimed by the appellant in the escalation bills is not the amount received by them but is the amount which is subsequently determined and agreed to by the purchaser.

4.24 Appellants do not deny that the duty needs to be paid on the escalation amount received by them. However as per them the said duty shall be paid only on finalization of the escalation bills. The demand in the present case has been made on the escalation bills raised by them, even when the escalation amounts have not been finalized in between them and the purchaser. Reliance placed by the Commissioner on the decision of tribunal in the case of Prestressed Concrete Poles [1998 (102) ELT 237 (T)] wherein following has been observed do not advance the case of the department as in the present case Purchaser has not agreed to the escalation bills raised by the appellant and the contract/ agreement specifically provide so.

4.25 Undisputedly the appellant is required to pay the duty on the escalation amount received by them along with the interest from the date when the goods against which these escalation bills are raised were cleared by them from the place of clearance as have been held by the Hon'ble Supreme Court in the following cases:

- Steel Authority Of India Ltd [2019 (366) E.L.T. 769 (SC)]
- International Auto Ltd. 2010 (250) E.L.T. 3 (S.C.)
- SKF India Ltd. [2009 (239) E.L.T. 385 (S.C.)]

In case of Steel Authority of India Ltd, Hon'ble Apex Court observed as follows:

"47. *Coming to Section 11AB, it came to be inserted by Act 33 of 1996. Thereafter, it was amended by Act 10 of 2000, Act 14 of 2001, Act 20 of 2002 and Act 49 of 2005. We have already extracted the relevant provisions of the said section. Section 11A must necessarily be read with Section 11AB. This is for the reason that interest under Section 11AB is premised upon the duty of excise not being levied or paid or short levied, short paid or erroneously refunded. Such duty is either determined under sub-section (2) of Section 11A or without such determination it being paid under Section 2B of Section 11A. In any of the circumstances, namely, non-levy, non-payment, short-levy and short-paid, any duty has been determined or paid as has been provided under Section 11A, necessarily the assessee becomes*

liable to pay interest from the first date of the month succeeding the month in which duty ought to have been paid.

48. The question which we are necessarily called upon to decide is when price is revised upward with retrospective effect and the excise duty on the same is paid immediately on a future date whether interest is payable under Section 11AB from the first day of the month succeeding the month in which the duty ought to have been paid under the Act. To keep the matter in focus, the exact question is which is the month in which the duty ought to have been paid.

49. Under the Rules, goods become exigible to duty on removal. Assessment is to be done by assessee itself by way of self-assessment. In a case where duty is payable on the basis of the value, the assessee is to apply the rate of duty to the value and pay the duty on or before the sixth day of the month succeeding the month in which removal of the goods takes place. Undoubtedly, if the removal takes place in March, the payment is to be made by 31st of March.

50. We have also noticed what happens if there is provisional assessment. In the case of provisional assessment, the assessee entertains a doubt regarding the actual value or the rate of duty. He applies and he is permitted under the order to remove goods on a provisional assessment. The assessment is thereafter finalized. When the provisional assessment is finalized, the assessee becomes liable however to pay interest from the first date of the month succeeding the month for which the amount is determined. We have no doubt in our mind that under Rule 7(4), the expression "succeeding the month for which such amount" is determined refer to the month of removal of the goods. When the provisional assessment has such consequences, it would occasion an invidious discrimination to place an interpretation on Section 11AB by which those assesses who go in for provisional assessment under Rule 7 are called upon to pay interest upon finalization of the assessment with reference to the date of removal in a case where the value is fully determined as a result of escalation clause being worked resulting in an upward revision of prices and under Section 11AB payability arises with reference

to the date of decision to grant escalation. In other words, the law will have to be interpreted in a manner that it is fair and equal to similarly situated group of assessees. Legislative intention, in this regard, also cannot be otherwise. Legislature has clearly in Section 11AB spelt out the time with reference to the Act and the Rules. Under Section 11AB in the case of short-levy or short payment inter alia, the expression "month in which the duty has become payable" under the Act and the rules must be understood as the month in which the duty is payable under the Rules made under the Act. Thus, if goods are removed in the month of January ordinarily payment must be made by the 6th of February. If the duty is not paid by the 6th of February, Section 11AB must be understood as mulcting the assessee with liability to pay interest from the first day of March in the example we have given. If the assessee went in for provisional assessment under Rule 7, it becomes liable from the 1st day of the month following the month for which the amount is determined.

51. *The expression "the month in which the duty ought to have been paid" under this Act, when it is read alongwith Rule 8, which declares that the duty on the goods removed from the factory or warehouse during a month is to be paid on the 6th day of the following month would mean that the Legislature has understood the expression "the month in which the duty ought to have been paid" under the Act in the same sense as it is declared in Rule 8."*

4.26 Appellant 1 filed Miscellaneous Application E/MISC/92648/17-Mum, stating as follows:

3. That during the impugned period, the Applicant had raised Escalation Bills on account of increase in cost of inputs. The Respondent has levied and confirmed demand of Excise Duty on such escalation bills even though that the Appellant had contended that Excise Duty becomes payable only on finalization of escalation bills and not at the time of issuance, because the buyer may not agree to pay the whole amount as claimed by the Applicant. However, the Respondent has noted that no such dispute has been raised by any of the buyers of the Application with respect to the Escalation Bills and accordingly,

Excise Duty is to be levied on the entire amount of the escalation bill.

4. The Applicant states that the Letter dated 03.03.2008 issued by the Commissioner of Cane Development and Director of Sugar, Karnataka is on such letter wherein it is clearly seen that contrary to the finding recorded by the Respondent, the buyer did object to the escalation bills issued by the Applicant and ultimately finalized the said escalation bills at a much lower amount than what had been claimed by the Applicant. Copy of the aforesaid letter dated 03.03.2008 is annexed hereto and marked as Exhibit "A" to this Application.

5. That as the findings on this issue (under paragraph 36 of the OIO) clearly fail to consider dispute letters, such as the Letter dated 03.03.2008 issued by the Commissioner of Cane Development and Director of Sugar, Karnataka, the production of the aforesaid letter as additional evidence has been necessitated in the present case. No prejudice whatsoever will be caused to the Department if the additional evidence is taken on record. However the Applicants will be prejudice if the said additional evidence is not taken on record.

GOVERNMENT OF KARNATAKA
(Commissioner for Cane Development
and Director of Sugar)

Office of the
Commissioner for Cane Development and
Director of Sugar, Bangalore

No. DSK/FIN/Lease/29/06-07
03.03.2008

Date

To.
The Managing Director,
Sri Dhanalakshmi Sahakari
Sakkare Karkhane,
Ramdurg,
Belgaum Dist.

*SUB: Settlement of Account of M/s KAY-BOUVET ENGINEERING
(P) LTD. and relieving them from contractual obligation.*

REF: No/DSSK/R/07-08/5703 Dated 24/01/2008.

The Managing Director M/s DSSK Ltd, Ramadurga, Belgaum District has submitted the proposal requesting the approval for settlement of account, relieving the contractor from the supply and erection agreement and withdraw the invoking of bank guarantee furnished by KAY -Bouvet Engineering (P) Ltd, Satara, for manufacture, supply and erection and plant and machinery of the factory. Along with the letter the managing director has also submitted the statement of account of KAY-Bouvet Engineering (P) Ltd certified by Chartered Accountant, the proceedings of the meeting held on 11/12/2007 with the supplier and the Board resolution dated 10/01/2008.

The Reconciled Statement of Account of M/s Kay-BOUVET Engineering (P) Ltd., towards supply, erection & commissioning of Sugar Plant 2500 TCD of DSSK Ltd., Ramdurg, Belgaum Dist, submitted by factory is as follows:-

PARTICULARS	AMOUNT (n rupees)
Total Contract Price as per Agreement Dated: 10.06.2000 including Taxes & Duties.	20,08,00,000.00
Bills Submitted by KAYBOUVET for Supply including Taxes & Duties & passed For payment by DSSK Ltd.,	16,20,76,803.00
Bills Submitted for erection by KAYBOUVET for Erection & passed for payment by DSSK Ltd.,	24,03,917.00
Total Gross Amount Payable to KAYBOUVET Engineering (P) Ltd., (A)	16,44,80,720.00
Deduction made by DSSK Ltd., in Supply Bills:	
1. Adjustment of Mobilisation advance paid for Supply Total Advance paid of Rs. 2,79,00,000.00 Less: 15% Adjusted <u>2,17,13,686.00</u> Balance to be adjusted: 61,86,314.00 Retention amount of performance 5% Entry Tax at 26 Total Deduction in Supply Bills (B)(I)	2,17,13,686.00 84,02,646.00 32,50,954.00 3,33,67,286.00
Deduction made by DSSK Ltd., in Erection Bills:	
1. Adjustment of Mobilisation advance paid for erection Total Advance paid of Rs. 7,50,000.00 Less: 15% Adjusted <u>3,60,588.00</u> Balance to be adjusted 3,89,412.00 Retention amount of performance	3,60,588.00 2,40,392.00 49,040.00 6,50,020.00

<i>TDS Deductions</i>	
<i>Total Deduction in Erection Bills (B)(II)</i>	
<i>Total Deductions (B) (1)+(II) (3,33,67,286 +6,50,020)</i>	<i>3,40,17,306.00</i>
<i>Balance Payable (A) – (B)</i>	<i>13,04,63,414.00</i>
<i>Less: Paid</i>	<i>12,90,90,831.00</i>
<i>Balance Payable towards Supply & Erection</i>	<i>13,72,583.00</i>
<i>Add: Amount Certified Escalation Payable</i>	<i>29,88,940.00</i>
<i>Amount of Taxes & Duties on Certified Escalation</i>	<i>7,08,565.00</i>
<i>Balance Amount of Retention Payable</i>	<i>28,77,000.00</i>
<i>Total Amount Payable as on Date</i>	<i>79,47,088.00</i>
<i>Less: Unadjusted Mobilisation Advance : Supply 61,86,313.00 Erection 3,89,412.00</i>	<i>65,75,725.00</i>
<i>Balance Payable to KAY-BOUVET as on 08.01.2008</i>	<i>13,71,363.00</i>

The Board of Directors of factory in their meeting held on 10/01/2008 have decided and recommended to settle the claim of the machinery manufacturer and relieve him from the agreement and also withdraw the invocation of bank guarantees in view of the fact that the factory has been leased to GMR Industries Ltd., and the contract with the factory is longer required to be executed by the KAY- Bouvet Engineering (P) Ltd.,.

M/s KAY-Bouvet Engineering (P) Ltd., has also in their letter dated 04/01/2008 has confirmed that the statement of account certified by the chartered accountants is acceptable to them and accordingly they are ready to accept the amount payable to them. They also further in their letter dated 08/01/2008 have declare and undertaken that they will not raise or initiate any dispute or legal action/proceedings in respect of any claim pertaining to the agreement dated 10/06/2000 in respect of supply, erection and commencing of plant and machinery subject to the condition that the factory should withdraw the invocation of bank guarantee letter issued to their bankers and adjusted the unadjusted portion of mobilization advance against the dues payable to them. He also stated that he will with draw the case filed in the court of Satara, Maharashtra.

In view of the above facts and circumstances you are hereby permitted to settle the claim of KAY-Bouvet Engineering (P) Ltd.,

relive them from the agreement dated 10/06/2000 and withdraw the bank guarantee invoked subject to the following conditions:-

- 1. The settlement of account should be in accordance with the reconcile statement dated 08/01/2008 certified by Chartered Accountant of the federation.*
- 2. M/s. KAY-Bouvet Engineering (P) Ltd., shall furnish an undertaking on a stamped paper to the effect that he will not initiate any legal action/proceedings or disputes in respect any claim pertaining to the agreement dated 10/06/2000 and subsequently. He shall also undertake to furnish any pending drawings of plant and machinery as per the request of the factory.*
- 3. He shall withdraw the case filed in the court of Satara and shall furnish copy of the court order.*

The Dakshina Kannada SSK Ltd., is directed to take an undertaking letter from M/s. KAY-Bouvet Engineering (P) Ltd., before settling his dues on a stamped paper duly vetted by an advocate

*Sd/-
Commissioner of Cane Development
and Director of Sugar, Bangalore*

- 1) Secretary to Government, Co operation Department, M.S. Building, Bangalore.*
- 2) The Managing Director, Karnataka State Co operative Sugar Factories Federation, Malleswaram, Bangalore.*
- 3) M/s. Kay Bouvet Engineering (P) Ltd., N-3, Additional MIDC Area, Satara, Maharashtra.*

*Sd/-
Commissioner of Cane Development
and Director of Sugar, Bangalore"*

4.27 We are of the view that this Miscellaneous Application needs to be allowed. In the same order demand has been made holding the value of the goods as per the contract to be undervalued on the basis of the cost production determined on

the basis of the Cost Auditor report. Demand has also been confirmed in respect of the same goods by taking the escalation claimed on the value of supplies made as per contractual agreement. In the same breath the impugned order seem to agree with the value as determined as per the contract and also reject the same to adopt the value determined on the basis of cost auditor report. Such an approach cannot be agreed to. It is settled position in law that demand, simultaneously could not have been confirmed by rejecting the contracted value and also accepting the same for some other purpose. The escalation bills even if added in toto to the value of the clearance will not add upto the quantum of undervaluation determined by referring to the cost of production.

4.28 In the present case though by raising the escalation bills appellant have claimed to revise the price upwards the same has not be agreed to by the purchaser and same is still to be determined. In absence of any such final determination of the revised price the demand made is premature. In our view on finalization of the quantum of the escalation, if the appellant do not pay the duty on the agreed escalation amounts, then the same becomes the admitted liability as per the contractual agreement and needs to be recovered by invoking the provisions of Rule 8 (3) of Central Excise Rules, 2002. However we are at present concerned with the demand made in respect of undetermined escalation amount which is pre-matured and needs to be set aside.

4.29 Impugned order also discusses the demand on the issue of limitation and penalties on the two appellant has held that extended period of limitation for making the demand has been rightly invoked and the both the appellants are liable to penalty observing as follows:

LIMITATION ISSUE

37. Regarding the LIMITATION factor, M/s KBEPL have contended that the Balance Sheet was an open document and the same was furnished to the visiting Audit Parties from time to time and as such the exercise of cost audit could have been undertaken earlier also and resultantly, extended period prior to October 2004 was not invocable in the instant case. I find that

only after the completion of the Cost-Audit exercise, it was detected that there was suppression of information and large scale manipulation of the accounts by over-valuation / under-valuation of bought out items / manufactured goods and clandestine removal resulting in the issue of this Show Cause Notice. Therefore, extended period is rightly invoked in the case. KBEPL have contended that a Show Cause Notice on the issue of CENVAT credit in respect of supply to M/s. Dhanlaxmi SSK was issued to them and so the matter was known to the Department. I find that it was different issue relating to wrong availment of CENVAT credit on bought out goods sent directly to M/s. Dhanlaxmi and credit availed by KBEPL at Satara. I find that in the said case no documents/records relating to the pricing of excisable goods or bought out goods were the subject matter of that Show Cause Notice and the said issue was limited to non-receipt of inputs in the factory of KBEPL at Satara. Hence, I find that this argument of KBEPL is not acceptable. I also find that KBEPL have mis-declared the assessable value on Central Excise invoices as 'transaction value' with intent to evade payment of excise duty, when they were clearly aware that no separate transaction value for each of the excisable goods was specified in the contract. KBEPL have also failed to bring to notice of the Department copies of Contracts/Work Orders which have quoted lump sum, contract amount and not separate transaction value. It is also proved beyond doubt that KC Goa have not manufactured excisable goods shown to have been purchased by KBEPL at Satara. So far as results of Cost Audit exercise undertaken by the Department is concerned, I am supported by the Hon'ble CESTAT's decision in the case of Ex. Engineer, Mhaisal Pump House (No.1) V/s C.C.E. Pune-II 2004(176)ELT-424 (Tri. Mumbai) [Para 5 & 6]. It was noted that but for the detailed scrutiny of records by the Cost Auditor, the non-inclusion of the various changes as enumerated in the Cost Audit Report would not have come to surface. It was held that the Commissioner was correct in holding the case to be covered by the larger period of limitation for duty demand. The relevant applicable portion of this decision is that unless the Cost Auditor undertakes required exercise factual position related to correct cost of the excisable goods would not come on record. In the

instant case, the Cost Auditor, who conducted his study based not only on the audited Balance Sheets of M/s KBEPL but also the basic relevant documents, has arrived at a certain conclusion and thereafter subject demand was raised upon M/s KBEPL. Relying upon this decision, I hold that the subject demand is not time barred. The Department's investigation has proved a deliberate manipulation of records with a malafide intention on the part of KBEPL to evade payment of excise duty. Hence, the provisions of extended period are rightly invoked to demand duty of past period up to five years.

38. In view of the foregoing discussions concluding that M/s KBEPL have undervalued the excisable goods manufactured by them and overvalued the bought out items and thereby evaded C.Ex. duty, that they have raised escalation bills but not paid the Central Excise Duty thereon and they have actually manufactured the excisable goods at their Satara Plant, but deliberately shown as manufactured and cleared from their KC Goa, I hold that M/s KBEPL have rendered themselves liable for penal action under the provisions of Sec 11AC as proposed in the subject SCN.

39. Now, I proceed to examine the role of Shri Niraj Chandra, Joint Managing Director and Chief Executive. He was in-charge of & responsible for all the activities carried out at KBEPL and KC Goa, and therefore, is the direct beneficiary of the tax evasion and responsible for the loss of revenue caused to Government exchequer. Shri Chandra has deliberately maintained that the goods are manufactured at KC Goa and transported from there to the customers although the investigations have proved the same to be contrary. The Cost Audit Report clearly shows that the assessable value shown by KBEPL is less than the value of raw materials consumed but still Shri Chandra has refused to give any reply on this discrepancy but availed CENVAT credit on the quantity of raw materials consumed. Shri Chandra has tried to make it appear that the CENVAT duty utilisation is higher because of Export of goods but this is not tenable because there is very meagre export of excisable goods which does not have any impact on the accumulation of CENVAT credit. For the various acts of commissions/omissions and the overall in charge

of operations, Shri Niraj Chandra has rendered himself liable for penal action.”

4.30 In view of our discussion whereby we have concluded that the demand made cannot be upheld on the merits of the case except for adjustment which is indicated in para 4.13, the issue of limitation and penal action becomes irrelevant and is not discussed further.

4.31 Thus in light of the discussions as above we summarize our findings:

- a. Demand made on the basis cost of production determined as per the cost auditor report is set aside.
- b. Demand made in respect of the alleged clandestine clearance needs to be adjusted after allowing the credit of the duty that has been paid by M/s Kay Chandra, Goa. Thus the duty demanded in respect of the alleged clandestine clearance needs to be modified to Rs 7,68,015/-.
- c. Demand made on the escalation bills is premature as the escalation amounts are not yet finalized between the seller and purchaser as per the term of contracts and is set aside.
- d. Penalties imposed on the Appellants are set aside.

5.1 Miscellaneous Application E/MISC/92648/17-Mum for placing on record additional evidences is allowed.

5.2 Appeals are allowed in the above terms modifying the order to the extent as indicated in para 4.18 above.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)