

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

Excise Appeal No. 1110 of 2012

(Arising out of Order-in-Original No. 12/P-III/Commr/2011-12. dated 30.03.2012 passed by the Commissioner of Central Excise & Service Tax, Pune-III)

M/s. TACO Composites Ltd.

Appellant

(Erstwhile M/s. Automotive Composites Systems (International) Ltd.), Plot No. 10, 11 & 12, S.O. 399,1, Village Bhare, Tal – Mulshi, Pune 412 111.

Vs.

Commissioner of Cen. Excise & ST, Pune-III Respondent

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

Appearance:

Shri Rajesh Ostwal with Ms. Payal Nahar, Advocates and Ms. Hanisha Jatania, Chartered Accountant, for the Appellant
Shri Amrendra Kumar Jha, Deputy 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: 19.12.2022

Date of Decision: 19.12.2022

FINAL ORDER NO. A/86302/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 12/P-III/COMMR/2011-12 dated 30.03.2012 of the Commissioner of Central Excise & Service Tax, Pune III. By the impugned order following has been held:

"ORDER

- i. I confirm demand of Rs.21,98,785/- equal to cenvat credit availed by them on the capital goods without having received the same in their factory, under Rule 14 of the Cenvat Credit Rules, 2004, read with Section 11A(1) of the Central Excise Act, 1944. I order appropriation of an amount of Rs.21,98,785/- already paid by them against the confirmed demand.*

- ii. *I order recovery of interest on the amount confirmed above, under Rule 14 of Cenvat Credit Rules, 2004, read with Section 11AB of Central Excise Act, 1944 and appropriate an amount of Rs.2,51,653/- already paid by them as interest.*
- iii. *I confirm the demand of Rs.21,75,023/- equal to cenvat credit availed by them on insulation material without having received the same in their factory, under Rule 14 of the Cenvat Credit Rules, 2004, read with section 11A(1) of the Central Excise Act, 1944, I order appropriation of an amount of Rs.21,75,023/- already paid by them against the confirmed demand.*
- iv. *I order recovery of interest on the amount confirmed as above, under Rule 14 of Cenvat Credit Rules, 2004, read with Section 11AB of Central Excise Act, 1944, and appropriate an amount of Rs.4,04,542/- already paid by them as interest.*
- v. *I confirm the demand of Central Excise Duty amounting to Rs.23,37,519/- on the inventory of damaged/rejected/non saleable goods written off in their books of account, under section 11A(1) of the Central Excise Act, 1944. I appropriate an amount of Rs. 23,37,519/- already paid by them against the confirmed demand.*
- vi. *I order recovery of interest on the above Central Excise duty/cenvat credit amount, under Rule 14 of Cenvat Credit Rules, 2004, read with Section 11AB of Central Excise Act, 1944 and appropriate an amount of Rs.2,95.457/- already paid by them as interest.*
- vii. *I confirm the demand of Central Excise duty on finished goods found short and written off and cenvat credit on raw materials/Inputs/WIP found short and written off fully in their books of account, totally amounting to Rs.2,09,90,046/- under section 11A(1) of the Central Excise Act, 1944, read with Rule 14 of Cenvat Credit Rules, 2004. I appropriate an amount of Rs. 1,06,90,268/- already paid by them against the demand confirmed.*
- viii. *I order recovery of recovery of interest on the above amount of Rs.2,09,90,046/-, under Rule 14 of Cenvat*

Credit Rules, 2004, read with Section 11AB of Central Excise Act, 1944.

- ix. *I impose penalty of Rs.2,77,01,373/- on the assessee under Rule 15(2) of Cenvat Credit Rules, 2004, read with Section 11AC of the Central Excise Act, 1944.*

This Order is passed without prejudice to any other action that can be taken against the assessee under the provisions of Central Excise law or any other law, for the time being in force."

2.1 Appellant is engaged in the manufacture of Sheet Moulding Components falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985. They are availing the CENVAT credit on the capital goods and inputs used by them.

2.2 It was observed that they had availed CENVAT credit, without the receipt of raw materials and capital goods in their factory. The preliminary investigations revealed that they had availed CENVAT credit on capital goods, required for setting up of Paint Shop without receiving the goods and installing the said Paint Shop at their factory. On the spot enquiries conducted at the factory revealed non existence of the paint shop in the factory premises.

2.3 Appellant have availed CENVAT credit (total Rs.21.98 lakh) in December, 2007, January, 2008, February, 2008 & April, 2008 on various equipments, said to have been procured from M/s Intec Surface Coating Private Limited for setting up a paint shop in their factory. However, it was found that these capital goods were never received and installed in their factory. Appellant had vide their letter dated 07.01.2009, addressed to DGCEI, Regional Unit, Pune intimated that they have deposited an amount of Rs.25.00 lakh vide TR6 challan dated 06.01.2009, which includes an amount of Rs.21.98 lakh towards reversal of irregular CENVAT credit together with interest, amounting to Rs.2.51 lakh, taken on the paint shop, procured from M/s Intech Surface Coating Pvt. Ltd., Pune, without having received or installed the same in their Pune plant.

2.4 Appellant have availed CENVAT credit on insulation material shown to have been received from their sub contractor M/s. Singh & Singh, Jamshedpur. The investigations however,

revealed that appellant had never received the insulation material at their Pune plant and the same was directly sent to their Jamshedpur unit. Thus they had wrongly availed CENVAT credit amounting to Rs.19.97 Lakhs without actually receiving material, so the same was required to be reversed. It was also found that Appellant had availed double Cenvat credit on some of the invoices. Therefore, the Cenvat credit wrongly availed twice on the same invoices amounting to Rs.1.78 Lakhs was required to be reversed by them. When this was pointed out to them, they vide their letter dated 24.02.2009 informed that they have deposited an amount of Rs.25.79 lakh in their PLA account, which includes an amount of Rs.21.75 lakhs (i.e., Rs.19.97 lakh + Rs.1.78 lakh) towards reversal of irregular CENVAT credit and interest amounting to Rs.4.04.

2.5 In the year 2007-08, they had migrated to the new SAP system. While migrating it was observed that there were certain inadvertent accounting errors like BOM error, Posting Entry, material issued to production but not captured in the books, process loss not captured in the books, etc. In result certain material stocks were reflected higher and some less. To rectify, JV entries were made so that the books of account can reflect the true and fair view of stock of inputs/ WIP and finished goods. Considering the above adjustments made, statutory auditors in audit report reported that the inventory records were not maintained properly resulting in gross variation between the physical and book stocks, which was set right in books of accounts in the month of May 2008.

2.6 On completion of enquiry/ investigation it was observed that appellant had

- availed CENVAT Credit on capital goods required for setting up of paint shop but did not receive the same in their factory,
- availed the Cenvat credit on insulation material without physically receiving the said inputs in their factory.
- availed CENVAT credit on inputs which were used in the manufacturing process upto the WIP stage, which have been categorized as unsalable and therefore, no Central

Excise duty was discharged on these goods or remission of duty was applied for.

- availed CENVAT Credit on goods which were found short during physical inventory and thus, the same appear to have not been used in the manufacture of finished goods.
- in respect of finished goods found short Appellant have cleared the same without issue of invoices and without payment of Central Excise duty in contravention of Rules 4, 6 and 11 of Central Excise Rules, 2002. As these goods found short have been written off fully in their books of accounts so, they are liable to pay Central Excise duty on the said goods.
- in terms of Rule 3 (5B) of CCR, 2004, CENVAT Credit attributable on rest of the goods written off, is required to be reversed by them.
- contravened the provisions of Rules 4, 6 and 11 of Central Excise Rules, 2002 and Rule 3(1), 3(5) & 3 (5B) of CCR, 2004 with intention to evade payment of Central Excise duty on the goods found short. Therefore, proviso to Section 11A (1) of CEA, 1944 for extended period of limitation is invokable.
- liable to pay Central Excise duty/ reverse CENVAT credit on the finished goods/raw material/WIP etc. found short.
- liable to pay Cenvat credit on the inputs/capital goods which were not used in the manufacture of finished goods in their factory.
- are also liable to pay interest on the amount of Central Excise duty evaded/ Cenvat credit wrongly availed on the goods written off, under Section 11AB of CEA, 1944 read with Rule 14 of CCR, 2004
- liable for penalty under Section 11AC of the Act and Rule 15(2) of CCR, 2004 for the acts of omission and commissions.

2.7 A show cause notice dated 21.02.2011 was issued to the appellant asking them to show cause as to why:-

- i. *The CENVAT credit amounting to Rs.21,98,785/- (Rs. twenty one lakhs ninety eight thousands seven hundred and eighty five only) availed on the capital goods*

without having received the same in their factory, as shown in Annexure "A" to this show cause notice, should not be demanded and recovered in terms of Rule 14 of CCR, 2004 read with Section 11A(1) of CEA, 1944 and why the amount of Rs.21,98,785/- already paid during the investigation as mentioned in Para 4 above, should not be appropriated against the said demand.

- ii. Interest on the above CENVAT credit amount should not be recovered under Rule 14 of CCR, 2004 read with Section 11AB of the CEA, 1944 and why the amount of Rs.2,51,653/- paid by them during investigations as mentioned in Para 4 above, should not be appropriated against the same.*
- iii. The Cenvat credit amounting to Rs.21,75,023/- (Rs. twenty one lakhs, seventy five thousands and twenty three only) availed on the insulation material not received in their factory as shown in the Annexure "A" to this show cause notice, should not be recovered from them in terms of Rule 14 of CCR, 2004 read with Section 11A(1) of CEA, 1944 and why the amount of Rs.21,75,023/- already paid by them during investigation as mentioned in para 6 & 14 above, should not be appropriated.*
- iv. Interest on the above CENVAT credit amount should not be recovered under Rule 14 of CCR, 2004 read with Section 11AB of the CEA, 1944 and why the amount of Rs.4,04,542/- already paid during investigations, as mentioned in para 6 & 14 above, should not be appropriated.*
- v. The Central Excise duty on the inventory of damaged/rejected/non- salable goods written off fully in their books of accounts, totally amounting to Rs.23,37,519/-(Rs. Twenty three lakhs, thirty seven thousands and five hundred nineteen only) as shown in Annexure "A" to this show cause notice, should not be demanded and recovered from them in terms of Section 11A(1) of CEA, 1944 and why the amount of Rs.23,37,519/-already paid by them during*

investigation as mentioned in para 10 & 14 above, should not be appropriated against the above demand.

- vi. *Interest on the above CENVAT credit/duty amount should not be recovered under Rule 14 of CCR, 2004 read with Section 11AB of the CEA, 1944 and why the amount of Rs.2,95,457/- already paid by them during the investigations as mentioned in para 10 above should not be appropriated.*
- vii. *The Central Excise duty on the Finished Goods found short and written off and Cenvat credit on the Raw Materials/ Inputs/ WIP found short and written off fully in their books of account, totally amounting to Rs.2,09,90,046/- (Rs. Two Crores Nine lakhs ninety thousands and forty six only) as shown in Annexure "A" to this show cause notice, should not be demanded and recovered in terms of Section 11A(1) of CEA, 1944 read with Rule 14 of CCR, 2004 and why the amount of Rs.1,06,90,268/- already paid by them during investigation as mentioned in para 12 & 14 above should not be appropriated against the above demand.*
- viii. *Interest on the above CENVAT credit/duty amount should not be recovered under Rule 14 of CCR, 2004 read with Section 11AB of the CEA, 1944.*
- ix. *Penalty should not be imposed upon them under Section 11AC of the CEA, 1944.*
- x. *Penalty should not be imposed upon them under Rule 15(2) of CCR, 2004.*

2.6 The show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Rajesh Ostwal, Ms Payal Nahar Advocates & Ms Hanisha Jatania, Chartered Accountant for the Appellant and Shri Amrendra Jha, Deputy Commissioner Authorized for the revenue.

3.2 Arguing for the appellant learned counsel submits

- The fact that the appellants have paid the demand along with interest and 25% penalty would not mean that the Appellants cannot proceed with the appeal.

The issue is squarely decided by this tribunal in the case Apex Communications [2016 (42) STR 153 (T)] and Safex Electromech (P) Ltd. [2019 (27) GSTL 535 (T)].

- The shortage in inventory is notional/ books shortage and not actual shortage. Demand merely on the basis of theoretical/ notional shortage without any evidence of actual shortage of goods, is not maintainable.
- Cenvat credit on insulation material cannot be denied to the appellants since the duty paid raw materials have been received and undisputedly used by the sub-contractor on behalf of the appellants only and cleared final product of excise duty. The issue is no longer res integra and is covered by the following decisions:
 - Bilt Graphic Paper Products Ltd. [2017 (4) TMI 1121-CESTAT]
 - Bilt Graphic Paper Products Ltd. [2018 (5) TMI 390 (T)]
 - Ballarpur Industries Ltd. [2017 (7) TMI 888 - CESTAT MUMBAI]
 - Vijayashree Instaprint Machinery [2005 (190) ELT 27 (T)]
 - Flex Industries Ltd. [2006 (201) ELT 479 (T)]
- Subcontractor has not availed any cenvat credit on the insulation material is, undisputed. Therefore, it is not a case of double availment of cenvat credit.
- In the show cause notice as well as in the impugned order, there is merely an allegation without any evidence to support the department's contention that the appellants have claimed double cenvat credit on some invoices. The appellants have not taken credit twice of the same invoice. Therefore, credit cannot be denied to the appellants.
- Excess stock itself shows that there is accounting error while posting entries.
- For application of Rule 3(5B), goods have to be available in the factory. Mere book entry for writing

off is not sufficient to invoke Rule 3(5B). Further it has to be shown specifically which inputs/ capital goods have been written off.

- General Motors Pvt. Ltd. [Final Order A/86151-86153/2022 dated 1.11.2022]
 - Tata Motors Ltd. [2019 (7) TMI 1797 - CESTAT MUMBAI]
 - Tata Motors Ltd. [2021 (11) TMI 830 CESTAT MUMBAI]
 - Hindustan Zinc Ltd. [2021 (10) TMI 482 - CESTAT NEW DELHI]
 - Hindustan Zinc Ltd. [2021 (8) TMI 935 - CESTAT NEW DELHI]
 - BCH Electric Ltd. [2016 (344) ELT 469 (T)]
 - HSIL Ltd. [2019 (2) TMI 846 - CESTAT HYDERABAD]
 - Volkswagen India Pvt. Ltd. - 2019 (5) TMI 971 - CESTAT MUMBAI
- No demand of duty can be made under Rule 14 of Cenvat Credit Rules, 2004 in respect of non-compliance under Rule 3(5) /Rule 3(5B) for the period prior to 1.3.2013. The entire period involved in the present case is prior to 1.3.2013. Prior to insertion of Explanation vide Notification No. 3/2013-CE (NT) dated 1.3.2013, there was no recovery provisions.
- Ericsson India Pvt. Ltd. [2019 (3) TMI 776 - DEL]
 - Heidelberg Cement India Ltd. [2017 (11) TMI 1394-Bang]
 - Steel Authority of India Ltd. [2020 (3) TMI 147-Chennai]
- The department has not produced any evidence to prove that finished goods have been removed by the appellants clandestinely.
- Pentagon Steel Pvt. Ltd. [2013 (288) ELT 271 (T)]
 - Rashtriya Ispat Nigam Ltd. [2008 (9) TMI 663]

- While making the demand revenue has not considered the excess stock mentioned in the statutory auditor's report.
- Rule 3(5B) is not applicable to finished goods and Work in process goods
- When WIP is not actually removed from the factory, there is no question of 'removal as such' under Rule 3(5). Therefore, credit reversal is not required under Rule 3(5).
- Even after considering CBEC Circular No. 907/27/2009-CX, dated 7.12.2009, several judicial pronouncements decided that reversal of credit is not required on WIP goods under Rule 3(5B).
 - Nectar Lifesciences Ltd [2013 (293) ELT 247 (T)]
 - Parknonwoven Pvt. Ltd. [2015 (10) TMI 423]
 - SMG International [2016 (2) TMI 1037]
- Extended period of limitation is not invocable.
 - Maruti Suzuki India Ltd. [2015 (8) TMI 493 SC]
 - Tata Motors Ltd. Vs. CCE [2019 (7) TMI 1797]
 - Hindalco Industries Ltd. [2003 (61) ELT 346]
 - Kirloskar Oil Engines Ltd. [2004 (178) ELT 998]
 - Martin & Harris Laboratories Ltd. [2005 (185) ELT 421]
 - Jindal Vijaynagar Steel Ltd. [2005 (192) ELT 415]
 - Shahnaz Ayurvedics [2004 (173) ELT 337 (All.)] Affirmed by the Hon'ble Supreme Court – 2004 (174) ELT A34 (S.C.).
 - Devans Modern Breweries Ltd. [2006 (202) ELT 744 (SC)]
- Penalty is not imposable and interest demanded as even the explanation inserted in Rule 3 (5B), only provides for the recovery of CENVAT Credit, and not interest and penalty.

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 Following findings are recorded in the impugned order while confirming the demand made in the show cause notice along with interest and for imposition of penalty:

I have gone through the case records and the submissions made by the assessee. From the averments made in the show cause notice, I find that the issues to be decided by me are

- I. whether the assessee is eligible for the cenvat credit availed on Capital Goods procured for setting up Paint Shop in their factory without receiving these Capital goods in their factory premises;*
- II. whether the assessee is eligible for cenvat credit on insulation material without physically receiving the same in their factory premises;*
- III. whether the cenvat credit of inputs, which were used in the manufacturing process upto the WIP stage, and later on these WIP goods were categorized as non saleable and therefore no C.Ex duty was discharged on these goods or remission of duty was applied for, is reversible by them;*
- IV. whether cenvat credit availed on goods, which were found short during the physical inventory and which appeared to have not been used in the manufacture of finished goods, since the goods found short were written off in their books of account, was reversible to the extent of cenvat credit attributable to these written off shortages in terms of Rule 3(5B) of CCR, 04, and*
- V. whether Central Excise duty is recoverable from the assessee in respect of finished goods found short and which appeared to have been cleared without payment of duty and without issue of invoices.*

44. Before dealing with the issues before me, in order to comprehend the admissibility of cenvat credit on Capital goods/inputs not received into the factory of the assessee, demand for reversal of cenvat credit in respect of inputs used in the Work in Progress but later on scrapped as non-saleable etc, and demand for reversal of cenvat credit in respect of shortages in the inventory which were written in their books of account,

and removal of finished goods without payment of duty, it is imperative that the related statutory provisions of the CCR,04, & CER, 02, be perused and understood. In the said context, I find that the following provisions are relevant to this case

....,

45. Accordingly, the issues raised in the show cause notice and the reply submitted by the assessee are being dealt with one by one as below:

a. Cenvat credit availed on Capital Goods procured for setting up Paint Shop in their factory without receiving the Capital goods in their factory premises –

I find that the cenvat credit amounting to Rs.21,91,785/- has been reversed by the assessee along with interest of Rs.2,51,653/-. The assessee has not disputed the factum of non receipt of the impugned capital goods in their factory premises but they have only put forth reasons for not having brought the said capital goods in to their factory premises. But, the fact remains that the assessee availed cenvat credit of the capital goods which were not brought into the factory premises and put to use therein, clearly in contravention of Rule 3(1) of CCR, 04, which stipulates that a manufacturer can avail credit of duty 'paid on any input or capital goods received in the factory of manufacture of final product, read with Rule 4(2a) of CCR, 04, which also elaborates availment of cenvat credit in respect of 'capital goods received in the factory.' Since the assessee have not satisfied this basic condition for availment of cenvat credit on capital goods, I do not find it necessary to go into the intricacies as to whether or not would be available to them at a later date after they install these capital goods the cenvat credit in some other premises as contended by them. assessee i.e. Pooja Forge Ltd. Vs. CCE, Faridabad. -2006(196) ELT 18 (Tri). The case law cited by the Del.) is not applicable to the facts of the present case because in that case the capital goods were moved between the appellant's own units for manufacture of same final products. However, in the instant case the capital goods were neither brought into the factory of production nor put to any use, although the cenvat credit on the same was availed. Similarly, the decision in the case of Contech Instruments Ltd. Vs. CCE,

Belapur – 2010(262)ELT 671 (Tri.MUM) would also not be of any help to the assessee because in that case the issue was regarding reversal of cenvat credit taken on inputs which were sent for processing whereas the facts in the present case are totally different. Thus I uphold the demand raised in the show cause notice on this issue.

b. Eligibility of cenvat credit on insulation material without physically receiving the same in their factory premises –

In this regards, I find that the cenvat credit amounting to Rs.19,96,960/- has been reversed by the assessee along with interest of Rs.3,68,850/-. insulation material was delivered at their vendor's premises in Jamshedpur In this case also the but the credit of the same was taken by the assessee, clearly in contravention of Rule 3(1) of CCR, 04, which stipulates that a manufacturer can avail credit of duty 'paid on any input or capital goods received in the factory of manufacture of final product'. The assessee have contended that that the insulation material required for further manufacture of final product was procured by M/s Singh & Sons, but in the said excise invoice issued by the supplier, the assessee was mentioned as consignee and therefore the cenvat credit was taken by them; that since Central Excise duty stands paid on the final sale price as declared by them to M/s Singh & Sons, which has been recovered from their customers M/s. Tata Motors Ltd., Jamshedpur, the excise duty stands paid on the final price as per Rule 10A of Valuation Rules, 2000; that M/s Singh & Sons have not availed cenvat credit on such insulated material directly received by them; that it is not the case of the department that there is a double availment of cenvat credit on the said insulated material nor is it the issue that the value of said material has not been included in the value of the final product, on which excise duty stands paid. Issue involved here is not whether the cost of insulation material stands included in In fact the issue the cost of finished goods cleared by their job worker on payment of duty or otherwise. Here the question is wrong availment cenvat credit without receipt of material in the factory in contravention of Rule 3(1) of CCR, 04. The assessee has not negated this fact but they

seem to argue their case on a different platform, which is not the fact in issue. Thus their reliance upon the Apex Court's decision in the case of International Auto, is of no avail since the facts in that case are different than in the present case. Here, it would not be out of context to refer to the dictum of the Mumbai High Court in the case of CCE, Thane I Vs. Nicholas Piramal (1) Ltd. arising out of Department's Appeal No. 9/2009, decided on 14.8.09. While upholding the Department's Appeal it is, inter alia, observed that-

'Para -26 - If the rule, as framed, was arbitrary, or in the case of sub- ordinate legislation, manifestly arbitrary, then it was for the assessee to challenge the said rule. The assessee has chosen not to do so, but seeks to adopt a contention that rule can be differently read to achieve the said object.

2.....The rule mandates specifically that an assessee seeking to avail Cenvat credit in respect of inputs used in the manufacture of exempted goods, the only method to which he can avail of is by following sub-rule 2. Sub-rule 2 provides for maintaining accounts.'

'Para -27 - In the light of the above discussion, in our opinion, it is not possible to accept the contention as advanced on behalf of the assessee that the said rule can be read differently. The assessee's submission has been that he gives up the credit which he had taken before the goods leave the factory premises. That amounts to compliance with Rule 6(1). The language of Rule 6(1) is not to grant credit to an assessee except in circumstances mentioned in sub-rule (2). We have therefore no hesitation in rejecting the said contention. It will not be possible in that context to read the rule as directory as sought to be contended on behalf of the assessee. The rule would have to be followed. In other words, it is mandatory, if an assessee seeks to avail of Cenvat credit as set out in the rule.'

The sum and substance of the aforesaid dictum is that if a particular rule in the statute mandates doing of a thing in a particular manner, it should be done in that manner and the assessee cannot adopt his own methodology and later argue that, nevertheless, the object of the statute stands achieved. Further, if all the tax payers device their own methodologies to

determine the tax liability vis a vis revenue neutral situations, the taxation laws and the mandated compliance would be reduced to a bundle of individual interpretations. Hence I am not inclined to accept the assessee's argument on this issue. Equity demands that one who comes to it should come with clean hands and not after breaking the law, be it procedural. Therefore I am inclined to reject the plea of the assessee to grant relief in this regard.

C. Availment of cenvat credit twice on the same invoice- *It was also noticed that the assessee had wrongly taken credit of Rs.1.78 lakhs twice on the basis of same invoice, which was required to be reversed by them. They have not contested the issue and paid the sum of Rs.1,78,063/- alongwith interest of Rs.35,692/- Therefore, I uphold the demand raised in the notice along with interest and penalty.*

d. `Reversal of cenvat credit of inputs used in the manufacturing process upto the WIP stage and later on these WIP goods categorized as non saleable. *The total value of such rejects written off as shortages is to the extent of Rs.2.63 Crores in their books of account. The assessee have deposited C.Ex. duty of Rs.23,37,519/- and interest amounting to 2,95,457/- on goods valued at Rs. 1,41,83,975/-. Regarding the balance amount of Rs.1,22,48,559/- pertaining to scrapping of WIP rejection they claimed to have paid C.Ex. duty at the time of disposal of the scrap between June 08 & Oct.08. Here I find that, in principle, the assessee have agreed to their duty liability on this count. They have attributed these shortages to the same not getting posted properly in their system However, their main contention is that the value for the sake of assessment has not been properly determined in as much as in respect of written off stock valued at Rs. 1,22,48,559/- pertaining to scrapping of WIP rejection, where they have paid C.Ex. duty at the time of disposal of the scrap between June 08 & Oct.08, the value adopted for payment of duty was the scrap value, which represents the transaction value in terms of Sec.4(1)(a) of CEA, 1944. However, in respect written off stock valued at Rs.1,41,83,975/- the duty is being demanded on this book value itself. Thus their main contention here is that the DGCEI has*

accepted duty on scrap for such quantity covered by book value of write off of Rs.1,22,48,559/- and therefore they will have to demand duty only on scrap value even for such quantities covered by write off of book value amounting to Rs. 1,41,83,975/-. Here, I find the un-retracted statement of the Shri Bhadkamkar, Head (Finance) dtd. 13.7.09, very vital, because in his statement he has, interalia, submitted that they have verified the whole issue and found that the amount of Rs.2.63 Crores had been adjusted by way of deduction from the closing stock as on 31.3.08; that out of the said stock they are able to account for goods worth Rs.1.20 Crores only, which are attributable to Work in Progress stock (WIP) at that time; that the same is either used in the manufacture of goods or sold as scrap on payment of duty;. that as regards the remaining amount of Rs.1.43 Crores they have not been able to account for. Thus the assessee have themselves admitted that they were not able to account for goods worth Rs.1.43 Crores. In such a situation the burden of proof lies upon them to prove that these goods valued at Rs. 1,41,83,975/- were indeed cleared after payment of duty at scrap value. They cannot equate written off accounted stock with written off unaccounted stock and try to demonstrate that the DGCEI is adopting different methods of valuation while demanding duty on written off shortages of rejects/WIP, which have been booked at their book value (prime cost + value addition) as per the accounting principles. Therefore the assessee's contention that there is excess demand of duty of Rs.21,03,768/- is untenable.

The assessee has further contended non applicability of Rule 3(5B) of CCR, 04 to demand reversal of credit. Here I find that the assessee has mis- interpreted the aforesaid Rule, which states that-

'If the value of any,

(i) input, or

(ii) capital goods before being put to use,

on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer or service provider, as

the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods.

On plain reading of this Rule alongwith the CBEC No.907/27/2009-CX dtd.7.12.09, referred to above. Circular clear that the cenvat credit on write off shortages of inputs used in rejects/ it is unambiguously WIP is reversible by the assessee and I am not inclined to accept the assessee's contention on this count and accordingly uphold the demand raised in the show cause notice.

e. Shortages written off in the books of account amounting to Rs.15.23 Crores: From the show cause notice I find that shortages of various material valued at Rs.15.23 Crores were written off by the assessee at the end of 31.3.08 in their books of account. This appeared final since no adjustment in the annual accounts of the assessee for the subsequent financial years have taken place. No goods appeared to have been put to use in the production of finished goods in the subsequent years or written back in the books of account in subsequent years. This became evident in the light of the fact that that raw material/finished goods/WIP etc. were physically not available in their factory at the end of the financial year 2007-08. The gross shortages have been resolved as absolute and final by their Board of Directors and subsequently written off. In the instant case out of the total shortages of Rs.15.23 crore, cenvat credit on goods valued at Rs.1.53 has not been taken by the assessee as per their own calculations. In respect of the remaining goods valued at Rs.13.70 crore (Finished goods of Rs.0.50 Crore and balance goods valued at Rs.13.20 Crore found short) the assessee have not disputed the fact that they had availed cenvat credit on the raw materials used in the WIP/finished goods etc. found short. In their submissions the assessee have claimed that the Insulation material valued at Rs.95,95,402/-, on which they have reversed the wrongly availed cenvat credit of Rs.21.75 lakhs, had been booked in the shortages although the material had not been received in their factory. Since this shortage is accounted for in the WIP shortages, the inventory of net shortages was re-calculated at Rs.12,73,66,816/- after deducting the amount attributable to the insulation material. The

cenvat credit reversible on this recalculated amount of shortages has been calculated at Rs.2,09,90,046/-(which includes shortages of finished goods valued at Rs.50,50,670/- on which the C.Ex. duty works out to Rs.8,32,350/-) However, the assessee have only reversed cenvat credit / paid C.Ex. duty of Rs.1,06,90,268/- on this account. The assessee submitted that out of these shortages the unexplained shortages work out to Rs. 5,42,82,953/- on which they have discharged their duty liability of Rs.1,06,90,268/- The reasoning adopted for justifying aforesaid material shortages are

- That the company was in the process of implementing SAP system The migration from the earlier system to SAP system created various distortions in the records and problems in implementation of the SAP system*
- Stocks were not properly updated in the system*
- The purchases were incorporated in the system and its receipts were shown as stock but the goods used directly by the shop were not accounted for in the system.*
- The stock of general items like stationery, hand gloves, cleaning materials were also considered as shortages*
- Unit of measurement in many cases were wrongly considered in the SAP system, which resulted in fictitious.*

The assessee have contested this issue on various aspects and I deal with the same one by one.

i) Issue relating to Bill of Material Error shortages totally amounting to Rs.2,59,63,608/--

Proposed demand of duty on input contained in WIP- valued at Rs. 1,39.91.151/-

The assessee have contended that they have been able account for the book shortages due to consumption not having being posted or incorrect consumption posted in SAP, as against the actual consumption worked out based on net goods produced vis-à-vis materials required for producing the final product; that the said write-off is only for the difference in stock and not on account of physical shortages of stock. The assessee cited two examples of Engine hood assembly 'A' & 'B' and tried to demonstrate that had the short quantity been correctly booked

in their respective consumption accounts at the original stage the need for accounting the said difference would not have arisen. Therefore they contended that it is a sheer accounting error and not physical shortages which have been written off and thus reversal of cenvat credit is not warranted. Here, I find that the assessee have not produced concrete evidence to show the materials were in fact issued for consumption but were not posted in the SAP. In fact, vide summons dtd. 25.1.11, Shri Badkamkar, Head (Finance) was asked to produce copies of issue slips and / or other documents in support of their contention that the material had been issued for production directly. However, in his statement dtd. 31.1.11, Shri Bhadkamkar, submitted that they did not have any documentary evidence to substantiate the said claim. Here I would like to rely upon the provisions of Rule 9(5) of CCR, 04, which in unequivocal terms has laid down that the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit. It is undisputed that the shortages have been detected by their own statutory auditors and they are reflected in their books of account. assessee are trying to deviate from the main issue by introducing a concept of book shortages and physical shortages and thus trying to demonstrate that the duty liability worked on the basis of book shortages is not tenable in law. In fact during the course of above demonstration the assessee have also gone one step ahead to accuse their own statutory auditors of not appreciating the fact that the 'figures booked in 702 account cannot be attributed to write off by the Company on account of physical shortages'. Even for the sake of argument this reasoning is taken on its face value, still it is difficult to understand the whopping difference of Rs. 12.73 crores of material shortages. The assessee have reasoned this out by submitting that these book shortages have occurred over a period of time in an accumulated manner and not during 2007-08 only. This reasoning proves that the assessee have been negligent in their inventory management for quite some time and it is only during the evolutionary period of their internal system up gradation that the entire deficient accounting system got exposed. The assessee have also admitted that they have

been Therefore I am unable to trace back the aberrations in their SAP system. inclined to conclude that they are short of any concrete evidence to disprove the write off figures in their own books of account unearthed by their own statutory auditors. The Bill of Material error is one of the main points being agitated by the assessee i.e. the goods which were not in the BOM were directly being issued for consumption and therefore not recorded in the SAP system. Here I would like to point out that certain inputs, as per assessee's own explanation, viz. Furnace Oil, appeared in the BOM for the first three quarters of 2007-08 and hence its consumption was recorded in the SAP. However, during the last quarter of the year this item was not included in the BOM and therefore its consumption was not recorded in the SAP was resultantly booked as shortage. This shows that their preparation of BOM itself is not standardized and deficient and non recording of consumption in the SAP system due to BOM error is nothing but an explanation shrouded with afterthought.

The assessee have argued non-applicability of provisions of Rule 3(5B) of CCR, 04, to the present issue on the grounds that show cause notice demands reversal of such cenvat credit on inputs contained in WIP, which means that the proposed demand is on inputs after being put to use and in WIP stage; that CBEC Circular the provisions of Rule 3(5B) of CCR, 04, speaks about inputs, 'before being put that the to use'. They have further contended No.907/27/2009-CX dtd.7.12.09 is contrary to the provisions of Rule 3(5B) of CCR, 04, in as much as in the aforesaid Rule there is no reference to inputs contained in WIP but to inputs 'before being put to use'. Here I would like to point out that the assessee have misinterpreted the wordings of the Rule in as much as it speaks about Inputs', or 'Capital goods before being put to use'. The words 'before being put to use' are restricted to the Capital goods only because separate provisions to deal with capital goods 'put to use' exist in the scheme of CCR, 04, by virtue of 2nd proviso to Rule 3(5) and Rule 3(5A) However, as regards Inputs are concerned they can be categorised as Inputs as such, Inputs issued for process & contained in WIP and inputs contained in the finished products, which become obsolete or non saleable. It is only to clarify this

issue that the Board has issued clarification under CBEC Circular No.907/27/2009-CX dtd.7.12.09, which has been discussed above. Thus the assessee's argument on this count is not sustainable. Accordingly, I hold that reason of BOM error being put forth by the assessee to justify the written off shortages is nothing but a theoretical argument, unsubstantiated by any concrete proof, which does not have the force to disapprove the written off shortages in their Books of account.

Proposed demand of duty on difference in stock of paints valued at Rs.45,66,965/- involving duty amount of Rs.7,52,609/-

i. Here the assessee have contended that out of total book shortage of Rs. 1,31,65,215/- the booking of stock valued at Rs.45,66,965/- represents a clear clerical mistake / error in considering the Unit of Measurement as ML instead of Litres and subsequent wrong posting in SAP; that the consumption of the paints was posted in ML instead of Litres. However, they have not been able to demonstrate in real terms the shortage presently booked and the shortage that would have been if the consumption had been posted in Litres. Even from the worksheet submitted the assessee this aspect is not clear. Therefore, I am unable to grant them any relief on this count. Further I find it surprising that some part of the total material gets booked in ml and the rest is not.

ii. Demand on packing material valued at Rs.1,38,71,456/- and the duty calculated at Rs.22,86,016/- The assessee have contended that although the receipts of these materials have been recorded in the system, the material is not a part of BOM; that the purchase register reveals the entire purchases made in this regard; that no packing material in the same form has been removed from the factory. Since the assessee have not produced any documentary proof to show that the material has in fact been consumed in the course of manufacture, I am unable to rely upon the assessee's purchase documents and come to a logical conclusion that since there are purchases of the packing material and since there is no clandestine removal, so the material must have been fully consumed during the course of manufacture. Therefore, I uphold the demand on this count.

iii. Demand on Furnace Oil used for maintenance valued at Rs.57,30,125/- on which the duty is calculated at Rs.9,44,325/- The assessee have argued that these items were directly used for production and as there is no facility to post consumption in the SAP system as the said goods do not form part of BOM (Bill of Material) and thus as the issues were not posted there was a difference in stock, as per books. In this case also the assessee have failed to produce any issue slips and / or other documents in support of their contention that the material had been issued for production directly. Without any such documentary proof, other documents evidencing only the purchases are not conclusive enough to prove its consumption. Here I would like to again point out that the Furnace Oil, appeared in the BOM for the first three quarters of 2007-08 and hence its consumption was recorded in the SAP. However, during the last quarter of the year this item was not included in the BOM and therefore its consumption was not recorded in the SAP was resultantly booked as shortage. This inclusion and exclusion of the material from the BOM itself casts a shadow of doubt on the entire inventory management of the assessee and I am unable to accept this line of argument put forth by the assessee. iv. Even in the cases where they have reversed the cenvat credit the assessee have not admitted that these are physical shortages but they are only book shortages. However, in the absence of any proof to that effect I am unable to subscribe to the assessee's argument. Thus I hold that the assessee is liable to reverse the cenvat credit/ pay C.Ex. duty, as the case may be, in the below mentioned cases-

- Tools & Spares valued at Rs.5,42,520/- involving duty of Rs.89407/-
- Maintenance Spares valued at Rs.49,05,327/- involving duty of Rs.8,08,398/-
- Shortages arising out of stock transfer to Jamshedpur - value of Rs.47,41,173/- involving duty of Rs.7,81,345/-
- Shortages under head - Carrier Film Weight - value of Rs.20,22,577/- involving duty of Rs.3,33,321/-
- Shortages under head - Scrap rejection not booked - value of Rs. 1,36,52,252/- involving duty of Rs.22,49,891/-

f. Shortages of Rs. 0.24 Crore are in respect of finished goods - Since the shortages remain unexplained, the assessee have paid Central Excise Duty on the aforesaid amount. Therefore I do not find it fit to have relook at it and hold the assessee has contravened provisions of Rules 4, 6 & 11 of Central Excise Rules,, 2002.

46. Now I would like to go through some of the case laws relied upon by the assessee -

i. Widia India Ltd. Vs. CCE, Bangalore - 2007(207) ELT 562 (Tri,Bang.) upheld by the Karnataka High Court as reported in 2010 (255) ELT 36 (Kar.) - Having gone through the facts of the cited case I find that in that the book shortages were held to be excessive than the physical shortages with reference to other documents viz. statutory records of production, RG1 maintained manually wherein through IDN (Internal Delivery Note) they accounted the production and the clearances were accounted through Delivery Challans. However, in the instant case no other parallel records evidencing movement of materials for production etc. has been submitted by the assessee and therefore I am inclined to defer from the cited case law as not applicable to the facts of this case.

Further, I would like to rely upon the Mumbai High Court decision in the case of CCE, Aurangabad Vs. Greaves Cotton Ltd. - 2008(225) ELT 198 (Bom) - wherein para '5 it is observed that -

'Para 5 - Rule 7(4) of CCR, 02, (now Rule 9(5) of CCR, 04) reads thus - "The manufacturer of final products shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, the person from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit.

The language of the Rule is plain and unambiguous. If the assessee claims entitlement to Cenvat Credit, it is the burden of proof upon the assessee to prove the admissibility of the cenvat

credit. In the matter at hands and in the facts and circumstances of the case the only manner in which the assessee could have justified the cenvat credit claim was by showing through the Books of account or by any other piece of evidence that the inputs which were short as per Audit Report and were not utilized in the manufacture of final product..... We do not think that except reproduction of Rule 7(4) of CCR, 02, (now Rule 9(5) of CCR, 04), any other material is required to record a finding in favour of the Department that it is the burden of proof of assessee to justify the cenvat credit availed.....

The facts of this case are similar and the assessee could have justified consumption of shortage material by producing evidence by way of internal slips or other records. However, they failed to do so and therefore I am not inclined to accept their line of argument.

ii. Pooja Forge Ltd. Vs. CCE, Faridabad. -2006(196) ELT 18 (Tri. Del.) - is not applicable to the facts of the present case as already discussed in para 17 above

iii. Contech Instruments Ltd. Vs. CCE, Belapur 2010(262)ELT 671 (Tri.MUM) is not applicable to the facts of the present case as already discussed in para 17 above

iv. International Auto Ltd. Vs. CCE, Bihar -2005 (183) ELT 239 (S.C.) - is not applicable to the facts of the present case as already discussed in para 17 above.

47. The show cause notice proposes to recover Interest under Rule 14 of CCR, 04, r/w Section 11AB of CEA, 1944. As per the stipulations under Rule 14 of CCR, 04, 'where the Cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same alongwith interest shall be recovered from the manufacturer or provider of output service and provisions of Sections 11A & 11AB of CEA, 1944, or Sections 73 & 75 of Finance Act, 1994, shall apply mutatis mutandis for effecting such recoveries.' As discussed above in the foregoing paras, it is proved that the assessee have taken/ utilised Cenvat credit wrongly in respect of raw material / capital goods/finished, which were either.

- *not received in the factory of the assessee, or*

- *not accounted for in their books of account, or*
- *written off in their books of accounts*

Accordingly, I hold the assessee liable to pay interest calculated on the amount equivalent to the wrongly taken credit, from the date of taking such It is also a settled credit till the date of reversal of the same by the assessee. principle that liability to pay interest is sine qua non to payment of duty when duty liability is confirmed. In this case duty is demanded under Section 11A of the Central Excise Act, 1944 which is equal to wrong availment of cenvat credit or reversal of credit.

48. I further find that the show cause notice seeks to invoke the provisions under the proviso to Section IIA(1) of CEA, 1944, for demanding duty for the extended period on the grounds of suppression of facts with intent to evade duty. Here I observe that the assessee had not intimated the department at any point of time that they have taken/utilised Cenvat credit wrongly in respect of raw material / capital goods/finished which were either -

- *not received in the factory of the assessee, or*
- *not properly accounted for in their books of account, or*
- *written off in their books of accounts*

It was only when the Department detected the delinquency of the assessee that they partly admitted their mistake and reversed the wrongly taken credit in order to mitigate the penal consequences. Had the delinquency not been detected by the Deptt., the assessee would have unduly benefited to a great extent. I also find that the assessee belongs to the organized sector and is well aware of their rights and obligations under the various tax statutes. They are working under self assessment scheme and should have been more vigilant about their tax practices. Therefore I am inclined to hold that the proviso to Section 11A of CEA, 1944, is rightly invoked in this case for demanding the duty for the extended period. I would like to rely upon the decision in the case of Bombay Dyeing & Mfg. Co. Pte. Ltd. Vs. CCE, Mumbai - 1999 (113) ELT 331 (Tri.. MUM] wherein it is held that -

'Where the assessee is in such knowledge and where the department have no knowledge of the situation, the Deptt. can allege suppression of facts.....'

In this case it cannot be disputed that the assessee was having knowledge of their deficient inventory management system from the beginning but failed to either take corrective steps or to intimate to the Department about the same till intervention of Departmental authorities.

49. As regards imposition or otherwise, of penalty on the assessee on going through the entire case I am inclined to hold that such huge shortages written off in their books of account and approved to by the Board of Directors, without looking at their obligations under the provisions of Cenvat Credit Rules, 2004 read with Central Excise Act, 1944, definitely points out to serious lacuna in their business accounting system and/or negligence on the part of persons The cenvat credit involved in responsible to comply with the legal obligations. this case is substantial and even if it is argued that there is absence of malafide, the negligence on part of the assessee is discernible and hence this is a fit case for imposing penalty.

50. Further, I observe that the assessee is working in a self assessment & self removal regime where a trust based scheme prevails and where such mistakes are not condonable because, in the instant case, had the department not detected the wrong availment/utilisation of the cenvat credit the assessee would have enriched themselves to that extent. The assessee should have been more vigilant about their tax obligations. Strict compliance of the provisions laid down under tax statutes is expected of the Assesseees who are working under self assessment scheme. Consequentially, the tax statutes attract principles of strict liability for any delinquency, irrespective of the existence or otherwise of mens rea, because of the civil obligation cast upon the assessee. The Hon'ble Supreme Court in the case of UOI Vs Dharmendra Textile Processors 2008-TIOL-192-SC-LB, while holding that mensrea is not an essential element for imposing penalty for breach of civil obligations, has also observed that "It is delinquency of the defaulter itself which

establishes his blameworthy conduct..... without any further proof of the existence of mensrea."

51. Thus once it is established that the assessee has committed breach of the mandatory provisions the same would constitute a breach of civil obligation cast upon him and irrespective of existence or non-existence of mensrea, the assessee shall be liable for statutory penalty. In this context the observations of the Hon'ble Supreme Court in the case of Gujarat Travancore Agency, Cochin Vs. C.I.T. -1989 (42) ELT 350 (SC) are relevant. In this case it was held that - Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion there is nothing in Section 271(1)(a) (of the I.T.Act) which requires that mensrea must be proved before penalty can be levied under that provision' Further, the Mumbai High Court in the case of Malaysian Airlines Vs. UOI 2010(262)ELT 192 (Bom.) has, interalia, held that

"Para 52. - ..It is well settled that when the consequences of the failure to comply with the prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory."

52. In view of the above rulings of the Apex Court and High Court and in view of the circumstances as discussed above, I hold that the penalty under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944 is rightly imposable, for having contravened the provisions of Rule 4, 6, 11 of Central Excise Rules, 2002, and Rules 3(1), 3(5) & 3(5B), r/w Rule 9(5) of Cenvat Credit Rules, 2004."

4.3 In the present case the appellant have paid the entire amount demanded along with the 25% of the penalty imposed under Section 11AC of the Central Excise Act, 1944. Vide letter dated 23.5.2012 they intimated the department that the payments made is made "Under Protest" and the appellants have reserved their right to challenge the impugned order in due course of time.

"We are aggrieved by the said Order in Original confirming the entire duty and levy of interest and penalty, as none of our submissions stands addressed in true spirit and also ignoring, the supporting evidences produced while passing the impugned Order in Original. The allegation of suppression of facts has been made on a wrong premise, which we submit that there is no wilful and/ or deliberate attempt with an intent to evade duty on our part and the same is conspicuously absent in the instant matter and the case has been made based on figures reflected in the books of accounts. It is a sheer accounting error which has led the department to proceed with the said case and as ascertaining the errors occurred in posting / not posting in SAP system during the transition period has led to the said difference in stock in books. Therefore, we have deposited the entire amount of duty, interest and also 25% amount of duty as penalty "Under Protest", reserving our right to contest the case in Tribunal and also to claim the refund of duties, interest and 25 % penalty, after the outcome of the case. As we have deposited the entire amount of duty demanded in above referred Order in Original and also the interest and 25% of duty amount as penalty (under protest) within 30 days from the receipt of Order in Original, we are entitled for waiver of 75 % penalty amount in terms of Section 11 AC (1) (c) of CEA, 1944, which is reproduced below."

4.4 Tribunal has in case of

A. Apex Communications [2016 (42) STR 153 (T)] held as follows:

"5. Even though, I took the help of both the A.RS present in the Court and my own knowledge of law, I could not find any legal provision which provides that once an assessee pays the entire demand with interest and penalty to the extent of 25% of the Service tax demanded, cannot challenge either the liability of Service tax and interest or penalty alone and the matter has to be treated as closed. No doubt, there is an instruction issued by the Board that once the assessee pays the Service tax and interest and intimates the department of the same on the basis of assessment of tax liability of the Central Excise Officer no show cause notice for differential amount of Service tax or

interest can be demanded after one year except where there is a case for invoking suppression of facts, misdeclaration, fraud, etc. The Board has taken a view and has advised the field formations in such cases where there is no suppression of facts, misdeclaration, etc. show cause notice should not be issued and subsequently provisions were amended to specifically provide that no further proceedings will be initiated against the assessee. Further, there is no law laid down anywhere that the matter has to be considered as settled when an assessee pays the tax demanded with interest and penalty in accordance with law. It is only provided in the case of Settlement Commission where the Settlement Commission decides the issue and amounts as per the Settlement Commission are paid by the assessee, he has no right to challenge. I am not dealing with the decisions of Settlement Commission but decision of the adjudicating authority which was considered by the learned Commissioner (Appeals).

6. In view of the above observations, I find no merit in the appeal filed by the Revenue and reject the same."

B. Safex Electromech (P) Ltd. [2019 (27) GSTL 535 (T)] held as follows:

4. On careful consideration of the submissions made by both the sides and perusal of the records, I find that though the appellant had paid Cenvat amount along with interest and 25% penalty on the instance of audit objection but subsequently, they claimed the refund. The only reason for rejection of the claim is that the appellant had opted for the provision made under sub-section (6) & (7) of Section 11A which reproduced below :-

(6) Any person chargeable with duty under sub-section (5), may, before service of show cause notice on him, pay the duty in full or in part, as may be accepted by him along with the interest payable thereon under section 11AA and penalty equal to one per cent of such duty per month to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of twenty-five per cent of the duty, and inform the Central Excise Officer of such payment in writing.

(7) The Central Excise Officer, on receipt of information under sub-section (6) shall -

- i. not serve any notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded where it is found by the Central Excise Officer that the amount of duty, interest and penalty as provided under sub-section (6) has been fully paid;*
- ii. proceed for recovery of such amount if found to be short-paid in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of such information.*

XXXXXXXXXXXXXXXXX

(emphasis added)

5. On plain reading of the above provision it is not only the payment of amount, interest and 25% penalty but the appellant needs to give an intimation to the department accepting their liability which the appellant had not given, in such case if at all the Revenue is of the view that the amount is legally payable, it was incumbent on the Revenue to issue a SCN which they failed to do so. Therefore, in these circumstances, the appellant is rightly entitled for refund of the amount of Cenvat credit, interest and penalty paid by them. Accordingly, I set aside the impugned order and allow the appeal. The adjudicating authority shall process the refund in accordance with law.

In view of the decisions as above we are of the view that the appeal in present case is maintainable even if the appellants had paid the amounts demanded along with interest and 25% of penalty imposed on them.

4.5 In the appeal memo filed by the appellant, in response to point at Sl No 8, Appellant have recorded "No. The appeal relates to denial of cenvat credit in respect of raw materials contained in the finished goods and raw materials contained in the finished goods and raw materials , the value of which was adjusted in the books of accounts as well as demand of excise duty in respect of

finished goods, the value of which was adjusted in the books of accounts."

From the above in appeal memo it is quite evident that the challenge in appeal is limited only to the denial of cenvat credit in respect of raw materials contained in the finished goods and raw materials contained in the finished goods and raw materials , the value of which was adjusted in the books of accounts as well as demand of excise duty in respect of finished goods, the value of which was adjusted in the books of accounts, whereas the demand has been confirmed in respect of the other issues also. However in their prayer appellants have prayed for setting aside the impugned order, whereas we do not find any grounds in the appeal memo challenging the demand in respect of at least the demand made in respect of the Cenvat credit availed on the capital goods required for setting up paint booth.

4.6 In respect of the demand made on the capital goods not received in the factory of manufacture appellants have in the ground of appeals, recorded as follows:

Cenvat Credit availed on capital goods required for setting up paint booth.

B.1 The appellants availed cenvat credit of Rs 21,91,785/- on various equipments procured from M/s Intec Surface Coating Private Limited, for setting up a paint shop in their factory. However, these capital goods were never received and installed in their factory.

B.2 The appellants had placed an order for the Paint Line in FY 2007-08 on M/s. Intech Surface Coating Pvt. Ltd. as per the following details:

<i>Supplier Name</i>	<i>PO Number</i>	<i>Date</i>	<i>PO Value including Taxes</i>
<i>Intech Surface Coating Pvt Ltd</i>	<i>1301500224</i>	<i>24.12.2007</i>	<i>3,07,46,396</i>

B.3 An amount of Rs 1.75 cr. was paid as an advance to INTECH. The said paint booth was ordered with an objective to supply the painted parts to OEM customers. The appellants had planned that the paint line will be installed in a separate building, adjacent to the existing plant. To facilitate this, the appellants finalized the deal with the landowner for constructing

a Paint Shop and the land owner started the civil work. However, as the title of the land was not clear, the construction of Paint Line building was kept on hold. The entire issue got stuck up due to the fact that owner is yet to get the clear title of said land in order to enable the appellants to start the construction.

B.4 Since the appellants had paid the advance, the Paint Line supplier started manufacturing of painting equipment and as per the agreed schedule, partial delivery of the painting equipment was completed three years back. This material was kept in the temporary godown as there was no place to install this equipment in the existing plant, while the appellants continued exploring alternate options to install the paint line. The said paint line supplied by M/s Intech is thus very much in usable condition.

B.5 The appellants are still in the process of identifying a suitable land to consolidate the operations either in Pirangut or any other location of Pune and start the painting operations on priority by using the existing equipment.

B.6 The appellants submit that, in view of the aforesaid facts, they have not been able to put the capital goods required for use in the paint booth in operation till date. Accordingly, the appellants have reversed the cenvat credit of Rs. 21,91,785/- availed on such capital goods, with interest on the same.

B.7 In any event, the appellants will be entitled to take cenvat credit on the capital goods required for use in the paint booth once it is installed in the factory and put for use in the manufacture of final product, in terms of Rule 3(1) of Cenvat Credit Rules.

*K.3 Also, in respect of the credit availed on **capital goods procured for setting up of paint booth**, insulation material and inputs contained in WIP goods, the appellants had reversed the credit prior to issuance of show cause notice. Hence, penalty cannot be imposed on the appellants in terms of Rule 15 (2) CENVAT Credit Rules, 2004.*

4.7 At the time of arguments, and as per the written submissions filed by the appellant, in respect of this demand appellant had submitted as follows:

Issue No	Demand Involved	Departments Contention	Brief submissions of the Appellant
4. Capital goods for setting up a paint shop	21,98,785 [Denial Of Credit under Rule 3 (1)]	Capital goods on which the appellants have claimed cenvat credit have neither been received or installed in the appellant's factory. Hence the credit availed is not admissible as per Rule 3 91) of CCR, 2004. [Refer para 3.2 page 108 of appeal memo]	(a) The appellants procured capital goods on payment of duty for setting up a paint shop and availed cenvat credit on the same. However, the owner of the land on which such paint shop was to be set up, did not have a clear title to the said land. Therefore, appellants kept the capital goods in a temporary godown. Due to this reason, the appellants have not been able to put the capital goods to use, till date. (ii) The appellants were under bonafide belief that they are going to use the capital goods and hence they have taken cenvat credit. However on pointing out by the audit team, the appellants immediately reversed the Cenvat credit along with the interest as prudent tax payer. Therefore, penalty is not imposable on the appellants.

4.8 From the above submissions made in the appeal memo and during the course of argument on appeal, it is evident that appellant do not dispute that these capital goods were not received by them and not installed/ put to use. They do not dispute the denial of the credit, which they had reversed along with the interest due on the same. They are only challenging the penalty imposed on them equivalent to the credit denied. We find that in respect of the said demand undisputedly appellant have paid the entire amount of credit along with interest on being pointed out by the audit much before the issuance of show

cause notice. In such a situation, the as per the provisions of Section 11 A (2) reproduced below, no notice could have been issued to the appellant and penalty imposed.

"(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder."

Thus the submission of the appellant, challenging the penalty imposed under needs to be accepted, and appeal in respect of this demand allowed to the extent of setting aside the penalty imposed.

4.9 In respect of the demand made on the insulation material without physically receiving the same in their factory premises appellants have in the ground of appeals, recorded as follows

Cenvat credit availed on insulation material

C.1 The appellants availed cenvat credit on insulation material, shown to have been received from their sub contractor- M/s. Singh & Singh, Jamshedpur. The said insulation material was directly sent to their vendor at Jamshedpur.

C.2 The appellants had cleared the manufactured goods to M/s. Singh & Sons on payment of excise duty and M/s. Singh & Sons had availed cenvat credit on the same. The insulation material required for further manufacture was procured by M/s Singh and Sons. However, since the appellants were mentioned as "consignee" in the excise invoice issued by supplier the appellants availed cenvat credit on the insulation material.

C.3 M/s Singh and Sons cleared their final products to M/s Tata Motors Ltd., Jamshedpur on payment of excise duty on the sale price as declared by the appellants to them, in terms of Rule 10A of Valuation Rules 2000. The cost of insulation material was included in the sale price of the final product supplied by M/s Singh and Sons to the appellants' customer i.e. M/s Tata Motors Ltd., Jamshedpur.

C.4 The fact that M/s. Singh and Sons have not availed cenvat credit on such insulation material is undisputed. Therefore, it was not a case of double availment of cenvat credit.

C.5 However, the said insulation material was not received in the factory of the appellants. Therefore, availment of credit on the same not being in conformity with Rule 3(1) of Cenvat Credit Rules the appellants reversed the said credit, along with interest.

4.10 At the time of arguments and in their written submissions appellant have stated as follows:

Issue No	Demand Involved	Departments Contention	Brief submissions of the Appellant
3. Inputs (Insulation Material) received by sub-contractor.	21,75,023 [Denial Of Credit under Rule 3 (1)]	Insulation material is directly received and used by the sub contractor of the appellants. Hence the credit is not admissible to the appellants though the invoice mentions consignee name as appellants. Out of Rs 21,75,023/-, Rs 1.78 lakhs pertain to invoices on which the credit has been claimed twice by the appellants. [refer para 6 page 109 of appeal memo]	Cenvat credit cannot be denied to the appellants since the duty paid raw materials have been received and used by the sub contractor on behalf of the appellants. Further, it is undisputed that the sub contractor has cleared the final product on payment of excise duty by adopting valuation under Rule 10A of the Valuation Rules, 2000-. Further, it is never the contention of revenue that the sub contractor has taken cenvat credit on the very same insulation material. Therefore, the appellants have correctly taken cenvat credit on insulation material.

4.11 Rule 10A of the Central Excise Valuation Rules, 2000 reads as follows:

10A. *Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer), then,-*

(i) in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

(ii) in a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker;

(iii) in a case not covered under clause (i) or (ii), the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods:

Provided that the cost of transportation, if any, from the premises, wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.

Explanation.- For the purposes of this rule, job-worker means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him."

From the provisions of Rule 10 A as reproduced above it is quite evident in the case covered under this Rule, it is the principal manufacturer who is selling the goods produced on job work, for delivery at the time of removal from the factory of job worker, thus it is principal manufacturer who has manufactured and cleared these goods. Undisputedly in the present case the goods were cleared from the premises of the job worker to unrelated

buyer after determination of value under Rule 10A. Thus the clearances undertaken were in fact clearances made by the principal manufacturer and all consequences including admissibility of CENVAT Credit on the input raw materials supplied by them to the job worker is on the principal manufacturer. The appellants in fact being the principal manufacturer cannot be faulted when they had availed the credit in respect of the inputs supplied by them directly to the job worker for the clearance of the finished goods as provided for in terms of Rule 10A.

4.12 On the issue of admissibility of CENVAT Credit on the inputs sent directly to the premises of job worker, the issue is no longer res-integra. CENVAT Credit has been held to be admissible in respect of the goods sent directly to the job worker in the following cases:

Bilt Graphic Paper Products Ltd.[2017 (4) TMI 1121-CESTAT],

"4. On the other hand, Shri H.M. Dixit, Id. Asstt. Commissioner (AR) appearing on behalf of the revenue submits that the cenvat credit could be allowed only when the input is received by the assessee and used in the manufacture of final product. In the present case, admittedly, the input in question were not received by the appellants and not used in the manufacture of final product by them. Therefore, the credit is not admissible to the appellants. He placed reliance on the judgment of Geno Pharmaceuticals Ltd. 2015 (37) STR 136.

5. On careful consideration made by both sides, I find that the fact is not under dispute that the input in respect of which the job worker raised the sale invoice in the name of the appellants were used by the job worker in the manufacture of goods on behalf of the appellants. Therefore the ownership of the input remains with the appellants and the same was used for their own product but at the premise of the job worker. The processed goods at the job workers end were being cleared on payment of duty by the appellants by raising sale invoices, therefore the inputs on which excise duty was paid was used in their manufacturing process at the job workers end is on behalf of the appellants only. Therefore, the cenvat credit on the inputs even

though not received by the appellants is admissible for the reason that the same was admittedly used by the job worker in the job work goods of the appellants only. The identical issue has been considered in various judgments some of them cited by the Id. counsel. In the case of Vijayashree Instaprint Machinery (supra) this Tribunal held that duty paid inputs used by the job worker while manufacturing the goods from the raw material supplied by the principal manufacturer credit of duty paid by the job worker in respect of such inputs is available to the appellants. In the case of Flex Industries Ltd.(supra) the division bench of the Tribunal held that in case of job work, the raw material sent by the principal, credit in respect of duty paid input used by the job worker is available to the principal supplier of the raw material. As regards the judgment of Geno Pharmaceuticals Ltd. (supra) relied upon by the Id. AR, I find that the fact in that case was duty was discharged by the job worker on loan licence basis and the credit was claimed by the principal who has neither manufactured the goods nor paid the excise duty. Therefore, the credit was rightly denied in that case. The fact of the case is not similar to facts of the present case.

Bilt Graphic Paper Products Ltd. Vs. CCE - 2018 (5) TMI 390 (T)

"4. We have carefully considered the submissions made by both sides. We find that there is no dispute that the inputs for which the job-worker has issued the invoice in favour of the appellant has been admittedly used in the manufacture of appellant's final product which suffered excise duty. In such case, the CENVAT Credit is clearly admissible particularly under specific provisions provided under Rule 3(1), which reads as under: -

"(1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise

(ii) to (xi)

paid on -

(i) any input or capital goods received in the factory of manufacture of final product

(ii)

Including the said duty, or taxes, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.”

From the above provisions, it can be seen that the CENVAT Credit is allowed not only on the input received in the factory of the manufacturer of the final product but also the input used in the manufacture of intermediate product by a job-worker availing the benefit of exemption under Notification No. 214/86-CE dated 25.3.1986. In view of this specific provision, in respect of the inputs used in the premises of the job-worker, the CENVAT Credit is admissible. As per the judgment relied upon by the appellant particularly in their own case, which is on the identical issue, the CENVAT Credit availed by them is in order and the same is clearly admissible.”

Vijayashree Instaprint Machinery [2005 (190) ELT 27 (T)]

2. After examining the records and hearings both sides, I find that the appellant is questioning the reliance placed by the lower appellate authority on certain decisions of the Tribunal. I find that the threadbare distinction sought to be made out by the Revenue between the facts of the present case and those of the cases relied on by the lower appellate authority does not in any way support the Revenue’s case. The simple question arising in the present case is whether Modvat credit of the duty paid by the job worker on the cost of input (electric wires) utilized by them in the manufacture of control panel from the raw materials supplied by the respondents was available to the latter. Ld. JDR has submitted that the respondents, by availing such credit,

were enjoying the same benefit twice. I cannot agree with this submission inasmuch as the credit in question is not the one availed by the respondents on their own inputs but the one availed by them in respect of the input added by the job worker for the manufacture of control panel. The duty paid on control panel received by the respondents from their job worker includes the duty paid by the latter on the input (electric wires) added by them while manufacturing the control panel. This component of the total duty on the control panel had not been taken as Modvat credit by the respondents initially. It was taken as credit only when they received the control panel from the job worker. This credit was clearly admissible to the respondents. The decision of the lower appellate authority is, admittedly, supported by the case-law relied on by it.

Flex Industries Ltd. [2006 (201) ELT 479 (T)]

The appellant is a manufacturer of Polyester Film. The main raw materials are PAT, MEG & DMT. It sends these materials to job workers for processing (into chips) and return. In processing the job workers use other duty paid inputs also. While returning the processed inputs to the appellant, the job worker also transfer the Modvat credit attribute inputs to the used in the processing of the material. The appellants took the transfer/credit into their account. Under the impugned orders, it has been held that credit was not due. The present appeal challenges those orders.

2. The contention of the appellant is that since the job workers had used duty paid inputs for the processing carried out by it, the appellants were rightly eligible for the transfer of those credits. It is being pointed out that issue had come up between the parties and this Tribunal held in favour of the appellant vide Final order No. 1345/05-SM. Branch dated 20-7-2005 in Appeal No. E/1174/2004-NB/SM. It is the contention of the learned Counsel that the issue raised in the present appeal is identical to the one decided in that order. The appellant has also relied upon the decision of the Tribunal in the case of Commissioner of Central Excise, Pondicherry v. Vijayashree Instaprint Machinery, reported in 2005 (190) E.L.T. 27 (Tri.-Chennai) in support of his contention.

3. We have perused the record and heard learned Senior Departmental Representative also. In identical case, this Tribunal has already held in favour of the manufacturer under the aforesaid orders. One of those orders is in the appellants' own case. We are in agreement with the view taken in those orders.

Ballarpur Industries Ltd. 2017 (7) TMI 888 - CESTAT MUMBAI]

"3. The subject issue here is – 'whether the appellant is entitled to CENVAT Credit for the inputs which have been purchased initially by the job-worker and utilized within the job-worker's premises for the product of the appellant and later sold to the appellant?' In principle the matter is covered by the Tribunal's decisions in the cases of *Flex Industries Ltd.v. Commissioner of Central Excise – 2006 (201) ELT 479 (Tri-Del)* = *2006-TIOL-897-CESTAT-DEL* and *Mahadev Industries v. Commissioner of Central Excise, Belgaum – 2000 (115) ELT 452 (Tri)*. The subject matter has also been decided in the appellant's own case of *Commissioner of Central Excise, Nagpur v. M/s BILT Graphite Paper Products Ltd. – 2017-TIOL-1785-CESTAT-MUM*. The Tribunal in the appellant's own case in *BILT Graphite Paper Products Ltd. (supra)* has observed as under:-

"...."

3.1 In the light of the above observation of the Tribunal and the decisions cited above, the impugned order is set aside and the appeal allowed with consequential relief, if any, to the appellant."

4.13 The principles stated in the above decision were incorporated in the CENVAT Credit Rules, 2004 vide the amendments made by Notification No 6/2015h. In view of the decisions as above we are of the view that the demand made for recovery of the CENVAT Credit availed by the appellant on the insulation material sent directly to the job worker without receiving the same in their premises cannot be sustained, the appeal needs to be allowed in respect of this demand.

4.14 In respect of the demand for denial of the CENVAT credits alleging that appellant has availed the CENVAT Credit twice on the same invoice, appellants have not stated anything in their

appeal memo. However in their submissions made at the time of hearing they contested the demand. From the show cause notice and the impugned order we do not find any support for the allegation made. Even the detail of invoice against which the credit has been alleged to have been taken twice is not stated. In absence of any details in respect of the invoice number/ date and the entries in the CENVAT account by which the credit has been taken twice, we are not in position to hold in favour of this demand. The allegation made without any reference to relevant documents and entries in the book of accounts cannot be upheld. Appeal filed by the appellant in respect of this demand is allowed.

4.15 In respect of the demand made on the gross shortages and on the Damaged/ rejected/ Non saleable stock, appellant has during the course of arguments submitted as follows:

Issue No	Demand Involved	Departments Contention	Brief submissions of the Appellant
Gross Shortage	2,09,90,046	RM/WIP has been found short and not used by the appellants but written off in the books of accounts. Hence, credit taken should be reversed under Rule 3(5B). FG has been found short and removed without issuance of invoice and hence, liable to excise duty.	(i) Rule 3(5B) applies where inputs are available in the factory but it's value is written off in books. When the department alleged that there is shortage of inputs or WIP, it would mean that goods are not available in factory hence, Rule 3(5B) will not apply. (ii) Rule 3(5B) is not applicable on WIP and Finished goods. (iii) Audit report in addition to shortage also reports excess goods. This itself shows that discrepancy is theoretical/ notional and not actual. Further, no adjustment for excess shortage given while raising demand. Detailed submissions - Kindly refer. (iv) Demand merely on the basis of theoretical/

			notional shortage without any evidence of clandestine removal of goods, is not maintainable.
Damaged/ rejected/ Non- saleable stock	23,37,519 [Demand under Rule 3(5)]	SCN The appellants are not able to account for stock of WIP valued at Rs.1,41,83,975/- and the same was adjusted against closing stock of WIP. However, no excise duty was paid by the appellants. Therefore, the cenvat credit attributable to the inputs used in WIP is required to be reversed, in terms of Rule 3(5) of CCR. 2004. OIO WIP stock has been written off in books as rejects. Therefore, as per Rule 3(5B) and CBEC Circular No. 907/27/2009-CX, dated 7.12.2009, cenvat credit of inputs contained in stock of WIP is required to be reversed.	(i) In the show cause notice, the department invoked Rule 3(5) of CCR, 2004 for reversal of credit, while in the impugned Order-in-Original, the department confirmed under Rule 3(5B) of CCR, 2004. Therefore, OIO is beyond the scope of SCN. Further, the department itself is not clear on which rule will apply to the present case. (ii) The department has admitted the fact that the appellants have made adjustment in the closing stock. This proves that there is no physical removal of WIP involved in dispute. It is settled legal position that Rule 3(5) of CCR, 2004 is not invokable if there is no physical removal of goods. (iii) Rule 3(5B) is not applicable to stock of WIP written off. Therefore, no reversal of credit is required in the case of WIP goods, in terms of Rule 3(5B) of CCR, 2004. (iv) Further, the appellants submit that demand can be raised on scrap value only and not on written off value, since part of damaged WIP were cleared as scrap by the appellants in the subsequent period, on

			which duty was paid & accepted by the department.
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4.16 From the facts as noted above it is observed that these demands have been made in respect to the accounting shortages, which were in respect Raw material, Work in Process material and Finished Goods. These shortages are not the physical shortages determined by the actual physical stock taking undertaken by the department. As per the appellants the entire issue of shortage in the present case, cropped up when the appellants migrated from the earlier system of accounting to SAP system. In process the appellants discovered certain accounting errors in books of account like BOM error, posting entry, material issued to production but not captured in the books, process loss not captured in the books, etc. Accordingly, some of the stocks in the books were reflected at higher side and some of the stocks were reflected at lower side. To rectify these accounting errors, the appellants passed JV entries as a corrective measure so that the books of account can reflect the true and fair view of stock of inputs/ WIP and finished goods. The department proceeded on the assumption that the shortage in books stock due to accounting errors is an actual shortage of stock without conducting any physical stocktaking to show that the shortages reflected in the books were actually the physical shortages too.

4.17 Appellants also placed on record the Chartered Engineers' Report dated 11.6.2012, confirmed by the Chartered Accountants report dated 13.6.2012, which shows the reconciliation between the theoretical consumption and actual consumption of raw material required for manufacture of finished goods. From these reports it is evident that there would not be any shortage against which the demand has been made. The entire demand is based on the accounts maintained by the appellant on various software (SAP).

As per the para 7, of the Show Cause Notice, Schedule No 18, forming part of the Balance sheet of appellant as on 31.03.2008 at sub para 7 contained reference to damaged/ rejected/ non-

saleable items found during the stock taking in the company. The said sub-para is reproduced below:

"To reconfirm the identification and segregation of damaged/ rejected/ non-saleable items included in the stock physically verified by the earlier management as on 31st March, 2008, the new management has undertaken physical verification of the entire inventory of the company on 19th May, 2008. The quantities of damaged/ rejected/ non-saleable items determined so identified as on 19th May, 2008 after making adjustment of the rejections reported during production for the period 1st April, 2008 to 18th May, 2008 have been deducted from the quantities as at 31st march, 2008 considered as goods and usable/ saleable have been valued. Being the technical matter, the auditors have relied on the quantities of the damaged/ rejected/ non-saleable items, having value of Rs 26,333 ('000), identified by the management."

The above observation made only point to identification of damaged/ rejected/ non-saleable items determined by the management. The fact of their clearance from their premises cannot be presumed by the observation made. It also do not imply that the said goods have been written off in the book of accounts of the appellant. Further Statutory auditors in paragraph:

- 5 (a) (i) & (ii) of the "Auditors Report To The Members of automotive Composite Systems (International) Limited" has observed as follows:

"5(a)(i) The closing stock of inventory of Rs 127,519 ('000) is net of damaged/ rejected/ non-saleable items determined by the Company on the basis in the Note 7 of Schedule 18. Being a technical matter, we have relied on damaged/ rejected/ non-saleable items as determined by the management. Further, in the absence of quantitative records for damaged/ rejected/ non-saleable items, we have relied on the management representation that the entire quantity of such items, as identified and determined, require adjustment to the stock physically verified at the year end."

(ii) Closing stock of raw materials, work in progress and finished goods include Rs. 3,431 ('000), Rs 4,740 ('000) and Rs 41 ('000) respectively being stock at a location of the Company where physical verification could not be carried out as at the year end by the management and accordingly the quantities as per inventory records after making adjustment of damaged/ rejected/ non-saleable items determined as stated in the Note 7 of Schedule 18, have been considered for valuation. The impact, if any, of discrepancies that may have been identified on such verification on the loss for the year cannot be ascertained."

- (ii) (c) of the "Annexure Referred to in paragraph 3 of the Auditors Report of even date to the members of Automotive Composite Systems (International) Limited on the accounts for the year ended 31st March 2008" has observed as follows:

"During the year the company has implemented SAP system. In our opinion the inventory records are not properly maintained consequentially material discrepancies aggregating to Rs. 128,760 ('000) net shortages (Gross Excesses – Rs 23,538 ('000) Gross Shortages – Rs 152,298 ('000) were noticed between physical stock and inventory records which have been properly dealt with in the books of accounts."

The above observation made by the by the statutory auditors clearly show that these shortages and excesses were clearly on the basis of faulty accounting policies of the company and did not establish the clandestine clearance of these goods.

4.18 Tribunal has consistently observed against the demand made in respect of the accounting shortages noticed, in case where these shortages were not supported by the other evidences of clandestine clearance of the inputs/ finished goods. In case of:-

A. MICO Ltd. [2001 (136) ELT 649 (T)]

"6 We have considered the matter, and find -

(a)

(b)

(c) *The next ground (iv) in appeal is regard onus being on the assessee to explain the discrepancy between actual stocks and RG 1 stocks. We have considered the ground and accept the same. However, it has to be first proved by the Revenue that there is a discrepancy between RG 1 stock and the actuals, then only the onus will shift on to the assessee.*

(d) *We have considered the submissions made and find that duty on shortage/excess goods have been demanded. No duty can be demanded on excess goods, without proving clandestine removal thereof; Relying on 1991 (52) E.L.T. 145; 2000 (125) E.L.T. 781 (Tribunal) = 2000 (91) ECR 569, 2000 (117) E.L.T. 644."*

B. Widia India Ltd Vs. CCE - 2006 (9) TMI 21, affirmed by Karnataka High Court in 2010 (255) ELT 36 (Kar.), the Court held as under:

"6. We have gone through the records of the case carefully. The main allegation of the Revenue is that the appellants conducted physical stock verification at the end of each year and found out shortages. They have not informed the Department of the shortages. The shortages found were adjusted in their SAP Inventory by passing entry under 702 system code movement and value of net shortage is set off in the Annual Reports. The appellants have failed to explain the reasons for shortages. Instead they posted entries in the company accounts reducing the value to the extent of goods short found. Thus it appears that the dutiable finished goods have not been accounted for properly. Therefore the appellants are required to discharge duty on the quantity of finished goods found short as evidence from their own stock taking and their own private statutory records of production which they failed to do. They are liable to pay total duty of Rs. 56,09,485/-.

7. It is seen that the statutory records of production, RG-1 is maintained manually wherein through IDN (Internal Delivery Note) they accounted production and through delivery challans, clearances were accounted. It is not the case of the Revenue that there is a discrepancy between the entries in the statutory

record of production, mainly RG-1 and the physical stock available on a particular day. It is admitted that a large number of components are being manufactured by the appellants and they have a special system of accounting called the SAP system. When the appellants find discrepancies in the physical stock and what is shown in the SAP system, we have to infer that errors have kept in the accounting of stock in the SAP system. In other words, SAP system accounting has not reflected the actual picture in view of the error found out by the appellants themselves at the end of each year. They also have their system of correction under system code Nos. 701 & 702 for adjustment of excesses and shortages. The above facts cannot lead us to a conclusion that shortages of finished goods have arisen on account of their removal without payment of duty and without accounting. The DGCEI officers themselves had not conducted any physical verification of stock of finished goods with reference to the RG-1 stock. When thousands of components are manufactured, there is every possibility of errors creeping in. After going through the Show Cause Notice, we come to a conclusion that even the SAP system of accounting is not hundred per cent fool proof. The error may be due to various reasons. It is not necessary for us to go into the details of the system. Suffice it to say that there is a margin of error in the SAP system of inventory management on account of various reasons. It is seen that the RG-1 Register is maintained manually and the production is accounted from the IDN and clearances are accounted through the delivery challans. In this system of manual accounting, the Revenue has not found out any discrepancy. What the Revenue has found out is that the appellants had found shortages/excesses of stock during physical verification at the end of year compared to the SAP system figure. This points out only that their own system of accounting has a margin of error. According to the appellants this come to around 2%. To put it in lay man's language, when the production of an item is 100, there is a possibility of the same being shown as either 102 or 98. This is what all we can infer from the Show Cause Notice issued to the appellants. The Adjudicating authority herself has observed that the transaction of the assessee is heavy and voluminous and almost one lakh pieces of items are

manufactured and cleared from their factory, on an average annually. She has given a finding that there seems to be a certain degree of negligence in maintaining the stock account as far as the Central Excise law is concerned. But there is no finding that the entries in the RG-1 Register are wrong. In the absence of such a finding, the above finding of the Commissioner is not sustainable. There is also no evidence of any clandestine removal of the finished goods. In these circumstances, no duty can be demanded. There is also absolutely no case for imposing any penalty. In these circumstances, we set aside the impugned order and allow the appeal. The case laws relied on by the appellants are very relevant in the facts of the case."

C. Micro Forge (I) Pvt. Ltd. [2004 (2) TMI 180]

"5. It is an admitted fact that the stock position was arrived at on the basis of an estimation. The opinion of Shri A.N. Sinha, Works Manager, was taken on the spot regarding the fluctuation in the weight of individual varieties of the forgings. There were in all 31 varieties in stock. In this connection I must mention that unless the department is in a position to clearly demonstrate the fact of shortage through actual physical weighment of the entire stock, the allegation of shortage of stock and consequent illicit removal of finished goods cannot be sustained. The method of stock taking adopted by the authorities at best can lead to a suspicion of shortage but cannot be a substitute for the proof of shortage."

D. Affirming the decision in case of Maruti Udyog Ltd. [2004 (173) ELT 382 (T)] Hon'ble Punjab and Haryana High Court has at [2010 (262) ELT 180 (P&H)] held:-

15. *When the facts of the present appeals are examined in the light of categorical findings recorded by the Tribunal, it becomes evident that the view taken by the Tribunal does not suffer from any illegality. The arguments raised by the Revenue are thus liable to be rejected. The Tribunal has recorded categorical findings that in the establishment of the dealer, full reconciliation of transactions concerning use of inputs was not possible. The shortages and excesses had been found to be normal. It was further found that that the establishment of the dealer is huge and complex which involved a complicated accounting problem.*

It cannot be controlled manually and they have put in place sophisticated computer based accounting system in order to ensure accuracy and efficiency. The findings further are that there was diversion of inputs in contravention of Rules relating to utilization thereof. The demand was based merely on the shortage detected during physical tallying. The dealer had not taken any account of the excess use of inputs for which no credit was claimed. Accordingly, the Tribunal found that once the excesses were not clandestine receipt of input, then the same view was required to be taken with regard to shortage also, namely that the shortages are not a result of any clandestine or unauthorized utilization. The shortage has been found to be very small namely 0.24 per cent. which is fraction of the input receipt. The shortages have been found within the tolerable limits expected by an efficient management. It was, therefore, rightly held that no demand could be raised under Rule 57-I of the Rules. Accordingly, Section 11AC and Section 11AB of the Act would have no application to the facts of the present case."

E. National Engineering Industries Ltd. [2015 (330) ELT 681 (T)].

"5. The admitted facts of the case are that the assessee is having computerized accounting which manages end to end operations i.e. from the set of procurement of raw material to sale of finished goods. It is also admitted fact that there are large varieties of raw materials, work-in-progress and finished products. The consumption of raw material goods which are used in process of making and the finished goods are not physically numbered and accounted on day-to-day basis. The standardized system of accounting based on measurement and conversion of raw material to finished product on weight/length basis is fed to the computer. The assessee undertakes with the help of cost auditor stock verification on annual basis to reconcile the inventory position. In such a situation it is but natural that minor variation (0.5% and below) do occur during reconciliation. The explanations provided by the assessee during the original proceedings have been accepted by the lower authority and he allowed the possibility of shortages and excesses in respect of various individual category of raw materials and finished goods.

However, he confirmed the reversal of credit in respect of raw material found short after netting of excess with shortage among various varieties. Same method has been adopted for finished goods also. We find that the shortages and excesses found during physical stock verification which remained unreconciled are within the tolerance limit keeping in view the thousands of types of raw material and finished goods involved in the accounting by the assessee. Such view has been taken by this Tribunal in the cases of Maruti Udyog Ltd. v. CCE, Delhi-III reported in 2004 (173) E.L.T. 382 (Tri. - Del.) and in Widia India Ltd. v. CCE, Bangalore reported in 2007 (207) E.L.T. 562 (Tri. - Bang.) later affirmed by the Hon'ble High Court of Karnataka in 2010 (255) E.L.T. 36 (Kar.). Another important point to be noted here is that while the whole discrepancy in physical stock has come to light only as per the stock taking conducted by the assessee, there is no allegation or evidence to the effect that the shortages/excesses are not attributable to accounting errors or complexities but are due to unaccounted clearances finished goods and consumption of raw material. In the absence of any such corroboration the assessee's plea on the non-sustainability of order reversing credit or demanding duty has strong force and is to be admitted. Accordingly, we find the reversal of credit on the raw material and the demand of duty on the finished goods solely on the ground of physical stock taking done by the assessee is not sustainable in the facts and circumstances of the present case."

4.19 Impugned Order relies on the decision of Hon'ble Bombay High Court in the case of Greaves Cotton Ltd. [2008 (225) ELT 198 (Bom.)]. In the said decision, the Hon'ble High Court while interpreting the Rule 7 (4) of the CENVAT Credit Rules, 2002, which is pari materia with the Rule 9 (4) of CENVAT Credit rules, 2004 observed as follows:

5. Rule 7(4) of Cenvat Credit Rules, 2002 reads thus :

"7(4) The manufacturer of final products shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods in which the relevant information regarding the value, duty paid, the person from whom the inputs or capital goods have been produced is recorded and the burden

of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer taking such credit."

The language of the Rule is plain and unambiguous. If the assessee claims entitlement to Cenvat credit, it is the burden of proof upon the assessee to prove the admissibility of the Cenvat credit. In the matter at hands and in the facts and circumstances of the case, the only manner in which the assessee could have justified the Cenvat credit claim was by showing through the Books of Accounts or by any other piece of evidence that the inputs which were short as per Audit Report and were not utilized in the manufacture of final product. Having gone through the orders of all the authorities, there does not appear to be any such attempt on the part of the assessee. On the contrary, we are convinced that more reliance is upon claiming exemption, because Cenvat credit claimed is upon the inputs which are a very small fraction of total inputs imported. We may only quote some part from the statement of Authorized Signatory of the assessee as referred in the order of the Joint Commissioner, which reads thus : -

".....He confirmed that in the Cost Audit 2002-2003, shortage of raw materials of value of Rs. 33,42,161/- was shown and it involved Cenvat credit of Rs. 5,34,746/-."

If this statement is taken into account, we are afraid, it was not open for the Commissioner (Appeals) to observe in paragraph No. 6 of his judgment that it was a case of alleged shortage of some items of inputs and excess of some other items of inputs, as revealed by the Cost Audit Report of the appellant for the period 2002-2003.

On going through the order of the Commissioner (Appeals), Cost Audit Report does not seem to be before the Authority, but the Authority seems to have relied upon a letter dated 17-10-2005 produced by the assessee at the time personal hearing which was in fact a list submitted by the assessee of the items found excess and those found short.

We do not think that except reproduction of Rule 7(4) of the Cenvat Credit Rules, 2002, any other material is required to record a finding in favour of the Department that it is the burden

of proof of the assessee to "justify the Cenvat credit availed. It is necessary to refer the orders of the Joint Commissioner as also the Commissioner (Appeals) because they have applied Rule 7(4) in correct perspective. In view of failure on the part of the assessee to account for utilization of the inputs which were short and upon which Cenvat credit was claimed, but were not accounted in the Audit Report as utilized in the production, the two lower authorities have decided the matter against the assessee, and therefore, those authorities cannot be said to have read Rule 7(4) in an incorrect manner.

6. So far as the order of CESTAT is concerned, it has mainly relied upon the decision of the Tribunal, at Delhi in the matter of Maruti Udyog Ltd. v. Commissioner of C. Ex., Delhi-III, reported in 2004 (173) E.L.T. 382. We must state here itself that the decision of the Tribunal is certainly not binding upon us and it is a question as to whether we should approve the view taken by Delhi Tribunal in Maruti Udyog case and followed by the Tribunal in the impugned judgment. It is observed by the Tribunal at Delhi in paragraph No. 7 in its judgment in the case of Maruti Udyog as under :

"The appellants have a huge and complex accounting problem. It is beyond manual tally. The appellants have put in place sophisticated computer based accounting systems to ensure accuracy and efficiency. The evidence on record does not indicate any diversion of inputs in contravention of rules relating to utilisation of inputs. The demand is merely based on the shortages detected during physical tallying, that too without taking into account the excesses noticed. Since there is no evidence, that the excesses are not the result of clandestine receipt of inputs, the same view is required to be taken in regard to shortages also, that the shortages are not the result of any clandestine or unauthorised utilisation of the inputs."

Probably in order to rely on these observations, the letter from Cost Auditor Shri Dhananjay V. Joshi was produced, which was practically in the same terms as the letter of Auditor namely Price Water House in the reported judgement and paragraphs No. 5.3 to 5.6 of which are reproduced in paragraph No. 2 of the reported judgment. From the observations of the Tribunal, it is

evident that the Tribunal has not placed reliance upon any legal provision, either from the Act or from the Rule, while exonerating the assessee from the liability to pay duty by reversing the Cenvat credit wrongly claimed. When there is no statutory foundation for such exemption, with due respect, we are unable to agree with the view taken by the Tribunal. It seems to be a sympathetic view by taking into consideration that it is a huge plant with huge turnover and in spite of huge and complex accounting system, there are bound to be some problems and some errors. With due respect, the Tribunal did not consider the other side of the coin. The Department does not function as a supervisor to ensure that every input is used or not used in the manufacture of final product is properly recorded in the accounts and the Department wholly relies upon the Books of Accounts maintained by the assessee for the purpose of finding out as to whether correct Cenvat credit is claimed and whether correct duty is paid by reversing the Cenvat credit to which they were not entitled. Ultimately, the amount recovered has to go to the Public Exchequer. Without accusing the Department in the present case, we cannot avoid considering a probability that the Books of Accounts being constantly under the control of the assessee, it is easier for assessee to play mischief, if assessee so desires."

The Appeal filed by the revenue against the decision of tribunal in case of Maruti Udyog, referred above has been dismissed by the Hon'ble Supreme Court [2015 (319) ELT 549 (SC)], holding as follows:

"We find from the reading of the impugned order of the Tribunal that the Tribunal has discussed in detail the accounting system of the respondent. The magnitude of the inputs used and the discrepancy which arose because of the various factors, on that basis it is stated that when the shortage of inputs as corrected is only 0.24%, that would be immaterial and correction of the total input is in use. In addition we find that the respondent had pointed out that this was due to accounting errors and there was no "shortage" in fact because of the reason that in respect of many inputs even stocks in excess was found. It was demonstrated before the authorities that though the shortage of

the inputs was to the tune of Rs. 25.67 crores, at the same time many other inputs were in excess and those figures were to the tune of Rs. 27.59 crores during the same period. This fact alone demonstrates the bona fides of the respondent in claiming the Modvat credit on the basis of figures disclosed by them in respect of the inputs which were used while manufacturing the motor vehicles. A finding of fact is recorded that there was no clandestine removal of any inputs. It is therefore, not a case for any interference."

Accordingly the view taken by the tribunal in the case of Maruti Udyog has been approved and sanctioned by the Hon'ble Supreme Court. Accordingly the reliance placed by the revenue on the decision of Hon'ble Bombay High Court decision in the case of Greaves Cotton Ltd., which did not agreed with the decision in case of Maruti Udyog cannot be proper.

4.20 The entire demand has been made by the revenue by invoking the provisions of Rule 3 (5B) of the CENVAT Credit Rules, 2004, which at the relevant time read as follows:

"Rule 3 CENVAT credit-

(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9.

(5B). If the value of any,

- (i) input, or*
- (ii) capital goods before being put to use,*

on which CENVAT Credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods :

Provided that if the said input or capital goods is subsequently used in the manufacture of final products, the manufacturer shall be entitled to take the credit of the amount equivalent to the

CENVAT Credit paid earlier subject to the other provisions of these rules."

4.21 In case of General Motors Pvt Ltd [Final Order No A/86151-86153/2022 dated 01.11.2022] we have observed a follows:

"There is complete legislative history to explain the insertion of the rule 3 (5B). Prior to the insertion of the said rule, CBEC has in 1995 issued Circular No 101/12/96-CS dated 22.2.1995 as a direction to plug the revenue leakage in situations where assessee was writing off the material in the books of accounts, but not reversing the MODVAT credit availed on those input materials. Subsequently, the CBEC issued circular no. 615/36/2002-X dated 16.7.2002 clarifying that in situation wherein inputs had been written off, the instruction mentioned in circular dated 22.2.1995 shall apply i.e. Credit availed must be paid back. Rule 3(5B) was introduced w.e.f. 11.5.2007. The intention for insertion of Rule 3(5B), was to plug those situations, wherein the assessee is availing benefit of Cenvat Credit on the inputs which are not intended to be used and are written off or provisioned for written off in the books of accounts, but still lying in the factory. Rule 3 (5B) is part of the CENVAT Credit scheme, and should be interpreted in a manner to fulfill the basic objective of scheme. On a plain reading of the aforesaid provision, it is clear that the assessee shall be liable to pay the amount of Cenvat credit availed on the inputs, which are either written off fully or partially or any provision for write off fully or partially has been made in the books of accounts. This provision shall only apply in respect, of those goods which are written off the input in the books of accounts of the appellants for the reason that they have been lost, destroyed or become obsolete. It cannot be applied to case where the value of goods for any reason is written down in the books of account. Explaining the scheme of MODVAT Credit, Hon'ble Supreme Court has in the case of Dai Ichi karkaria Ltd [1999 (112) ELT 353 (SC)] observed as follows:

"17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable

product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.”

This decision in an unambiguous manner provides that once the credit has been taken by the appellant then the same is available to him unless the manufacturer himself chooses not to use the raw material in its excisable product. Thus it is the option of the manufacturer to declare that inputs on which he has taken the credit have become unusable or have been lost and are not available for the purpose of manufacture of finished goods which are cleared on the payment of duty. The philosophy of this observation of Hon’ble Apex Court, is what has been formally stated in Rule 3 (5B) of the CENVAT Credit Rules, 2004.”

4.22 Interpreting the said rule Tribunal has is case of Tata Motors Ltd. [2021 (11) TMI 830 – CESTAT Mumbai] held as follows:

6. We find that in the facts and circumstances of the present case the shortages and excesses if any found are theoretical due to huge quantity of inputs handling. It is not a case of the Department that the appellant have ever removed any Cenvat inputs without payment of duty from their factory. Therefore, even though there is any shortage or excess, the input was available within the factory premises or consumed in the

production. This issue has been considered by this Tribunal in the appellant's own case as follows: -

(i) Tata Motors Ltd. Vs. Commissioner of Central Excise & Service Tax (LTU), Mumbai – 2019 (7) TMI 1797-CESTAT-Mumbai

3. We have heard learned counsel for the Appellant and learned Authorised Representative for the Revenue and perused the records of the case including the synopsis and the case laws cited by the respective sides. Learned counsel submits that considering the magnitude of their operations the shortages are meagre/ negligible and therefore Cenvat credit on the same should not be denied. According to him in view of large magnitude of their operations, it is not practicable to have conventional method of book keeping i.e. to receive, store and issue inputs and strike balance of these transactions on daily basis in a register. In order to handle such volume of transactions, they have put in place sophisticated computer based accounting system to ensure accuracy and efficient. The entries regarding receipt of inputs are made at receipt point where the consignments are inwarded and after sample checking of quality and invoiced quantity, Goods Inward Note (GIN) is prepared, thereafter the acceptable inputs are stored in the allotted Bins. As per the learned counsel errors can creep in for many reasons like picking up wrong LH/RH parts, despatch of alternate parts, incorrect posting to alternate parts etc. Also there may be errors in noting down various types of parts during physical stock verification, parts not available at the time of stock taking at its specified storage rack but subsequently found in another storage rack. He also submits that the shortages/ excess are only theoretical since they follow total documentation discipline with respect to receipt of inputs and consumption of inputs and the value of inputs found short/excess if compared with the total value of procurement of inputs is negligible i.e. 0.59% approximately and such a meagre shortages are commercially acceptable. The inputs were undisputedly received in their factory and upon receipt they were properly accounted for. Learned counsel denied the allegation that the inputs were not used in or in relation to the manufacture of final products.

He further submits that the extended period is not invocable in the facts of the present case and Rule 3(5B) ibid has no application in the present case. Nor Rule 11 is applicable as the said rule will come into play only when the Cenvat Credit has been taken or utilised wrongly whereas in the present matter the Cenvat credit was rightly taken on eligible inputs upon their receipt. Learned Authorised Representative on the other hand reiterated the findings recorded in the impugned order and prayed for dismissal of Appeal. According to learned Authorised Representative the appellants are liable to pay an amount equivalent to Cenvat Credit taken on inputs allegedly written off in terms of Rule 3(5B) ibid alongwith interest and penalty, as it categorically states that an amount equivalent to the Cenvat credit taken on input written off is payable by the assessee. He denied the contention of learned counsel that those parts which were not available during physical stock verification at its specified storage rack were subsequently found in another storage rack.

4. Rule 3(5B) ibid specifically provides that If the value of any input or capital goods before being put to use, on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of accounts, then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods. A plain reading of the said rule makes it clear that it is applicable only in cases where goods are available in the factory and only a book entry has been made to write off the value of the said goods, which is not the allegation of the department against the Appellant.

5. The magnitude of the inputs used and discrepancy which arose because of various factors, on that basis it is stated on behalf of the appellants that when the shortage of inputs is only 0.59%, that would be immaterial and correction of the total input is in use. It is settled principle that Tax Authorities should go by the normal commercial practice. We are also aware about the submission of learned counsel that this was due to accounting errors and there was no "shortage" in fact as in respect of many inputs even stocks in excess was found and also

some of the parts which were not available at the time of stock taking at its specified storage rack, subsequently found in another storage rack. It is not the case that the inputs which were found short were not received or were clandestinely removed. We also cannot lose sight of the fact that there were excesses also in inputs which were brought to the notice of the department but these excesses were ignored by the department. This fact itself establishes the bonafide of the appellants in claiming CENVAT credit on the basis of figures disclosed by them in respect of inputs which were used by them. Although there is a finding that the appellants have suppressed the facts with intent to wrongfully avail and utilize the inadmissible Cenvat credit, but the same has not been substantiated by producing any evidence. Merely making allegations of suppression or intention is not sufficient unless the same is established beyond reasonable doubt. The inputs were undisputedly received in the factory of the appellants and upon receipt they were properly accounted for. In our considered view rule 3(5B) ibid cannot be applied on the facts of this case as the entire case of the department is that the goods are not available in the factor whereas for the application of the said rule the goods have to be available in the factory and only a book entry is to be made to write off the value of the said goods. We are also not oblivious of the fact that on a similar set of facts in appellants own case this Tribunal in the matter of M/s. Tata Motors Ltd. Vs. CCE, Pune-1; reported in 2016-TIOL-1027- CESTAT-MUM while relying upon the law laid down by the Hon'ble Supreme Court in the matter of Maruti Suzuki India Ltd.; 2015(319) ELT 549 (SC) decided the issue in favour of the Appellants. Similarly in another matter of Appellants i.e. Appeal No. E/172/2009 in the matter of M/s. Tata Motors Ltd. Vs. CCE&ST, Jamshedpur, a coordinate Bench of the Tribunal vide Order dated 11.1.2019 decided the issue in favour of the appellants therein and held that the demand is not sustainable and there is no evidence on record that the inputs on which the Credit was taken, were not received in the factory or removed as such from the factory.

6. While following the decisions as cited above and in view of the facts of this case and also in view of the discussions made

hereinabove, we are inclined to set aside the impugned order and accordingly the appeal filed by the appellants is allowed with consequential relief as per law, if any."

(ii) Tata Motors Ltd. Vs. Commissioner of Central Excise – 2017 (345) ELT 653 (T)

5. I find that there is discrepancy in the inventory of input on which Cenvat credit being taken by the appellant but discrepancy is only to the extent of 0.08%. It cannot be ruled out that in a big industry, there is always possibility of minor variations in the stock, which occurred due to human error. Moreover, in the present case neither there is any charge nor any evidence to show that differences in input inventory is either due to short receipt or cleared from factory clandestinely. In such a situation, even if there is shortage of input, the same must be lying in the factory. On the identical issue in the appellant's own case cited by the Id. Counsel, this Tribunal has decided the issue relying on the decision of Maruti Udyog Ltd. [2004 (173) E.L.T. 382 (Tri.-Del.)] which was upheld by the Hon'ble Apex Court reported in 2015 (319) E.L.T. 549 (S.C.) held as under :

4.1--.

5. In view of the above, I find that the issue is squarely covered by the decision of the Hon'ble Supreme Court in case of Maruti Suzuki India Ltd. (supra). The impugned order is set aside and appeal is accordingly allowed.

Following the ratio of the aforesaid judgments of this Tribunal which is based on the Hon'ble Supreme Court's judgment in case of Maruti Suzuki India Ltd. (supra), I am of the view that Cenvat credit cannot be disallowed in the facts and circumstances of the present case. The impugned order is set aside, appeal is allowed."

(iii) Tata Motors Ltd. Vs. Commissioner of Central Excise – 2017-TIOL-1027-CESTAT-MUM

4. I have gone through rival submissions. I find that the Order-in-Original clearly records that the appellants have elaborate method of accounting. There is no allegation of any mischief in the shape of clandestine clearance of receipt of raw materials. The Tribunal in case of Maruti Udyog has observed as follows: -

".....

5. In view of the above, I find that the issue is squarely covered by the decision of the Hon'ble Supreme Court in case of *Maruti Suzuki India Ltd. (supra)*. The impugned order is set aside and appeal is accordingly allowed. Following the ratio of the aforesaid judgments of this Tribunal which is based on the Hon'ble Supreme Court's judgment in case of *Maruti Suzuki India Ltd. (supra)*, I am of the view that Cenvat credit cannot be disallowed in the facts and circumstances of the present case. The impugned order is set aside, appeal is allowed."

4.23 We also note that an explanation as follows was inserted in Rule 3 (5B) vide Notification No 03/2013-CE 9NT) dated 01.03.2013, providing for recovery mechanism in terms of the said rule.

"Explanation. - If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A), (5B) and (5C), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken and utilized."

The period involved in the present case is prior to the date of insertion of the said explanation. In case of *Steel Authority of India Ltd. [2020 (3) TMI 147 – CESTAT Chennai]* following has been held relying on the judicial precedence:

"7. It is for the department to prove the allegations raised in the SCN. Even from the SCN or the documents placed before me, there is no evidence to show that the appellants have written off the full value of capital goods. There is only partial writing off to the extent of 50%, 70%, 90%. On such score, the amendment brought forth w.e.f. 1.3.2011 to reverse the credit on partial written off value would only apply. However, the provision for recovery of the credit availed wrongly has been introduced only w.e.f. 1.3.2013. This being the case, the demand raised for the credit availed from 1994-2010 and written off during this period cannot sustain. The Tribunal in the case of *Ericsson India Pvt. Ltd. (supra)* has discussed the same which is reproduced as under :

"7. Having considered the rival contentions, we find that the issue is one of interpretation. We further find that for reversal of cenvat credit on partial writing down of value of inputs, the provision was introduced only first time by amendment of Rule 3(5B) of Cenvat Credit Rules, with effect from 01.03.2011. Further, there was no provision prior to 01 March 2013 for recovery of cenvat credit and interest thereon under Rule 3(5B) etc. which was made applicable with effect from 01.3.2013 only, by virtue of Notification No. 3 of 2013-CE(NT) dated 01.03.2013. The notification provides that if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (5), (5A) and (5B), it shall be recovered, in the manner as provided in Rule 14, for recovery of CENVAT credit wrongly taken.

8. Learned Counsel have also pressed the ground that as they were not required to reverse the cenvat credit on partial writing down the value of inputs, prior to 01.03.2011, accordingly, we hold that as there was no such legal requirement. The learned Counsel also prays that they are entitled to refund, already reversed credit on account of partial writing down of value, prior to 01.03.2013.

9. In this view of the matter, we hold that the issue has arisen due to change of opinion on the part of the Revenue, but there is no suppression of facts on the part of the appellants. Further, we find that no amount was due to be reversed under rule 3(5B) on the date of issue of show cause notice. Accordingly, we hold that larger period for limitation can not be invoked and no show cause notice was required to be issued. Accordingly, we hold that impugned order is not sustainable, and is set aside. Appeal is allowed with consequential relief. In this view of the matter, we set aside the demand, penalty and interest."

In Sanghavi Engineering Vs CCE Hyderabad - 2013 (297) ELT 277 (Tri.- Bang.) similar view as discussed wherein requirement to reverse the credit when the value has been partially written off would take effect only after 1.3.2011 was noted.

"2. In view of the cited provisions, it has to be held that, prior to 1-3-2011, a manufacturer of final product who availed Cenvat credit on inputs was not required to reverse any part of that

credit on the ground of a part of the value of the inputs being written off the books of account. Only cases of writing off the full value of the inputs on which Cenvat credit had been availed called for reversal of the credit. The present one is not such a case. It is also pertinent to note that the Department has no case that the amendment dated 1-3-2011 has retrospective effect."

Similar view as taken in M/s.Kirloskar Ferrous Industries Ltd.(supra) and relevant portion of the order is reproduced as under :

"5. After considering the submission of both the parties and perusal of the material on record, I find that from the show cause notice itself, it is clear that there was no provision for full write off of inputs and capital goods. The audit party raised the objection that the appellant has made a provision for write off of the inputs and capital goods and demanded the reversal of the same. In reply to the audit note, the appellant had written letters dated 24.4.2011; 25.11.2011 and 8.7.2013 whereby the appellant has clarified that the provisions to write off was partially made. I find that this provision to reverse the proportionate CENVAT credit on partially write off came into existence from 1.3.2011 whereas the period involved in the present case is 2009-10. I find that the inventory against which the partial write off was made was available with the appellant and there was no physical removal of the goods. In reply to the show-cause notice also, the appellant has given a detailed chart showing that there was partial write off. Further, I find that the Tribunal in the case of Sanghavi Engineering cited supra has held that prior to 1.3.2011, a manufacturer of final product who availed CENVAT credit on inputs was not required to reverse any part of that credit on the ground of a part of the value of inputs being written off in the books of accounts. The amendment w.e.f 1.3.2011 was not retrospective and it was prospective. Therefore, by following the ratio of Sanghi Eng. cited supra, I am of the view that the impugned order is not sustainable in law on merit as well as on limitation. Therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any."

8. From the discussions made above, and following the above decisions, I am of the considered opinion that the demand cannot sustain. Impugned order is set aside. Appeal is allowed with consequential relief, if any."

4.24 In the present case the entire demand has been made by the revenue by relying on the book of accounts taking note of the adjustment of stocks of inputs/ work in process/ finished goods as shortages, without producing any evidence of clandestine clearance of the same Further no stock taking has been independently conducted by the revenue to determine any shortages under panchanama. The demands made by the revenue just by alleging shortages justified in view of the following decisions of tribunal.

A. Pentagon Steel Pvt. Ltd. – 2013 (288) ELT 271 (T)

"8. However, we are of the view that mere shortage of finished goods or raw materials in the stock cannot by itself construed that the said goods were removed clandestinely by the assessee. The department has to adduce positive evidences of such removal of goods clandestinely demonstrating the intent to evade payment of duty."

B. Rashtriya Ispat Nigam Ltd. Vs. CCE - 2008 (9) TMI 663

"4... Therefore, in the very nature of accounting, there is bound to be difference. Unless it is shown that the appellants had cleared the goods without payment of duty in a clandestine manner, or in other words, unless there is evidence to show that there is clandestine clearance, this type of demand of duty is not sustainable.

6. On a very careful consideration of the issue, we find that the case-laws relied on by the Revenue are the cases decided by a Single Member Bench, whereas the Division Bench's decisions are in favour of the department. In any case, the longer period is clearly not invocable and since different basis are adopted for estimate the production, consumption, clearance, stock taking etc. the discrepancy between the stock taking figures and the production figures which are accounted should not immediately lead us to the conclusion that the difference has been removed clandestinely. All the case-laws decided earlier by this Bench are

clearly applicable. The longer period also is not invocable. Therefore, the duty demand cannot be sustained. The penalty imposed is also not justified. Hence, we allow the appeal with consequential relief."

C. Dalmia Cements (Bharat) Ltd. [2008 (224) ELT 484]

"9...The word "removal" has not been defined under CCR, 2004 either. In the circumstances, the above observation of the Apex Court assumes significance and has to be followed as binding ruling. Accordingly, we are of the view that all the decisions cited by Id. Counsel in support of the assessee's contention that Rule 3(5) of the CCR, 2004 would not be invocable unless there was physical removal of capital goods/inputs are in accordance with the ruling of the Apex Court."

4.25 Impugned order relies upon the Circular No. 907/27/09-CE dated 07.12.2009, for justifying the demands made by invoking the provisions of Rule 3 (5B) of CENVAT Credit Rules, 2004. Board has by the said circular clarified as follows:

"2. The matter has been examined. Rule 3(5B) of the CENVAT Credit Rules, 2004, provides that if the value of any input on which cenvat credit has been taken is written off fully in the books of accounts, then the manufacturer is required to reverse the credit taken on the said input. As far as finished goods in concerned, it is stated that excise duty is chargeable on the activity of manufacture or production. Even though liability for payment of tax has been postponed to the time of removal of goods for the factory, but still the legal liability to pay the excise duty has been fastened on the goods, when it has been manufactured or produced. Therefore, normally all goods manufactured suffer excise duty at the time of removal, but if the manufactured goods are destroyed due to natural causes etc., Rule 21 of Central Excise Rules, 2002, provides for remission of duty. Further, Rule 3(5C) of CENVAT Credit Rules, 2004, also requires reversal of credit on the inputs when the duty is ordered to be remitted under the said Rule 21. Therefore, if the goods have been manufactured, in that case, a manufacturer is liable to pay excise duty unless duty is remitted under Rule 21. Therefore, if the value of finished goods is written off, the manufacturer would be liable to pay excise duty or he

would be required to reverse the credit on the inputs used, if duty has been remitted on finished goods.

3. As regard writing off work in progress (WIP), it is stated that if the WIP has reached the stage, when it can be considered as manufactured goods, in that case, the same treatment as applicable to finished goods, discussed in para 2 above would apply. However, if the activity carried out on the WIP goods cannot be considered as amounting to manufacture, in that case, the said goods should be considered as input and the treatment for reversal of credit applicable to input would be applicable."

After taking note of this clarification in Nectar Life sciences Ltd [2013 (293) ELT 247 (T)] following has been held:

"6. The above pleas of the appellant were not accepted by the Commissioner who by referring to the provisions of Rule 3(5B) and 3(5C) as also to the Board's Circular No. 907/27/2009-CX., dated 7-12-2009, confirmed the demand of duty as proposed in the notice along with confirmation of interest and imposition of penalty of identical amount under Rule 15 of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

13. We further note that the legal issue as regards reversal of credit is well settled. If the inputs, on which the credit stand availed were issued for further manufacture of the goods and goods are destroyed during the course of manufacture of the goods, no reversal of Cenvat credit is called for. For the above proposition, reference can be made to the Tribunal's decision in the case of Commissioner of Central Excise and Customs, Pune v. Spectra Speciality [2008 (231) E.L.T. 346 (Tri.-Mum.)] as upheld by the Hon'ble Supreme Court as reported in [2009 (240) E.L.T. A77]. To the same effect is another decision of the Tribunal in the case of Commissioner of Central Excise, Chennai v. Indchem Electronics [2003 (151) E.L.T. 393 (Tri.-Chennai)] wherein it stand held that where inputs were actually issued and thereafter destroyed in fire accident, there is no requirement of reversal of Cenvat credit. The said decision also stands upheld by the Hon'ble Supreme Court, when the appeal filed by the Revenue was dismissed, as reported in 2003 (157) E.L.T. A206 (S.C.)). The list is unending and we do not feel any need to refer to all such decisions as the issue is almost settled.

14.... Whereas the Revenue is contending that it was actually the inputs which were destroyed, the appellants stand is that it was the work-in-progress, which was destroyed in the fire. The said goods were admittedly work-in-progress, in which case, no reversal of credit is justified. There is clearly no evidence on record to substantiate Revenue's allegations and findings that the destroyed goods were actually inputs, which were not issued for further manufacturing."

4.26 In SMG International [2016 (2) TMI 1037, following has been held:

"4. The Id. Counsel for the appellant submitted that initially the refund claim was rejected by the adjudicating authority on the premises that as the appellant informed the department that they are giving the figures of written off work in progress in their balance sheet and has not been finalised that they will submit the same. In view of the above, the adjudicating authority rejected their refund claim in terms of Rule 3(5B) of the Cenvat Credit Rules, 2004 read with C.B.E. & C. Circular No. 907/27/2009-CX, dated 7-12-2009. The said order was challenged before the Id. Commissioner (Appeals) who rejected the refund claim relying on the provisional Rule 3(5C) of the Cenvat Credit Rules, 2004. As the provisionally Rule 3(5C) of Cenvat Credit Rules, 2004 are not applicable. In this case, therefore, he submits that the impugned order may be set aside and appeal be allowed.

5. On the other hand, the Id. AR reiterated the finding of the impugned order and submits that the appellant have written off the credit pertains to work in progress in that way provisions of Rule 3(5B) are invoked, consequently, the appellant are not entitled to avail Cenvat credit.

6. Heard the parties considered the submissions.

7. In this case the appellant has filed the claim refund on duty paid by them on account of reversal of Cenvat credit availed on inputs which were used in work in progress/semi-finished goods. Admittedly, the inputs on which Cenvat credit was availed by the appellant were used in manufacture of final goods. Therefore, the Cenvat credit cannot be denied to the appellant, moreover,

the work in progress lost in fire. Therefore, appellant is not entitled for claim of remission of duty but the appellant cannot be asked to reverse Cenvat credit. It is a fact on record that the appellant has not written off the value of semi-finished goods/work in progress. In that circumstance, Rule 3(5B) of the CCR, 2004 is not applicable in this case."

4.27 The entire case against the appellants have been made out on the basis of their own book of accounts. There is no evidence adduced to show that the appellants had intention to evade payment of duty by undertaking the review of their account books vis a vis physical inventories at time of shifting their accounts on SAP. Once the book of accounts disclosed the facts completely then proceeding against the appellant by invoking the extended period of limitation cannot be justified, in view of the following decisions.

A. Hindalco Industries Ltd. [2003 (61) ELT 346]

"6. Further, the finding of suppression of facts against the assessee is wholly unfair, apart from being incorrect. Balance Sheets of companies is a publicly available document. Therefore, the allegation that data stated in the Balance Sheet was suppressed from Central Excise authorities is not a viable allegation. The demand has to fail on the ground of limitation itself."

B. Kirloskar Oil Engines Ltd. [2004 (178) ELT 998]

"4. In view of this position, the judgment rendered by the Northern Bench, Delhi in the matter of Hindalco Industries Ltd. (supra) is fully applicable as this demand has been raised on the basis of information appearing in the balance sheet. In this connection, I respectfully follow this judgment by the Northern Bench, Delhi in the case of Hindalco Industries Ltd. (supra). And since the balance sheet of the company being publicly available document, the allegation of suppression of such information is not sustainable. Therefore, extended period cannot be invoked under proviso to Section 11A(1) of the Act ibid."

C. Martin & Harris Laboratories Ltd. [2005 (185) ELT 421]

"5. Apart from this, the extended period of limitation for raising the demand from the years 1998-99 through a show cause

notice dated 26-8-2003 could not be invoked. There was no suppression of material facts by the appellants as the balance sheets prepared by them were publically available documents and copies of the same were sent to the Revenue also. The duty demand raised is apparently time-barred. In this view, we are fortified by the ratio of the law laid down in the case of Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T), wherein also the demand was raised on the basis of the information appearing in the balance sheet of the assessee/company after invoking the extended period of limitation. But it was ruled that extended period could not be invoked as the balance sheets were publically available document and the demand was held to be time-barred against the assessee. The case of the appellants also stands squarely covered by this ratio of the law laid down in that case."

D. Jindal Vijaynagar Steel Ltd. [2005 (192) ELT 415]

"6. Moreover, the fact of giving interest free advance to M/s. JVSL is mentioned in the Balance Sheet of the appellant company. In view of the findings of the adjudicating authority and the ratio of CEGAT's decision in Hindalco Industries Ltd. v. CCE, Allahabad - 2003 (161) E.L.T. 346 (Tri.-Del.), wherein it is held that demand raised on the basis of information appearing in Balance Sheet is not sustainable invoking the extended period as Balance Sheet of companies is a publicly available document, the longer period cannot be invoked in this case. On this ground alone, the entire demand is liable to be set aside."

4.28 In view of the above decisions we are not in position to hold that extended period of limitation as provided under Section 11 A will not be available for making this demand as the entire case in respect of denial of CENVAT Credit in respect of raw materials contained in the finished goods and raw materials contained in the finished goods and raw materials , the value of which was adjusted in the books of accounts as well as demand of excise duty in respect of finished goods, the value of which was adjusted in the books of accounts, is made out against the appellants on the basis of the own documents of the appellant, which were in the public domain. As we do not find the any justification for invocation of extended period of limitation in

respect of these demands the penalties imposed under Rule 15 (2) of CENVAT Credit Rules, 2002 read with Section 11 AC of the Central Excise act, 1944 cannot be justified in view of the decision of the Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills [2008 (238) ELT 3 (SC)] holding as follows:

"17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of

deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.”

4.28 In view of the discussions as above, we summarize our findings as follows:

- i. For the demand made in respect of the Capital Goods, for setting up the paint shop, admittedly appellants have not received any capital goods against which they have taken the credit. They have reversed the credit taken along with the interest, during the course of investigation. They have in their appeal not challenged the finding in respect of the non receipt of the capital goods, but have only challenged the penalty imposed in respect of the amount already reversed on this account, much prior to issuance of the show cause notice. The Appeal is allowed to extent of setting aside the penalty imposed which is under challenge in this appeal.
- ii. Demand made in respect of the inputs not received by the appellant in their factory premises but sent directly to the premises of the job worker, from where the goods were cleared to the customers as per Rule 10A of the Valuation Rules, 2000. In view of the precedent decisions the appeal is allowed in favour of the appellant.
- iii. Demand made alleging availment of the credit twice, is set aside as being unsubstantiated. Appeal allowed in respect of this demand.
- iv. Demand made in respect of the shortages of finished goods, is set aside in absence of any evidence of clandestine clearance of the finished goods. The appeal is allowed in respect of this demand.
- v. Demand made by invoking Rule 3 (5B) of the CENVAT Credit Rules, 2004, in respect of alleged shortages of the

inputs and work in process material is set aside following the judicial precedence. Appeal is allowed.

- vi. Demand at 'iv' and 'v' is barred by limitation as it is based on the book of accounts of the appellant.
- vii. Penalties imposed on the appellant are set aside.

5.1 Appeal allowed as indicated in para 4.28 above.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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