CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Excise Appeal No. 290 of 2008

(Arising out of Order-in-Original No. 10/PD/Th-II/2007 dated 28.11.2007 passed by the Commissioner of Central Excise, Thane-II.)

M/s. Tata Iron & Steel Co. Ltd. ....Appellant
(Presently known as M/s. Tata Steel Ltd.)
Dattapara Road,
Borivali (East),
Mumbai – 400 066

VERSUS

Commissioner of Central Excise, Thane-II ....Respondent
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai – 400 028

WITH

Excise Appeal No. 1229 of 2008

(Arising out of Order-in-Original No. 15/PD/Th-II/2008 dated 25.09.2008 passed by the Commissioner of Central Excise, Thane-II.)

M/s. Tata Iron & Steel Co. Ltd. ....Appellant
(Presently known as M/s. Tata Steel Ltd.)
Dattapara Road,
Borivali (East),
Mumbai – 400 066

VERSUS

Commissioner of Central Excise, Thane-II ....Respondent
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai – 400 028

Excise Appeal No. 938 of 2009

(Arising out of Order-in-Original No. 25/PD/Th-II/2009 dated 20.05.2009 passed by the Commissioner of Central Excise, Thane-II.)

M/s. Tata Iron & Steel Co. Ltd. ....Appellant
(Presently known as M/s. Tata Steel Ltd.)
Dattapara Road,
Borivali (East),
Mumbai – 400 066

VERSUS

Commissioner of Central Excise, Thane-II ....Respondent
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai – 400 028

AND

Excise Appeal No. 280 of 2010

(Arising out of Order-in-Original No. 15/KLG/Th-II/2009 dated 12.11.2009 passed by the Commissioner of Central Excise, Thane-II.)

M/s. Tata Steel Ltd. ....Appellant
Plot No. A-6 & F-8,
MIDC Industrial Area,
Tarapur, Boisar,
Thane – 401 506

VERSUS

Commissioner of Central Excise, Thane-II ....Respondent
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (West),
Mumbai – 400 028

APPERANCE:

Shri Shriram Shridharan, Advocate with
Shri Dev Shanmukh, Advocate for the Appellant

Shri Shambhoo Nath, Special Counsel, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 85356-85359/2024

Date of Hearing: 29.02.2024
Date of Decision: 22.03.2024

PER: DR. SUVENDU KUMAR PATI

In this second round of litigation before the Tribunal legality of the orders passed by the Commissioner in confirming demand as per

Rule 8 of the Central Excise Valuation Rules, 2000, on the basis of computation done at 110% of the cost of production of such goods at the second unit received through inter-plant transfer, is assailed in this appeal after the first order of confirmation passed by this Tribunal on 22.03.2013 was set aside by the Hon'ble High Court of Bombay with a direction to decide the issue afresh, in the light of the decision of Larger Bench of this Tribunal passed in the case of *ITC Ltd. Vs. Commissioner of Central Excise, Chennai-I* reported in *2016 (333) ELT 287 (Tri.-LB),* while keeping all contentions of the parties expressly open for consideration and decision in the *de novo* proceeding.

2. Before delving in to the fact of the case, it is necessary to put on record that three appeals are filed in the name of Tata Iron & Steel Co. Ltd., as they were being prosecuted in the Forum below and one appeal is filed by Tata Steel Ltd. It is learnt that Tata Iron & Steel Co. Ltd. is no more in existence as the same has been renamed as Tata Steel Ltd. but Appellants being reluctant to get themselves substituted from Tata Iron & Steel Co. Ltd. to Tata Steel Ltd., though their all four appeals before the Hon'ble Bombay High Court were filed in the name of Tata Steel Ltd. as revealed from the cause-title. We are of the view that in the event Appellants M/s Tata Iron & Steel Co. Ltd. not succeeding in the appeal, it should not escape the liability on the ground that order was passed against a Company which is not in existence or that it is a decree against a dead person.

3. Fact of the case, in brief, is that Appellants are manufacturer of wire rods falling under Tariff Item No. 72142090 of the Central Excise Tariff Act, 1985. Appellant Company has three units which are involved in the process of manufacturing. It received the raw materials/inputs *viz.* billets from their Jamshedpur Plant which were cleared on payment of duty on the assessable value arrived at 110% of the cost of production as per proviso to Rule, 9 read with Rule 8 of the Central Excise Valuation Rules. Appellants used those inputs in manufacture of wire rods at Tarapur (Thana) and it cleared those to its Borivali plant on payment of Central Excise duty on the value equal to 110% of cost of manufacture of wire rods. Borivali unit finally manufactures wires and clears the same on payment of duty. Appellants had taken CENVAT Credit on the duty paid on inputs and so also their Borivali unit. However, while computing the assessable value, it had taken the cost of production of Jamshedpur plant and ignored the assessable value calculated at 110% on the ground that it was inter-plant transfer on which notional profit was added, which was not to be computed to arrive at the cost of production of wire rods. Respondent-Department is of the view that assessable value on input invoices of Jamshedpur plant, which were worked out at 110% of the cost of production of inputs (billets) received from their Jamshedpur plant, is to be taken into consideration for payment of duty and accordingly, basing on audit report that observed short levy of Central Excise duty from May 2003 to December 2006, January 2007 to December 2007, January 2008 to June 2008 and July 2008 to December 2008 involving an amount of ₹5,73,58,264/-,

1,47,10,893/-, 74,60,687/- and 65,57,303/- respectively, periodic show-cause cum-demand notices were issued to the Appellants proposing duty, interest and penalty even for the extended period. Appellant failed to succeed in the adjudication process as well as before the CESTAT on this valuation issue and went on appeal to the Hon'ble High Court rising several points of law, instead of preferring appeal before the Hon'ble Supreme Court as per Section 35G(1) of the Central Excise Act 1944, where alone appeal lies in respect of issues involving valuation.

4. While the appeals of these Appellants were pending before the Hon'ble Bombay High Court, in another similar issue, arose in an appeal filed by M/s. ITC Ltd. before the Chennai Bench of this Tribunal, it was noticed that there was a precedent decision passed by Chennai Bench of this Tribunal in the case of *Eveready Industries India Ltd.* reported in *2010 (5) TMI 958 – CESTAT Chennai,* the findings of which is contrary to the findings of the Mumbai Bench Tribunal. Taking note of divergent views expressed by the Tribunal at its different Benches, matter was referred to the Hon’ble President for constitution of a Larger Bench to decide the issue and give a finding as to which of these two divergent decisions would confirm the correct possession of law? Accordingly, Larger Bench of this Tribunal was constituted and that decided the issue holding that the final decision dated 11.05.2010 passed by Chennai Division Bench of CESTAT in *Eveready Industries India Ltd.* and its subsequent judgment reported in *2011 (274) ELT 564 (Tri.-Chennai)* represent the correct position of law and not the final decision of Mumbai

Division Bench passed in respect of *Tata Iron & Steel Co. Ltd. Vs. CCE, Thane-II* reported in *2013 –TIOL-707*. On the basis of this judgment of the Larger Bench, at the instance of present Appellant, Hon'ble Bombay High Court has re-formulated the substantial question of law to give a finding as to if order dated 22.03.2013 passed by this Tribunal can be set aside and matter can be remanded back to the Tribunal for reconsideration on the ground that Larger Bench of this Tribunal has overruled in 2016 the said judgment passed by the Division Bench of this Tribunal, which was appealed against and it answered the question in the affirmative with a direction for *de novo* hearing of the appeal, in the light of Larger Bench decision and after acceptance of suggestions of learned Counsel for the Appellant that would be acceptable to the Respondent, liberty was granted to hear the appeal by expressly keeping open all contentions of the parties. A further direction was also given for disposal of this appeal preferably within a period of six months from the date of order of Hon'ble High Court is presented by the parties before the Tribunal. The order being placed before this Tribunal on 10.11.2023 by the Appellant, it is to be disposed of preferably by 09.05.2024.

5. At this juncture, it is required to be placed on record that against the referral order dated 11.02.2014 passed by Chennai Bench in ITC Ltd., Respondent-Department has preferred a Civil Appeal bearing No. 001648/2015 before Hon'ble Supreme Court of India. Again after the order of the Larger Bench of CESTAT was

passed on 12.02.2016, another Civil Appeal bearing No.009166/2016 was preferred by the Respondent-Department before the Hon'ble Supreme Court. Against order dated 28.02.2023 by which ITC Ltd. final judgment was delivered, Civil Appeal No. 000087/2024 was filed and against order of same Chennai Bench of the Tribunal passed on 16.03.2023 disposing of another appeal of ITC Ltd. filed for the subsequent period, Civil Appeal No. 889/2024 was filed before the Hon'ble Supreme Court. In submitting the above information sought orally from the parties, learned Counsel for the Appellant also made a fair submission, with reference to status report downloaded from the website of Hon'ble Supreme Court, that appeals in Civil Appeal No. 001648/2015 and Civil Appeal No. 000087/2024 were admitted by Hon'ble Supreme Court for joint hearing. It is at this point, we are required to dispose of the appeal in obedience to such direction and in acceptance of the submission made by the learned Counsel for the Appellant that in view of order passed in *Xerox India Ltd. Vs. Commissioner of Customs & Central Excise, Meerut* reported in *2017 (349) ELT 532 (All.)* of the Hon'ble Allahabad High Court that when specific direction is given to the Tribunal to decide issue on merit, it can’t wash off its hand in not giving a decision on merit. In view of the direction contained in the remand order which was apparently passed without bringing to the notice of the Hon'ble High Court about pendency of two appeals then, out of these four appeals before the Hon'ble Supreme Court, in which order for constitution of a Larger Bench and order passed by the Larger Bench overruling the order passed in Appellant’s own case were assailed but we will not desist ourselves from deciding the issue as per the direction of the Hon'ble Bombay High Court despite the fact that in the relied upon judgment of Hon'ble Allahabad High Court, hearing of the appeal was deferred as some other appeal on the issue involved therein was pending before the Hon'ble Supreme Court. It is in this background the appeals are heard from both the sides at length and taken up for orders.

6. Learned Counsel for the Appellant Shri Shriram Shridharan submitted that issue has been settled by the Larger Bench in their favour and there is a direction from the Hon'ble Bombay High Court to dispose of these appeals in the light of the decision passed by the Larger Bench in *M/s ITC ltd.* case cited (*Supra*). He has also taken us to para 17 & para 20 of the Larger Bench decision passed on 12.02.2016, wherein the Larger Bench had observed that the Division Bench of this Tribunal fell into a clear analytical error and ultimately concluded that the decision of this Tribunal passed in Appellant's case, reported in *2013 TIOL 707* does not represent the correct view regarding application of Rule 8 of the Valuation Rules and noted that previous order passed in *Commissioner of Central Excise, Chennai Vs. Eveready Industries* reported in *2011 (274) E.L.T. 564 (Tri.-Chennai)* represents the correct position of law for which these four appeals of this Appellant may be decided in confirmity to the Larger Bench findings, as has been directed by Hon'ble Bombay High Court.

7. *Per contra*, Learned Special Counsel for the Respondent-Department Mr. Shamboo Nath submitted that decision of this Tribunal was based on an analysis of the provision existing prior to amendment made to the Central Excise Act with effect from 01.07.2000 in respect of Section 4 and its amendment provision *vis.a vis.* Rule 6 of the Central Excise Valuation Rules, 1975 that was in force till Central Excise Valuation (determination of price of excisable goods), Rules 2000 was brought in and it was compared with the existing Rule 8, interpretation of which has resulted in passing of divergent opinions by two Division Benches of this Tribunal. He further submitted that the core point that "material consumed" includes cost of material, duties and taxes etc. was being ignored by the Division Bench at Chennai while passing the order in Eveready Industries India Ltd. and also by the Larger Bench. Taking duties and taxes, even ignoring freight and insurance etc., if cost of the Appellant-Company located under Tarapur, Thane District is to be calculated on the basis of Cost Accounting Standard prescribed by ICWAI *viz* CAS-4 certificate as per circular issued by Department on 13.02.2003 *vide* No. 692/8/2003-CX, it should include the duties paid by its Unit at Jamshedpur and therefore, distinction made between value and cost for the second Unit as well as the justification given in the order that Notional Profit is added only for the purpose of taxation and not to be included in cost would be of no consequence for the second Unit at Tarapur Thane, since landing cost of its input includes tax component of the raw material and therefore, a thread bore analysis of the provision and applicability of

the Larger Bench decision to the Appellant's case is required to be made as liberty has been granted by the Hon'ble Bombay High Court for a *de novo* hearing and passing of order after taking into consideration all contentions of the parties and keeping the same expressly open for discussion.

8. We have gone through the case record, relied upon judgments, provision of law and the written note of submissions filed by the parties. At the outset we must say that at the behest of Appellant, as could be revealed from para 10 of the Remand order passed by the Hon'ble Bombay High Court, direction for keeping all contentions of the parties expressly open has been given by the Hon'ble Court and taking advantage of the said direction we would like to analyse the gist of the judgment passed in *Eveready Industries India Ltd*. case and in Appellant's case that was earlier disposed of in 2014 against the Appellant but subsequently set aside by the Hon'ble Bombay High Court to enable this Tribunal to pass the decision in the light of the Larger Bench observations.

9. Now coming to the first case on the issue namely Eveready Industries India Ltd. that was disposed of by the Division Bench of Chennai on 11.05.2010, it is observed that the period involved in the said appeal was 2001-2002 and by following Department of Revenue Circular dated 13.02.2003 issued vide Circular No. 692/8/2003-CX, (without any retrospectively expressly attached to it), in which cost of production for the purpose of arriving the assessable value of the

goods captively consumed was to be computed in accordance to CAS-4 has been prescribed and basing on the certificate issued by the Cost Auditor of the Company to that respect, it was held that cost of material should not be the assessable value while acknowledging that in the case of *Union Carbide of India ltd. vs Collector of Central Excise, Calcutta* reported in *2003 (158) E.L.T. 15 (SC)* it was held that cost of production would be actual cost of production together with Notional Profit but in para 3 of the said order a contrary finding is available, the relevant portion of which is quoted here under

> *"… The corporate overheads and notional deemed profit taken into account for the limited purpose of computing the assessable value for payment of duty at Navi Mumbai Plant <u>is not to be taken into account</u> while working out the cost of production at National Carbon Plant<u>.</u> …"*
>
> *(Underlined to emphasise)*

9.1 With due respect to the observations made by the Hon'ble Division Bench, we are constrained to observe that the said observation that corporate overheads and notional deemed profit should not be taken into account while working out the cost of production is not based on any Circular Order or precedent decision even after adopting the method prescribed in Circular dated 13.02.2003 meant for the post-period that such computation is to be made in accordance with CAS-4 that defines "material consumed", i.e. its cost of raw material and duties etc. On the basis of same reasoning the Division Bench of Tribunal at Chennai also passed another order in respect of same *Commissioner of Central Excise,* *Chennai Vs. Eveready Industries India Ltd.* as reported in *2011 (274) E.L.T 564 (Tri.-Chennai).*

10. Order in respect of these appeals was passed on 22.03.2013. As could be seen from the said order, reference to Eveready Industries India Ltd. order is missing and it is acknowledged by the larger Bench in its finding at para 15 that neither Revenue nor the Assesse had brought the rulings of *Eveready Industries India Ltd.* passed by the co-ordinate Bench at Chennai to the knowledge of the Mumbai Bench and if such decision was brought to the knowledge of Mumbai Bench, it would have taken an appropriate decision in following the same or referring the issue to the Larger Bench. Therefore, without being influenced by the decision of the Chennai Bench, by way of its acceptance or rejection, Mumbai Division Bench had rendered its decision on the basis of provision of Law and other materials placed before it. The sum and substance of this order would go to say that for the period involved in these appeals namely from May 2003 to December 2008 Circular dated 13.02.2003 issued for the purpose of determination of cost of production to meet the requirement of Rule 8 was applicable and the said Circular clearly states that CAS-4 issued by ICWAI would be taken for the purpose of determination of cost and CAS-4 has clearly stated that cost of "material consumed" shall be the cost of material, duties and taxes, freight inwards, insurances and other expenses directly attributable to the procurement and therefore, Appellant's contentions that cost of billets for Tarapur Unit (Thane) is the cost of billets determined by

the Jamshedpur factory without addition of 10% is untenable for the reason that Rule 8 does not state about additional or notational profit at 15/10% but it states that the value in case of Inter-plant transfer would be 110% of the cost of production or manufacture of such goods and in making a comparison between Rule 6(b)(ii) of the Valuation Rules, 1975 with Rule 8 of the Valuation Rules, 2000, the Division Bench had arrived at the conclusion that notional profit, which was envisaged in the old Rule, is no more available in the present Rule 8 for which definition of cost in CAS-4 as contained in Para 5.1 would determine the cost of material received at Tarapur unit and as per Rule 8 it would be 115/110% of the cost of production of Billets and not cost of raw material consumed for manufacturing of Billets. Further, justification is given in the same order as to non-acceptance of Revenue neutrality situation since it would result in loss of interest accrued in favour of the Government of India payable on duties post clearance of goods and also non-acceptance of Appellant's plea against invocation of extended period.

11. The Larger Bench of this Tribunal took note of the findings of both the orders and proceeded with individual analysis of the provision of law and it's application on payment of duties *vis-a-vis* valuation of goods in case of inter-plant transfer that was not amounting to sale. We would be failing in our duty in not reproducing the reasonings given in the said judgments, which is vividly reflected in para 4.3 to para 11 of the said order -

*"**4.3** Section 4 of the Act sets out principles of valuation of excisable goods for the purpose of charging duty of excise. Section 4 of the Act, to the extent relevant and material, reads as under :-*
(I) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.
Since the supply of raw materials by the Bhadrachalam unit to the Chennai unit does not amount to a sale, since both units ate under the same assessee/corporate entity - M/s. ITC Ltd., Section 4(1)(a) has no application. Clause (b) of the said provision enacts that the value in such circumstances shall be determined in such manner as may be prescribed. The relevant prescription is set out in the Valuation Rules, 2000 (relevant for the period under dispute). Rule 2(c) of these rules defines "value" as meaning the value referred to in Section 4 of the Act. Chapter II of the Valuation Rules sets out principle for determination of value. Rule (3) therein enacts that the value of any excisable goods shall, for the purpose of clause (b) of sub-section (1) of Section 4 of the Act, be determined in accordance with these rules. Parties are agreed that the only and appropriate rule applicable in the facts and circumstances of the case is Rule 8. Since the conflict is on the interpretation of Rule 8, we extract Rule 8 of the Valuation Rules :

Rule 8. -
Where the excisable goods are not sold by the assesse but are used for consumption by him or on his behalf in the production or manufacture of other articles, <u>the value shall be one hundred and ten per cent (one hundred and fifteen percent, upto 4-8-2003), of the cost of production or manufacture of such goods</u>

5. *Board Circular No. 692/08/2003-CX, dated 13-2-2003 issued clarification on the valuation of goods captively consumed. This clarification noticed that ICWAI, subsequent to its previous circular dated 30-6-2000, had developed Cost Accounting Standards (CAS) Nos. 2, 3 and 4 of capacity determination, overheads and cost of production for captive consumption respectively. The Board's Circular dated 13-2-2003 therefore clarified that cost of production of captively consumed goods will hence forth be done strictly in accordance with CAS-4.*

6. *CAS-4 sets out Cost Accounting Standards for the cost of production for captive consumption. To the extent relevant and material for the purposes of our primary analysis of the scope of Rule 8 of the Valuation Rules and in the context of the Board Circular (supra), suffice it to note that CAS-4 was developed to bring about uniformity in principles and methods used for determining the cost of production of excisable goods used for captive consumption and the standards and the disclosure requirements set out therein facilitate better transparency in the valuation of excisable goods used for captive consumption. Paragraph 3.2 of CAS-4 provides that the cost of production will include various cost components which stand defined in CAS-1 and that CAS-4 standard must be read in conjunction with CAS-1 Standard. Para 4.1 defines "cost of production" as consisting inter alia of "material consumed". Para 4.2 defines "captive consumption" as consumption of goods manufactured by one division or unit and consumed by another division or unit of the same organization or related undertaking for manufacturing other products. Para 5.1 defines "material consumed" to include (d) "self-manufactured items". The Explanation under paragraph 5.1 states that cost of material consumed shall consist inter alia, the cost of material. Deductions authorized while computing the cost of material consumed is also set out, particulars of which are not necessary for the purposes of our analysis herein.*

7. *The dear intendment underlying indication of the method of computing value of the material consumed as elucidated in para 5.1 is for the purpose of computing the cost incurred in the manufacture of goods by the unit captively consuming the produce of its other unit. Para-6 of*

<u>CAS-4 requires preparation of a cost sheet in the format set out in Appendix-I or as nearly thereto as possible.</u> For facilitating preparation and verification of the cost of production, Appendix-I is the format mandated by this standard to set out the statement of cost of production of goods employing captively consumed goods. <u>Chapter III of CAS-4 in which the paragraph 5.1 occurs sets out principles for determination of cost of production for captive consumption and indicates that the consumed material shall included a range of materials as indicated in para 5.1 including "self-manufactured items".</u> The principles for valuation of self-manufactured items is also distinctly specified in Chapter III. We set out this principle :-

Self-manufactured Items :
These will include any goods manufactured with raw material, indigenous or imported bought out material etc. by the manufacturer in the same factory for further use is manufacture of final product. For this purpose, the cost of production of such self-manufactured items shall be considered as material cost for the subsequent product <u>after considering inward freight, octroi, etc., as applicable.</u> Intermediate products/goods transferred <u>by another unit of the same manufacturer etc. shall be based on cost of production as per CAS-4.</u>

8. *Since Bhadrachalam unit of ITC Ltd. was not selling the raw material but was captively consuming these goods at its Chennai unit, Section 4(1)(b) of the Act and Rule 8 of the Valuation Rules becomes applicable, as already considered. In view of mandate of Rule 8, Bhadrachalam unit was remitting excise duty at the time of clearance of such raw material, at 115%/110% of the cost of production of such raw material. Until 4-8-2003, Rule 8 required value of such goods to be reckoned as 115% of the cost of production and since 5-8-2003 at 110% of such cost for remittance of excise duty. The Bhadrachalam unit was remitting excise duty accordingly and undisputedly.*

9. *The issue is whether the cost of production of the goods - the packaging material that is manufactured by the Chennai unit of the appellant should be computed at 115%/110% of the cost of production/manufacture of the raw material procured from its Bhadrachalam Unit or at the* *actual cost of such raw material since there was only a stock transfer and not a sale of these goods by the Bhadrachalam Unit to the Chennai unit.*

9.1 *The answer to the issue turns upon interpretation of Rule 8, in particular on the expression "cost of production of manufacture of such goods", in the said Rule.*

10. *On facts, invoices were raised by Bhadrachalam unit reflecting the total cost of raw materials stock transferred to the Chennai unit at 115%/110% of the cost of production of the Bhadrachalam unit i.e. at value on which excise duty was remitted. To comply with AS-17 Standards, the Chennai unit reckoned the value of the raw material procured from its Bhadrachalam unit at the value reflected in the invoices raised by the transferor unit. The Chennai unit also raised Intra-Division Service Charges (IDSC) and Intra-Corporate Notional Charge (ICNC) on the differential value between the value reflected in the invoices raised by Bhadrachalam unit and the value 'at which Bhadrachalam unit was selling such raw material to third parties. This was again for compliance with AS-17 standards. Revenue's endeavour to compute the cost of the raw material on the basis of the IDSC/ICNC values was negated by this Tribunal in its ruling on issue No. (a) and for the reasons recorded therefor in the order dated 11-2-2014.*

11. *It is pertinent to consider that Rule 8 of the Valuation Rules stipulates that in the case of captive consumption the value shall be determined at the rate of 110% of the costs of production or manufacture of such goods. The Board's Circular dated 13-2-2003, spelt out that the cost of production should be computed as per CAS-4 formula. By careful reading of the para 5.1 of CAS-4 read with para 4.1 of CAS-1 and the guidelines note, the appellant's case falls under the category 5.1 (d) of CAS-4. (self-manufactured items) as extracted above."*

(Underlined to emphasise)

12. If this was the observation then Division Bench of the Bombay Tribunal was right in taking 110% of the value of goods of

Jamshedpur Unit as the cost of raw material (Billets) received at Tarapur Unit, against which they had also availed CENVAT Credit but in further analysis the issue under Para 12 to 14, the Larger Bench had given an altogether divergent observation in respect of the order passed by the Division Bench of this Mumbai Tribunal in Appellant's case and ultimately observed that the said order is not giving the correct position of law. The reasoning cited in the said order emanates from the fact that it was observed by the Larger Bench that in *Union Carbide of India ltd. vs Collector of Central Excise, Calcutta* reported in *2003 (158) E.L.T. 15 (SC)*, Hon'ble Supreme Court had laid down ratio that for the purpose of computing the cost of production, Rule 6 of the Valuation Rules is squarely applicable to the cases of inter-plant transfer for determination of cost of production under Rule 8, where goods are not sold but are captively consumed by the Appellant and the interpretation made to distinguish cost and price in the case of *Challapalli Sugar Vs. Commissioner of Income Tax* by the Hon'ble Supreme Court was also considered to arrive at the conclusion that cost of raw material at Jamshedpur would also remain as cost of material consumed at Tarapur, by removing the notional profit. It is however worth mentioning, here that no finding is available in those two judgments that Rule 6 of Valuation Rules, as existing then was similar to Rule 8 of the Valuation Rules, 2000. In this connection it would be appropriate to reproduce the finding of the Division Bench of Mumbai making a distinction between both the provisions and offering reasoning and to why *Union Carbide of India ltd.* decision would not be applicable in the existing case. The relevant portion of the said judgment made in para 13 is reproduced below.

> *"…Therefore, the cost of billets at Tarapur unit would be 115/110% of the cost of production of billets. So far as the Hon'ble Supreme Court's decision in the case of Union Carbide (supra) is concerned, the decision relates to Rule 6(b)(ii) of the erstwhile Central Excise Valuation Rules, 1975, which is reproduced below :-*
> *"(ii) if the value cannot be determined under sub-clause (i), on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods."*
> *Rule 6(b)(ii) envisages inclusion of notional profit which is not relevant to this case which is covered under Rule 8 of the Valuation Rules, 2000 and the provisions of Rule 6(b)(ii) are not similar to the provisions of Rule 8 of the Valuation Rules as claimed by the appellants. Similarly, the Tribunal's decision in the case of Rajasthan Spinning & Weaving Mills v. CCE (supra) cited by the appellants, relates to Rule 6(b)(ii). Similarly, the Hon'ble Supreme Court's decision in the case of HBL Aircraft Batteries v. CCE (supra) relates to valuation relating to contract prices in case of different class of buyers and is not relevant to this case. In the case of Hindustan Polymers v. CCE (supra), the question before the Hon'ble Supreme Court was regarding deduction of packing cost while determining the value and hence the case law is not relevant to the present case.*
> ***6.2*** *As already discussed above, the value of goods cleared for captive consumption would be 115/110% of the cost of production or manufacture of such goods and as per the Board circular dated 13-2-2003, the cost of production of captively consumed goods will have to be construed strictly in accordance with CAS-4. The relevant portion of CAS-4 is reproduced hereunder :-*
> *"5.1 Material consumed*
> *<u>Material consumed shall include materials </u>directly identified for production of goods such as :*
> *(a) indigenous materials*
> *(b) imported materials*
> *(c) bought out items*
> *(d) self-manufactured items*
> *(e) process materials and other items*

> *Cost of material consumed shall consist of cost of material, duties and taxes, freight inwards, insurance, and other expenditure directly attributable to procurement. Trade discount, rebates and other similar items will be deducted for determining the cost of materials. Cenvat credit, credit for countervailing customs duty, sales tax set off, VAT, duty drawback and other similar duties subsequently recovered/recoverable by the enterprise shall also be deducted".*
> *Thus cost at Tarapur unit as per Rule 8 would be 115%/110% of the cost of production of billets and not the cost of raw material consumed for the manufacture of billets…"*
>
> *(Underlined to emphasise)*

13. Having regard to the finding of the Division Bench of Mumbai and the Larger Bench on the issue that conformed the judgment of Eveready Industries India ltd, we would be at loss to go with the finding of the Larger Bench though rule of precedent would dictate adherence to the decision of the majority but when the same would provide a *ratio* for its acceptance. In the instant case reasoning and the findings seem to be contradictory to each other and it would be difficult to accept the same even as an *obiter*. It would be, worthwhile, to quote Lord Denning to justify the reason of not following the decision of the Larger Bench, which is not even contrary to the direction of the Hon'ble Bombay High Court granting us liberty to take into consideration all contentions and decide the case in the light of Larger Bench decision (Not necessary following it as a binding precedent) apparently for the reason that the same was appealed before the Hon'ble Apex Court.

14. Lord Denning (In CHO 2008:16) once said

> *"All that I am against is too rigid application, a rigidity which insists that a bad precedent must necessarily be followed." In addition, he stated that "an erroneous decision on a point of law can again be perpetuated forever." (Denning, 1979:299)."*

14.1 Further he had also criticized the binding effect of such precedent in the following words

> *"Lord Denning (in Cho, 2008) criticized the binding effects of such precedents, suggesting that on occasion they may result in the prevention of justice. The rigidity of the law in these instances, the complexity of precedent, and a slowness to respond to technological, economic and social changes, should also be discussed when considering the disadvantages associated with this notion of precedent (Bankowski et al, 1997)."*

14.2. Observation of Indian Judiciary in no exception to it. Hon'ble Supreme Court in the case of *Maktul vs. Manbhari,* reported in *AIR 1958 SC 918, also had observed,*

> *"… Previous decisions should not be followed to the extent that grievous wrong may result; and accordingly the courts ordinarily will not adhere to a rule or principle established by previous decisions(s) which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure there from in any case, but its application must be determined in each case by the discretion of the court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result…"*

15. Taking spirit of the above statement of Lord Denning made in respect of the rule of precedent and in obedience to the decision of Hon'ble Supreme Court referred above, we are of the considered

view that deciding these appeals on the basis of the finding of the Larger Bench, that has accepted the reasoning of the Division Bench of Mumbai on point of law but departed to give a contrary finding on the basis of apparently erroneous observation of the decision of the Hon'ble Supreme Court passed in connection with the erstwhile provision contained in Valuation Rules, 1975 existing prior to the relevant period would cause further hardship to the parties. Normal practice and Judicial discipline require a Division Bench to follow the Larger bench or refer the matter in appropriate case to the Larger Bench to take a decision for constitution of a Larger Bench comprising of more members than presently decided the issue but in the present factual scenario when Hon’ble Bombay High Court has permitted this Tribunal to go into all contentions raised by the parties to find out applicability of the Larger Bench decisions to the Appellant’s case and pass order in the light of the said decisions and having regard to the fact that the Larger Bench decision has not yet attained finality, in view of admission of appeal preferred against the said decisions before the Hon'ble Supreme Court together with the direction of Hon’ble Bombay High Court to dispose of the appeal within 6 months which may not be possible if this matter is further referred to a still Larger Bench by an Interim Order of the Tribunal that would also be contrary to the direction of Hon’ble Allahabad High Court passed in *Xerox India Ltd*. cited *Supra*, we are of the collective conclusion that it would not be a breach of judicial propriety to give a finding that Appellant is liable to pay the duty, interest and penalty as demanded in the Show-cause notice that was also confirmed by this Tribunal vide its earlier order dated 22.03.2013, hence the order.

THE ORDER

16. The appeals are dismissed and the order passed by the Commissioner of Central Excise, Thane-II *vide* Order-in-Original No. 10/PD/Th-II/2007 dated 28.11.2007, Order-in-Original No. 15/PD/Th-II/2008 dated 25.09.2008, Order-in-Original No. 25/PD/Th-II/2009 dated 20.05.2009 and Order-in-Original No. 15/KLG/Th-II/2009 dated 12.11.2009 are hereby conformed.

(Order pronounced in the open court on 22.03.2024)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

Prasad/Kajal