::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
क	**V2/ 63/RAJ/2019**	**AC/JAM-I/C.Ex/19/2018-19**	**29-03-2019**

ख अपील आदेश संख्या(Order-In-Appeal No.):

RAJ-EXCUS-000-APP-056-2020

आदेश का दिनांक / Date of Order:	**27.04.2020**	जारी करने की तारीख / Date of issue:	**27.04.2020**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants** & Respondent :-

M/s Rajhans Metal Pvt Ltd, Plot no. 21/3, GIDC, Shankar Tekri, Jamnagar-361140.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार कोपुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s Rajhans Metals Pvt Ltd, Plot No. 21/3, GIDC, Shankar Tekri, Jamnagar- 361 004 (hereinafter referred to as "**appellant**") filed the present appeals against Order-In-Original No. AC/JAM-I/C.EX/19/2018-19 dated 29.03.2019 (hereinafter referred to as **"impugned order"**) passed by the Assistant Commissioner, CGST & Central Excise, Division-I Jamnagar (hereinafter referred to as "**the adjudicating authority**").

2. The brief facts of the case are that during CERA audit of the records of the Appellant, it was noticed that the Appellant was selling their finished goods viz. Brass Billets/Ingots, Copper Alloys wire others (Brass wire less than 6mm dia) etc. at huge loss on manufacturing activities for more than four years; that the percentage of loss to the net worth of the company in the year 2013-14 was to the extent of 30.09% and due to continuous loss of the company, the net worth of the company was getting reduced every year resulting in reduction of capital of the company. It appeared that the Appellant was selling their finished excisable below manufacturing cost deliberately. A Show Cause Notice dated 04.04.2018 covering the period from F.Y. 2012-13 to 2015-16 was issued to the Appellant demanding differential Central Excise duty amounting to Rs. 66,055/- alleging undervaluation of excisable goods alongwith recovery of interest and imposition of penalty.

2.1 The above Show Cause Notice was adjudicated by the adjudicating authority vide impugned order wherein he confirmed the demand of Central Excise duty of Rs. 66,055/- under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as 'Act') alongwith interest under Section 11AA and imposed penalty of Rs. Rs. 66,055/- under Section 11AC of the Act.

3. Being aggrieved with the impugned order, appellant preferred the present appeal, *inter-alia,* on the various grounds as under:

(i) that they had submitted reply dated 01.05.2018 to the Show Cause Notice dated 04.04.2018 that they had not cleared finished goods below manufacturing cost. That adjudicating authority neither considered the said submission nor gave any findings thereon.

(ii) that impugned order resorting to valuation of goods at 110% of cost of production is without authority of law.

(iii) that appellant had not sold their finished goods namely brass billets/ ingots and brass wire below the 'cost of production' and for the same appellant submitted details year wise, in tabular form citing cost per kg as per CAS-4, quantity cleared

per kg, duty paid , declared assessable value per kg. that Department has calculated duty payable taking into consideration assessable value as 110% of cost of manufacture without verifying the fact.

(iv) that impugned order is untenable in law in view of amendment to Rule 6 of the Central Excise Valuation Rules 2000. That there is no allegation in the notice dated 04.04.2018 or in the impugned order, let alone any evidence, that there is any additional consideration flowing directly or indirectly from buyer of the goods to the appellant. That departmental allegation, that the losses incurred by the appellant are nothing but extra commercial consideration flowing indirectly to the appellant over and above the 'transaction value' indicated on the sales invoices and therefore, the same is includable in the assessable value, is untenable in law since the term 'consideration' appearing in Section 4(1)(a) of the Act, is nothing but only monetary consideration flowing from the buyer to the seller.

(v) that impugned order based on the decision of Supreme Court in the case of FIAT, is untenable in law since the facts of the present case are completely different to the FIAT case.

(vi) that applicability of the FIAT decision was clarified vide CBEC Circular No. 979/03/2014-CX dated 15.01.2014, wherein the board has clarified that the FIAT decision doesn't automatically apply to every case where the manufacturing cost is higher than the transaction value at the time of sale of goods. That board has clarified that the applicability of the FIAT decision has to be decided on a case-to-case basis by the Department and with utmost diligence.

(vii) that they have declared the correct assessable value in their ER-1 returns and hence the demand beyond the normal period of limitation is not maintainable since none of the ingredients for invoking extended period of limitation under Section 11A(4) of the Central Excise Act, 1944 are present in this case.

(viii) that confirming of recovery of interest and imposing penalty are unsustainable in law, since the demand of recovery of differential duty itself is unsustainable in law both on merits and limitation.

4. The appellant was given 4 (four) opportunities of personal hearing on 27.09.2019, 05.11.2019,17.12.2019 & 03.01.2020. However, no one appeared for hearing on any of these dates. Since the appeal cannot be kept pending indefinitely, I take the instant appeal for decision on the basis of records available before me.

5. I have carefully gone through the facts of the case, impugned order and the grounds of appeal memorandum. The issue to be decided in the present appeal is whether the impugned order confirming central excise duty of Rs. 66,055/- alongwith interest and imposing equal penalty is correct, legal and proper or

otherwise.

6. I find that the period involved in the demand is from F.Y. 2012-13 to 2015-16. I find that CERA Audit, had noticed that contrary to the accepted business practices, the appellant was selling their finished goods at a huge loss on manufacturing activities and the said practice was continuing for more than four years at a stretch. That it was also noticed by the CERA audit that percentage of loss to the net worth of the company in the year 2013-14 was to the extent of 30.09%. That due to continuous loss to the company, the net worth of the company was getting reduced year after year resulting in reduction of capital of the company. That it appeared that appellant was selling their finished excisable goods at a value below cost of manufacturing continuously for many years deliberately and were incurring loss in their Books of Accounts. I find that if appellant had any objection against the findings of the adjudicating authority regarding incurring loss in their books of accounts, they should have produced their books of accounts, balance sheets etc., to counter the said findings before adjudicating authority, but this has not been done.

7. I find that from the scrutiny of the Books of Accounts, it was found by the CERA audit that the Director's note on 'Operations', forming part of the Annual Report for the F.Y. 2011-12 to 2013-14 kept on declaring every year that the prices of non-ferrous scarp remained highly volatile throughout the year and company was not able to pass on full impact of price increase due to stiff resistance from buyers. I find that since the appellant had cleared their finished goods below manufacturing cost continuously for a long period to penetrate market, the price was not the sole consideration for sale of goods. Therefore, transaction value of the finished goods i.e. Brass billets/ ingots, Copper Alloys wire others (Brass wire less than 6mm dia) etc, cleared by the appellant during the period from F.Y. 2012-13 to 2015-16 required to be rejected and the transaction value liable to ascertained by invoking provisions of Section 4(1)(b) of the Central Excise Act, 1944 (hereinafter referred to as **'the Act'**) .

7.1 For better understating the issue, I would like to reproduce the Section 4 of the Act.

SECTION [4. Valuation of excisable goods for purposes of charging of duty of excise. — (1) 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.

[***Explanation***. — For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) .....

8. I find that since the appellant had cleared their finished goods below manufacturing cost continuously for a long period to penetrate market, hence price was not the sole consideration for sale of goods. Therefore, I agree with the findings of the adjudicating authority that transaction value of the finished goods cleared by the appellant is required to be ascertained by invoking provisions of Section 4(1)(b) of the Central Excise Act, 1944.

8.1 My views are supported by the Hon'ble Supreme Court judgment in the case of **M/s Fiat India Pvt Ltd, reported at 2012 (283) E.L.T. 161 (S.C.)** where, *inter alia,* it has been held that;

43. What can be construed from the plain reading of Section 4 of the Act and the interpretation that is given by this Court on the expression 'normal value' is, where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. Normal price, therefore, is the amount paid by the buyer for the purchase of goods. In the present case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over for nearly five years and the consideration being only to penetrate the market and compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. The existence of extra commercial consideration while fixing the price would not be the 'normal price' as observed by this Court in *Xerographic Ltd.'s* case (supra). If price is the sole consideration for the sale of goods and if there is no other consideration except the price for the sale of goods, then only provisions of Section 4(1)(a) of the Act can be applied. In fact, in *Metal Box's* case (supra) this Court has stated that under sub-Section (1)(a) of Section 4 of the Act, the 'normal price' would be the price which must be the sole consideration for the sale of goods and there cannot be any other consideration except the price for the sale of goods and it is only under such situation Sub-Section (1)(a) of Section 4 would come into play. In the show cause notices issued, the Revenue doubts the normal price of the wholesale trade of the assessees. They specifically allege, which is not disputed by the assessees, that the 'loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. It is true that in notices issued, the Revenue does not allege that the buyer is a related person, nor do they allege element of flow back directly from the buyer to the seller, but certainly, they allege that the price was not the sole consideration and the circumstance that no prudent businessman would continuously suffer huge loss only to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. This court in the case of *Union of India* v. *Hindalco Industries* - 2003 (153) E.L.T. 481, has observed that, 'if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of

sub-section (1) of Section 4 of the Act could be made'. That the price is not the normal price, is established from the following three circumstances which the assessees themselves have admitted; that the price of the cars was not based on the manufacturing cost and manufacturing profit, but have fixed at a lower price to penetrate the market; though the normal price for their cars is higher, they are selling the cars at a lower price to compete with the other manufacturers of similar cars. This is certainly a factor in depressing the sale price to an artificial level; and, lastly, the full commercial cost of manufacturing and selling the cars was not reflected in the lower price. Therefore, merely because the assessee has not sold the cars to the related person and the element of flow back directly from the buyer to the seller is not the allegation in the show cause notices issued, the price at which the assessees had sold its goods to the whole sale trader cannot be accepted as 'normal price' for the sale of cars.

.....

.....

50. ..... In our view, for the purpose of Section 4(1)(a) all that has to be seen is : does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price under Section 4(1)(a) of the Act. This is the price which has been charged by the manufacturer from the wholesale purchaser or sole distributor. What has to be seen is that the sale made at arms length and in the usual course of business, if it is not made at arms length or in the usual course of business, then that will not be real value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the section. This Court in *Raj Kumar Knitting Mills* case (supra), while construing the said expression, has held that the word 'ordinarily sold' do not refer to contract between the supplier and the importer, but, the prevailing price in the market on the date of importation and exportation. Excise duty is leviable on the value of goods as manufactured. That takes into account manufacturing cost and manufacturing profit.

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

(Emphasis supplied)

Further, as held by Hon'ble Supreme court in the above referred case, at Para 61,

61. ***After amendment of Section 4 :-*** Section 4 lays down that the valuation of excisable goods chargeable to duty of excises on a*d-valorem* would be based upon the concept of transaction value for levy of duty. 'Transaction value' means the price actually paid or payable for the goods, when sold, and includes any amount that the buyer is liable to pay to the assessee in connection with the sale, whether payable at the time of sale or at any other time, including any amount charged for, or to make provisions for advertising or publicity, marketing and selling, and storage etc., but does not include duty of excise, sales tax, or any other taxes, if any, actually paid or payable on such goods. Therefore, each removal is a different transaction and duty is charged on the value of each transaction. The new Section 4, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 ('the Rules 2000' for short) which is also made effective from 1st July, 2000. Since the price is not the sole

consideration for the period even after 1st July, 2000, in our view, the assessing authority was justified in invoking provisions of the Rules 2000.

9. I find that valuation of the goods for charging excise duty, has to be ascertained by following the provisions of Valuation Rules (issued vide Notification No. 45/2000-C.E. (N.T.) dated 30.06.2020 wherein relevant rules for the purpose of present matter reads as under:

Rule 3. The value of any excisable goods shall, for the purposes of clause (b) of sub-section (1) of section 4 of the Act, be determined in accordance with these rules.

9.1 I find that Rule 6 and Rule 11 of the valuation rules is applicable in the present case. The said Rules are reproduced as under;

Rule 6. *Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.*

Explanation. - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely : -

(i) value of materials, components, parts and similar items relatable to such goods;

(ii) value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(iii) value of material consumed, including packaging materials, in the production of such goods;

(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

(Emphasis supplied)

Rule 11.

If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act.

10. Therefore, I find that extra consideration in this case is the purpose of 'penetration to market' and the appropriate way to ascertain the money value of such extra consideration flowing indirectly from buyer to the appellant is that the assessable value in this case should be worked out by adding 10% of profit margin to the manufacturing cost (i.e. total 110% of the manufacturing cost). I therefore, hold that the assessable value for payment of central excise duty is rightly determined under Section 4(1)(b) of the Act read with Rule 6 and Rule 11 of the Central Excise (Determination of price of excisable goods) valuation Rules 2000.

11. I find that appellant has argued that the impugned order based on the decision of Supreme Court in the case of FIAT is untenable is law, since the facts of the present case are completely different from the FIAT case. Further, appellant has also referred the Board's Circular No. 979/03/2014-CX, dated 15.01.2014 to support their contention.

11.1 In this regard, I find that decision in the case of M/s FIAT India Ltd, has been issued by Hon'ble Supreme Court in respect of valuation of excisable goods sold by the manufacturer at a price below manufacturing cost continuously for a long period with an intention to penetrate market. The facts of the said case and the facts of the present case are similar in as much as the appellant had sold their finished goods viz. Brass billets/ ingots, Copper Alloys wire others (Brass wire less than 6mm dia) etc., below manufacturing cost continuously for four years admittedly to penetrate market and to compete with other manufacturers of similar goods. Hence, I find that the facts of the present case and that of FIAT India Ltd case are similar and therefore, ratio of the findings of the decision in FIAT India Ltd case is squarely applicable in the present case.

11.2 Further, as far as Board's Circular No. 979/03/2014-CX, dated 15.01.2014 is concerned, I find that Board has clarify the issue pertaining to implementation of Hon'ble Supreme Court's decision in the case of M/s FIAT India Ltd,

Relevant Para 2.1 of the said circular is reproduced as under;

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

11.3 I find that in the instant case, appellant was continuously selling their finished goods at a price which is below manufacturing cost for more than four years to penetrate market and no such circumstances has been clarified by the Board vide Circular dated 15.01.2014. Therefore, I find that plea of the appellant on this count does not hold good.

12. I find that appellant has contended that they have not sold their finished goods below the manufacturing cost and that the CAS-4 certificate shows the average rate charged by them during the entire financial year and that they have charged prices which are higher than manufacturing cost.

12.1 In this regard, I find that the demand has been worked out by adding 10% profit margin to the cost of production as per the CAS-4 certificate issued by a Cost Accountant appointed by the appellant. I further find that all the companies

are required to maintain their accounts as per prescribed accounting methods, and the CAS-4 has been issued as per international accepted method of accounting. Further, appellant had consistently sold their finished goods at a price which was less than their manufacturing cost, this fact has also been accepted by them in the Director's Note appearing in their Annual Financial Reports. Hence, finished goods sold by the appellant cannot be considered as the transaction value for charging of central excise duty. Therefore, I find that these contentions of the appellant do not hold good.

13. I find that since the appellant had sold their finished goods viz. Brass Billets/Ingots, Copper Alloys wire others (Brass wire less than 6mm dia) etc. at a prize below manufacturing cost continuously for four years to penetrate the market and to compete with other manufacturer of similar goods which is extra commercial consideration, hence the price is not the only consideration and therefore, valuation of the excisable goods for the purpose of charging of duty of excise adopted by the appellant under Section 4(1)(a) of the Act is not legally correct. Hence, I find that adjudicating authority has correctly rejected the assessable value of the excisable goods shown by the appellant and correctly determined the assessable value for payment of central excise duty under Section 4(1)(b) of the Act read with Rules 6 and 11 of the Central Excise (Determination of price of excisable goods) valuation Rules, 2000. Therefore, I find that demand has been correctly confirmed in the impugned order.

14. I find that appellant have failed to pay central excise duty amounting to Rs. 66,055/- in respect of their finished goods during the period from F.Y. 2012-13 to 2015-16, therefore, they have to pay interest at the rates specified by the Central Government. I find that in a large number of judicial pronouncements, it has been held that payment of interest is a civil liability; that whenever sums due to the Government are not paid within the stipulated period, irrespective of the fact whether the delay is caused with intention to evade tax or otherwise, interest liability is automatically attracted. Hence, I find that interest liability has been correctly ordered in the impugned order.

15. I find that appellant was Central Excise registered assessee since long and was working under self-assessment era. The appellant was supposed to assesses the proper value of their finished goods and they were supposed to reflect the proper value and central excise duty in their ER-1 returns. The appellant had filed wrong periodical ER-1 returns wherein they have deliberately mis-stated the

figures of assessable value of finished excisable goods cleared by them. Thus, I find that appellant had willfully suppressed the facts and contravene various provisions of the Central Excise Act & Rules made thereunder with an intent to evade central excise duty. Therefore, I find that penalty under 11AC has rightly been imposed by adjudicating authority.

16. In view of the above facts and discussions, I reject the appeal of the appellant *in toto*.

१६.१ अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

16.1 The appeal filed by the appellant stands disposed off accordingly.

27/11/2020

सत्यापित

जे. एस. नायेचा
अधीक्षक (अपील्स)

(Gopi Nath)
Commissioner (Appeals)

By RPAD:

To,

M/s. **Rajhans Metals Pvt Ltd,** Plot No. 21/3, GIDC, Shankar Tekri, Udyog Nagar, Jamnagar- 361 004	**मै. राजहंस मेटल प्राईवेट लिमिटेड,** **प्लॉट नं 21/3, जीआईडीसी ,** **शंकर टेकरी , उद्योग नगर ,** **जामनगर - 361 004**

Copy to:

1. The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot.
3. The Assistant Commissioner, CGST & Central Excise Division-I Jamnagar.
4. Guard File.