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

### Excise Appeal No. 941 of 2008

(Arising out of Order-in-Original No. 09-10/PD/Th-II/2008 dated 30.05.2008 passed by the Commissioner of Central Excise & Customs, Thane-II)

**M/s. Raychem RPG Ltd.** **Appellant**
1/62, M.G. Road, Near Bharat Petroleum Pump,
Off Western Express Highway, Post Sativali,
Vasai (E), Thane 401 209

Vs.

**Commissioner of Central Excise, Thane-II** **Respondent**
3rd floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

WITH

### Excise Appeal No. 942 of 2008

(Arising out of Order-in-Original No. 09-10/PD/Th-II/2008 dated 30.05.2008 passed by the Commissioner of Central Excise & Customs, Thane-II)

**Shri Kapil Gohil** **Appellant**
1/62, M.G. Road, Near Bharat Petroleum Pump,
Off Western Express Highway, Post Sativali,
Vasai (E), Thane 401 209

Vs.

**Commissioner of Central Excise, Thane-II** **Respondent**
3rd floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

AND

### Excise Appeal No. 85535 of 2013

(Arising out of Order-in-Appeal No. 114/115 dated 23.10.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals-IV), Mumbai-I)

**Commissioner of Central Excise, Thane-II** **Appellant**
3rd floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

Vs.

**M/s. Raychem RPG Ltd.** **Respondent**
Bldg. No.2B & 3, Survey No.40, 64, 65 & 66,
Hissa No. 1 & 2, Village-Deodal,
Post-Kaman, Tal. Vasai, Thane 401 202

Appearance:

Shri S.S. Gupta, Chartered Accountant, for the Appellant
Shri Anantha Krishnan, Commissioner, Authorised Representative for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**

Date of Hearing: 03.03.2022
Date of Decision: 06.05.2022

**FINAL ORDER NO. A/85433-85435/2022**

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No. 09-10/PD/TH-II/2008 dated 30.05.2008 of the Commissioner of Central Excise, Thane II. By the impugned order, the Commissioner has held as follows:

*"ORDER*

*1. I hold that the value of excisable goods cleared/stock transferred to their Unit No. 2/Customer Care Centre at Kalher from where the goods are sold to unrelated buyers without carrying out any manufacturing activity should be determined by applying the principles and provisions enumerated under Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Since M/s Raychem RPG Ltd. have failed to give the selling price of the components manufactured in their factory which are put up along with other bought out items constituting various cable jointing kits, I hold that the same should be arrived at on pro-rata basis of total sale price of the kits as furnished by M/s Raychem RPG Ltd. vis-à-vis the cost of excisable goods manufactured and that of the bought out items constituting cable jointing kits.*

*2. I confirm in terms of sub-section (2) of Section 11A of the Central Excise Act, 1944, the total duty of Rs. 5,54,55,641/- (Rupees Five Crore Fifty Four Lakh Fifty Five Thousand Six Hundred Forty One only) [ Basic Excise Duty Rs. 5,48,84,430/- + Education Cess Rs. 5,51,815/- + Secondary and Higher Education Cess Rs. 19,396/-), as demanded vide subject Show Cause Notices dated 11.5.2007 and 28.12.2007 under Section 11A(1), as payable by/recoverable from M/s Raychem RPG Ltd., Vasai.*

*3. I order that the statutory liability of interest on the amount determined as payable at Sr.No.2 above shall also be recovered*

*from M/s Raychem RPG Ltd. under Section 11AB of the Central Excise Act, 1944.*

*4. I impose a penalty of Rs. 5,01,51,8221- (Rupees Five Crore One Lakh Fifty One Thousand Eight Hundred Twenty Two only) on M/s Raychem RPG Ltd. under Section 11AC of the Central Excise Act, 1944.*

*5. I also impose penalty of Rs. 53,03,819/- (Rupees Fifty Three Lakh Three Thousand Eight Hundred Nineteen only) under Rule 25 of the Central Excise Rules, 2002 for contravening various provisions of the said Rules.*

*6. I impose a penalty of Rs. 1,00,000/- (Rupees One Lakh only) on Mr. Kapil M. Gohil, Senior Manger-Finance and Company Secretary of M/s Raychem RPG Ltd. under Rule 26 of the Central Excise Rules, 2002."*

1.2 Appeal No E/85535/2013 has been filed by the revenue against order-in-appeal No. 14/15 dated 23.10.2012 of the Commissioner (Appeals-IV) Central Excise, Mumbai-I dropping the demands for the subsequent period on the same issue.

2.1 Appellants are engaged in the manufacture of excisable goods viz. Electrical Insulating Material, Heat Shrinkable Sleeves/Tubes, Power Cable Accessories, Surge Arrestors, Bus Bars, Branch Off Clips etc. falling under Ch. No. 85, 76, 73, 83, 84 and 39 of the first schedule to Central Excise Tariff Act, 1985.

2.2 They were clearing Electrical Insulating material, and Telephone Cable Accessories, such as Heat Shrinkable Tubings, Moulded Parts, Wrap Around Sleeves, Break Cuts etc. of various dimensions (hereinafter referred to as "the excisable goods") on stock transfer basis, to their Customer Care Centre situated at Kalher, Bhiwandi (depot), by paying duty on the value arrived at on the basis of 110% of the cost of production or manufacture of such goods.

2.3 At their depot, they also procure some bought out items/articles, such as copper braids, hose clips, support rings etc. directly from the market. These bought out items, in their original condition, as obtained from various manufacturers/dealers, are put together in cartons along with the excisable goods cleared by them from their manufactory. The composition/constituents of each carton varies as per the specifications / requirements of different customers. The goods

put up/packed in the cartons are sold from their depot in the name of "Cable Jointing Kits"

2.4 The activity of making the cable jointing kit basically involves putting together of the excisable goods (in packed condition as received from their factory) along with other bought out items, along with the instructions for use of the said articles in the carton/box is not the activity of manufacture and hence the use of excisable goods for consumption by them or on their behalf in the production or manufacture nor any other article emerge as a result of putting together various items /articles in a carton/box. Therefore the value determined by the Appellant under Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, is improper and the value should have been determined under Rule 11 read with Rule 7, ibid.

2.5 Accordingly a show cause notice dated 28.12.2007 was issued to appellant alleging contravention of the provisions of the Central Excise Act, 1944 and Rules framed thereunder in as much as they have failed to : -

i. determine the correct assessable value of the excisable goods manufactured and cleared by them from their factory to their customer Care Centre / Depot at Kalher, as required under Section 4(1)(b) of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.;

ii. correctly assess the duty payable on the excisable goods as required under Rule 6 of the Central Excise Rules, 2002;

iii. clear the said excisable goods on payment of appropriate duty as required under Rule 4 read with Rule 8 of the Central Excise Rules, 2002;

iv. declare proper Assessable value, Central Excise Duty payable/paid on the excisable goods on the invoice under which the goods were cleared, as required under Rule 11 of the Central Excise Rules, 2002 and

v. they have failed to declare proper assessable value, Central Excise Duty payable/paid on the excisable goods cleared by them in the periodical returns filed by them at the relevant time, as required under Rule 12 of Central Excise Rules, 2002.

2.6 Therefore Appellants were asked to show cause as to why:-

- Differential central excise duty should not be demanded by invoking extended period of limitation.
- Why interest should not be demanded on the said differential duty.
- Why penalties should not be imposed in terms of Section 11AC of Central Excise Act, 1944, Rule 25 and Rule 26 of the Central Excise Rules, 2002

2.8 This show cause notice was adjudicated by the Commissioner as per the impugned order as per para 1, above. Aggrieved appellants have filed these appeals.

2.9 Two more show cause notices as detailed in table below were issued to the appellant.

| Show Cause Notice Date | Period of Demand | Amount in Rs |
|---|---|---|
| 20.04.2009 | 01.04.2008 to 30.09.2008 | 44,06,939/- |
| 03.03.2010 | 01.04.2009 to 30.09.2009 | 49,50,322/- |

2.10 These show cause notices were adjudicated by the Additional Commissioner, Central Excise Thane II confirming the demand of duty with interest and penalties, etc.

2.11 Aggrieved by these orders of Additional Commissioner, appellants file the appeal before Commissioner (Appeals). Commissioner (Appeals) has vide his order in appeal No 114/115 dated 23.10.2012 allowed the appeal filed by the appellant.

2.12 Revenue has filed appeal against the said order of the Commissioner (Appeals).

3.1 We have heard Shri S S Gupta, Chartered Accountant for the appellants and Shri Anantha Krishnan, Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Chartered Accountant, submits:-

- Rule 8 of the Central Excise Valuation Rules, 2000 is applicable when the manufactured product is used in production or manufacture of other articles. The manufactured products have been used in production of

cable jointing kits. The meaning of the word 'production' is much wider than the meaning of 'manufacture', as has been held in the decisions as follows:

- V.M. Salgaoncar & Bros. (P) Ltd[1998-(99)-ELT-3 (SC)]
- N.C. Budharaja and Co. [1993-(204)-ITR-412 (SC)] to substantiate the meaning of production.

- The word consumption does not always mean consumption by destruction of product held by the Supreme Court. The Commissioner has given the narrow meaning of the word 'consumption' to mean consumption by loss of original identity. Therefore, the value shall be determined in Rule 8 of the Central Excise Valuation Rules, 2000.
  - Reliance is placed on the following decisions were in the Valuation has been upheld under Rule 8:
  - P.C. Pole M/s. P.C. Pole Factory [ 2006-(199)-ELT-865 (Tri.-Mumbai)]
  - Indian Hume Pipe Co. Ltd [2015-(321)-ELT-460 (Tri.-Chennai)]
  - Diffusion Engineering Ltd. [2014-(300)-ELT-145 (Tri.-Mumbai)]
  - Pest Control India (P) Ltd. reported in [2005-(186)-ELT-865 (Tri. Mum)].
- The Rule 11 of the Central Excise Valuation Rules, 2000 cannot be applied de hors of the principles laid down in provisions of Rule 4 to Rule 10 of the Central Excise Valuation Rules, 2000 and Section 4(1) of the Central Excise Act, 1944. Thus, the principle laid down in rule 4 to 10 of the Central Excise Valuation Rules, 2000 will have to be applied for determination of value u/r. 11 of the Central Excise Valuation Rules, 2000. The department has applied Rule 7 of the said rules which pre-supposes that "such goods" shall be sold from depot. "Such goods" have been interpreted by the Tribunal in the case of M/s. Savita Chemicals Limited reported in [2000 (119) ELT 394 (T)] to mean the same or similar goods. The appeal of the department against the Order of the Tribunal has been dismissed by the Supreme Court in the case of M/s. M/s.

Savita Chemicals Limited reported in 2001-(130)-ELT-A262 (SC).

- Rule 7 of the Central Excise Valuation Rules, 2000 cannot be applied as the goods sold from depot are not "such goods".
- The method of working backwards from the sale price has been rejected by the Tribunal in the case of M/s. Otis Elevators Company (India) Limited [ 2008 (229) ELT 568 (Tri. Bang.)]. The Tribunal in para 9 has observed:

> 9. "..... The method of valuation adopted should be within the ambit of Section 4 read with Valuation Rules. The learned Advocate has clearly shown that while arriving at the reduced transaction value, the Commissioner has simply gone by certain estimate. Compared to the method adopted by the Commissioner, we are of the considered view that the valuation method adopted by the appellant is more acceptable as it is within the ambit of Valuation Rules. It is very clear that the valuation cannot be dealt in terms of Rules 4, 5, 6, 7, 8, 9 & 10 and then finally, one has to come to Rule 11. While coming to Rule 11, the nearest thing which is consistent with Section 4 is only the cost construction method. We are also in agreement with the learned Advocate that the Commissioner has erred in holding that the cost construction method can be applied only if the goods are used for consumption for manufacture of other excisable goods. The word "article" is not limited to excisable goods....."

- The Supreme Court has also applied Rule 11 of the Central Excise Valuation Rules, 2000 in the case of M/s. UTC Fire and Security India Ltd. reported in 2015-(319)-ELT-591 (SC). In this case the company was selling smoke detectors and other parts in two distinct streams as under:
  - Sales in loose condition; and
  - Sales as part of turnkey projects where no separate values are recovered for the sale of these goods but

the price of the goods forms part of an overall consideration mentioned for such turnkey contracts.

- The value of smoke detectors used in turnkey projects was determined on the basis of cost (at the relevant time Rule 6(b) of Central Excise Valuation Rules, 1975 which is parallel to Rule 8 of the Central Excise Valuation Rules, 2000). This rule was applied even when the sale price of the goods in loose condition was available under Section 4 of the Central Excise Act, 1944. (vi) The Supreme Court in para 13 of the Order has observed that Rule 7 of the Valuation Rules, 1975 should be applied in line with the principle for valuation laid down for earlier rules. It approved valuation of goods under Rule 6(b) of the Central Excise Valuation Rules, 1975, following the ratio the value shall be determined u/r. 8 of the Central Excise Valuation Rules, 2000.

- The appellants have from time to time informed the department about the activities and manner of determination of value. These letters are attached as Annexure-A to Annexure-B in the appeal. Therefore, the department was aware of the activity and manner of determination of value. Hence, the demand is time barred.
- The issue relates to the determination of interpretation of the valuation and statutory provisions. It is submitted that the penalty shall not be levied in such cases as held by the Tribunal in the following cases:
  - Sonar Wires Pvt. Ltd [1996 (87) ELT 439 (T)]
  - Synthetics & Chemicals Ltd. [1997 (89) ELT 793 (T)]
  - Man Industries Corporation [1996 (88) ELT 178 (T)]
  - Sports & Leisure Apparel Ltd. [2005 (180) ELT 490]
  - Aquamall Water Solutions Ltd. [2003 (153) ELT 428]
  - Blue Cross Laboratories Ltd. vide order no. A/1529/C-WV/SMB/2007
- Appeal No. E/85535/2013 filed by the department: All the submissions made on merit above for determination of value, is reiterated. The Order in Original has also confiscated the goods and levied redemption fine of Rs 5 crores which has been set aside by the Commissioner

(Appeals). It is submitted that in this case the issue relates to the interpretation of valuation and provisions. Hence, the redemption fine should not be levied. Furthermore, as held by the Tribunal in the case of M/s. Shiv Krupa Ispat Pvt. Ltd. reported in 2009 (235)-ELT-623 (Tri. LB Mum) that the redemption fine should not be levied if the goods are not available.

3.3 Arguing for the revenue learned Authorized representative while reiterating the findings recorded in the impugned order appealed against by the appellants, and the grounds of appeal in the revenue appeal.

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

4.2 Issue whether the process of packing the excisable goods manufactured by the appellant along with the other bought out items in a carton and sold as *"Cable Jointing Kit"* was considered in case of XL-Telecom [1999 (105) E.L.T. 263 (A.P.)] by Hon'ble Andhra Pradesh High Court, holding as follows:

**"2.** W.P. No. 8818/97 is filed by XL Telecom Limited, Hyderabad questioning the circular issued by the Central Board of Excise and Customs, declaring that the process of putting together duty paid articles into a container like carton, kit etc. and bringing into existence a new commercially distinct product namely `Cable Jointing Kits' amounts to manufacture under Section 2(f) of the Central Excise Act, 1944 (in short `the Act') and classifying the same under Heading 85.47 of the Central Excise Tariff Act, 1985. The Circular number is 308/24/97-CX, dated 27-3-1997. By virtue of the said circular, the cable jointing kits were made liable for excise duty under Central Excise and Salt Act, 1944.

**12.** What emerges from the above is excise duty is leviable on goods manufactured. The expression manufacture means bringing into existence a new substance and does not mean merely to produce some change in a substance, however minor in consequence the change may be and as a result of treatment, labour and manipulation there should be transformation in the raw material and as a result of treatment, labour and

manipulation a new and different article must emerge having a distinct name, character or use. It is not enough if there is change, the change should result in bringing into existence a new and definite article having a distinctive name, character or use and the said article must be marketable and it should be known to the market as such. In the absence of any one of the ingredients referred to above, the provisions of the Act are not attracted and no excise duty is leviable. Even if the goods so produced were excisable goods mentioned in the schedule, they cannot be subjected to duty unless they are marketed or capable of being marketed. The marketability is one of the principle test in determining the liability to excise duty. In addition the product which is brought into existence must have a distinct identity in the commercial world.

**13.** Let us apply the above tests to the facts of the present case. As pointed out in the earlier paragraph, the identity of the items placed in the kit is not changed. They are known in the market as such. There is no transformation in the articles which are placed in the kit. They are marketable as such. Further, no process is also involved except that all the articles are put together in one box. It is true that by placing all these articles in one kit the kit has a distinct name known as `cable jointing kit'. However, there is no change in character and use of the articles placed in the kit. In other words, except the test that the articles which are placed in the kit has a distinct name, the other tests have not been satisfied. Therefore, placing different articles in the kit does not amount to manufacture. If once the activity of placing the articles in the kit does not amount to manufacture, the provisions of the Act are not applicable as the levy of excise duty is on the production and manufacture of goods."

4.3 In the present case the counsel for the appellant urge, that the appellant have consumed the goods cleared by them from their manufactory to their depot and from their depot they have cleared these goods cleared from the factory along with other bought out items, packed together in a carton as "cable jointing kit". It is evident from the order of the Hon'ble High Court of Andhra Pradesh, that the "cable jointing kit" is an excisable good classifiable under heading 85.47 of the First Schedule to Central Excise Tariff Act, 1985, however the same cannot be subjected

to excise duty as the activities undertaken do not amount to manufacture and hence will be excluded from the purview of Section 3 of the Central Excise Act, 1944. It is the submission of the counsel that finished goods cleared from their factory have been **consumed for production** of the "cable jointing kit". To substantiate the said preposition he has relied upon the decisions in the case of V.M. Salgaoncar & Bros. (P) Ltd [1998 (99) ELT 3 (SC)] and N.C. Budharaja and Co. [1993 (204) ITR 412 (SC)].

4.4 Taking a pause here we refer to the decision in case of **Grasim Industries [2018 (360) E.L.T. 769 (S.C.)]** wherein five Judges bench of Hon'ble Supreme Court after taking of the amendments made to the Section 3 and 4 of the Central Excise Act, 1944 has held as follows:

"**6.** On first principles, there can be no dispute. Excise is a levy on manufacture and upon the manufacturer who is entitled under law to pass on the burden to the first purchaser of the manufactured goods. The levy of excise flows from a constitutional authorisation under Entry 84 of List I of the Seventh Schedule to the Constitution of India. The stage of collection of the levy and the measure thereof is, however, a statutory function. So long the statutory exercise in this regard is a competent exercise of legislative power, the legislative wisdom both with regard to the stage of collection and the measure of the levy must be allowed to prevail. The measure of the levy must not be confused with the nature thereof though there must be some nexus between the two. But the measure cannot be controlled by the rigors of the nature. These are some of the settled principles of laws emanating from a long line of decisions of this Court which we will take note of shortly. Do these principles that have withstood the test of time require a rethink is the question that poses for an answer in the present reference.

**7.** At this stage, it may be necessary to specifically take note of the provisions of Sections 3 and 4 as originally enacted and as amended from time to time

Section 3

| Section 3 of the Act in force prior to amendment by Finance Act, 2000 (Act 10 of 2000) | Relevant portion of Section 3 as substituted/amended (with effect from 12th May, 2000) by Section 92 of the Finance Act, 2000 (No. 10 of 2000) |
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| 3. Duties specified in the First Schedule to be levied. -<br>(1) There shall be levied and collected in such manner as may be prescribed, -<br>(a) a duty of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985;<br>(b)…… | 3. Duties specified in the [First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985] to be levied. -<br>There shall be levied and collected in such manner as may be prescribed, -<br>(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);<br>(b)……. |

Section 4

| Section 4 as originally enacted (in the Central Excise and Salt Act, 1944), | Section 4 as amended by Amendment Act No. 22 of 1973 | Section 4 as amended by Finance Act, 2000 with effect from 1-7-2000 |
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| Determination of value for the purposes of duty -<br>Where under this Act any article is chargeable with duty at a rate dependent on | **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 value, such value shall, subject to the other provisions of this Section, be deemed to be -<br>(a) the normal price thereof, that | **Valuation of excisable goods for purposes of charging of duty of excise. -** (1) Where under this Act, the duty of excise |

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| the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement of deduction whatever except trade discount and the amount of duty then payable. | is to say, 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, where the buyer is not a related person and the price is the sole consideration for the sale :<br>Provided that -<br>(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the Assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;<br>(ii) where such goods are sold by the Assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;<br>(iii) where the assessee so | is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -<br>(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 goods are not related and the price is the sole consideration for the sale, be the transaction value;<br>(b) in any other case, including the case where the goods are not sold, be the value determined in |

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| | arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;<br>(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.<br>(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.<br>(3) 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. | such manner as may be prescribed.<br>(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.<br>(3) For the purpose of this section, -<br>(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;<br>(b) persons shall be deemed to be "related" if -<br>(i) they are interconnected undertakings;<br>(ii) they are relatives; |

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| | (4) For the purposes of this section, -<br>(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;<br>(b) "place of removal" means -<br>(i) a factory or any other place or premises of production or manufacture of the excisable goods; or<br>(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed;<br>(c) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor.<br>Explanation. - In this "clause" holding "company"," subsidiary company and "relative" have the same meanings as in the Companies Act, 1956; (1 of 1956 )<br>(d) "value", in relation to any excisable goods, -<br>(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the | (iii) amongst them the buyer is a relative and distributor of the assessee, or a subdistributor of such distributor; or<br>(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.<br>Explanation. - In this clause -<br>(i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of Section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969); and<br>(ii) "relative" |

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| | packing which is of a durable nature and is returnable by the buyer to the assessee.<br>Explanation. - In this sub- clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;<br>(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.<br>(e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements/other-wise than in retail. | shall have the meaning assigned to it in clause (41) of Section 2 of the Companies Act, 1956 (1 of 1956);<br>(c) "place of removal" means -<br>(i) a factory or any other place or premises of production or manufacture of the excisable goods;<br>(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed; |

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| | | (d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization |

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| | | expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. |

20. We find no room whatsoever for any disagreement with the above view taken by this court in Bombay Tyre International Ltd. (supra). It is a view consistent with what was held by the Federal Court and the Privy Council in Central Provinces and Berar (supra), Boddu Paidanna (supra) and Province of Madras (supra) and the decisions that followed thereafter including the decision in Voltas Limited (supra) and Atic Industries Limited vs. H.H. Dewa, Asstt. Collector of Central Excise and ors [(1975) 1 SCC 499] the true purport of which was explained in Bombay Tyre International Ltd. (supra). Both the above opinions were clarified to mean that neither of them lay down any proposition to the effect that the excise duty can be levied only on the manufacturing cost plus the manufacturing profit only. 21. At this stage, the amendment to Section 3 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is conspicuous. The amendment of Section 3 to the Act not only incorporates the

essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in Bombay Tyre International Ltd. (supra). This fundamental change by introduction of the concept underlying value-added taxation in the provisions of Section 3 really find reflection in the definition of 'transaction value' as defined by Section 4(3)(d) of the Act besides incorporating what was explicitly held to be permissible in Bombay Tyre International Ltd. (supra). Section 4(3)(d), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy.

23. Accordingly, we answer the reference by holding that the measure of the levy contemplated in Section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both Section 3 and 4 would operate in their respective fields as indicated above. The view expressed in Bombay Tyre International Ltd.(supra) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in Section 4(3)(d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old Section 4 as held to be permissible in Bombay Tyre International Ltd. (supra) besides giving effect to the changed description of the levy of excise introduced in Section 3 of the Act by the Amendment of 2000. In fact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.

4.5 We have referred to this decision of the Hon'ble Supreme Court at this point because this decision refers to the charging section (i.e. Section 3) and valuation section (section 4) of the Central Excise Act, 1944. In para 7 Hon'ble Apex Court has referred and reproduced both the sections both prior and post amendments made in the year 2000. From the perusal of Section 3, it is evident that "*a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which*

*are produced or manufactured in India."* If the argument of the Counsel is to be accepted than the duty of excise should have been levied and collected from the appellants on the clearance of the "cable jointing kits" so cleared from the depot of the appellant. Even the Constitutional Entry at Sl No 84 of List 1 Union List in Seventh Schedule, mandated the levy and collection of the excise duty on the goods "**manufactured or produced in India**". If the arguments are accepted then it also needs to be accepted that "cable jointing kits" cleared by the appellant were the goods produced in India, and hence should have been cleared on the payment of excise duty as applicable. Admittedly appellants do not pay any duty on the clearance of the said "cable jointing kits" from their depot. Commissioner has in impugned order observed as follows:

*"39. The issue to be decided in the instant case is how to assess the goods manufactured and cleared by the assessee from their factory and sent to their another premises under cover of invoice when the goods are cleared from the factory, no sale takes place. The goods so cleared are subsequently sold along with some bought out items after placing in one carton as cable jointing kit. Since the goods manufactured and cleared from the factory are not sold at the time of clearance from the factory, the assessee company paid duty at factory gate after resorting to y the provision of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The assessable value of the goods was arrived at by adding 15% or 10% to the cost of production of goods. For deciding whether the method adopted by the assessee for arriving at the assessable value and the duty paid on the goods cleared from their factory to their Customer Care Centre at Kalher (previously cleared to their Building No. 2 where kitting was to be done) is correct or not. Let us compare the situation prevailing with the assessee company with that described in Rule 8 of the Valuation Rules, 2000. Rule 8 of the Valuation Rules requires;*

*i) excisable goods should not be sold by the assessee and*

*ii) the goods are used for consumption by him or on his behalf in the production or manufacture of other articles,*

*then the value shall be 115%/110% of the cost of production or manufacture of such goods.*

*40. Now let us see the situation prevailing in the instant case. It is an admitted fact that the excisable goods cleared from the factory are sold from the Customer Care Centre by placing in some other carton along with some bought out items. It is also an admitted fact that no process of manufacture is carried out on the said goods in the Customer Care Centre. Even the packing of the goods cleared from the factory as well as those bought out items are not removed. Hence, it cannot be said that even without opening packing or wrapper of any excisable goods, the goods were used for consumption for manufacture of other articles. Here the argument of the assessee that they produced some article, by putting extra labour and manipulating with the manufactured excisable goods (in their factory) and bought out items fails. What is required by Rule 8 is – the excisable goods should be used for consumption ..... It is false to say that any goods can be consumed without even opening the packing done in the factory of the manufacture. Now let us discuss what is 'consumption'.*

*Consumption - noun from the verb 'to consume'. Consume means - i) to eat or drink, ii) to use up, iii) to destroy, iv) to devour or overcome completely v) to waste away.*

*Consumption means the act or process of consuming.*

*41. In the case of State of Tamilnadu V Bharat Dairy reported in 1992 (61) ELT 25 (Madras ) it was observed that 'the legislation concisely used the expression 'consumes' in Tamilnadu General Sales Tax Act, 1959 in contradistinction to the expression 'use' implying loss of original identity.*

*42. In the case of State of Kerala Vs Cochin Coal Co. 1961 (12) STC 1, it is observed that - goods might be consumed within the meaning of Article 286(1)(a) either by destruction or by way of use depending on the nature of the goods'.*

*43. The Hon'ble Supreme Court in the case of Dy CST (Law) V Pio Foods Packers 46 STC 63 SC has pointed out that there was*

*no essential difference between pineapple fruit and canned slices. It was held that Section 5A 1(a) of the Kerala General Sales Tax Act, 1963 truly spoke of goods consumed in the manufacture of other goods for sale. The Court held that if pineapple is sliced and made ready for sale in the market (by adding sugar, preservatives and by canning) the slices did not cease to be pineapple. It was also held in 1980 (60 ELT 343 (SC) that there was no consumption of original pineapple fruit for the purpose of manufacture. It was further observed that - although a degree of processing is involved in preparing pineapple slices from the original pineapple, yet the commodity continues to possess the original identity, notwithstanding the removal of inedible portions, the slicing and thereafter canning it or adding sugar to preserve it cannot be said to be "manufacture".*

*44. Raw cotton is consumed at various stages in conversion to cloth. Distinct utilities are produced at each of these stages and what is produced is at next stage consumed. Conversion of a commodity into a distinct commercial commodity by subjecting it to some processing is consumption. A raw material is said to be consumed in the manufacture of a new article. The word consumption often refers to transformation or conversion at intermediate stages prior to the final act of devouring or annihilation, and thus denotes the production or manufacture of new articles from the raw material. Consumption constitutes 'utilisation' thereof.*

*45. From the above discussions, it is fact that the goods manufactured in the factory by the assessee are not at all consumed by the assessee himself or on his behalf, which is not in agreement of the requirement of rule 8 of the Valuation Rules, 2000.*

*46. Now about the other requirement of the said rule- 'production or manufacture of other article'. Here the word "manufacture' as per Section 2(f) of the Central Excise Act, 1944 includes any process -*

*i) incidental or ancillary to the completion of a manufactured product;*

*ii) which is specified in relation to any goods in the section or chapter notes of the first schedule) to the Central Excise Tariff Act, 1985; (5 of 1986) as amounting to (manufacture: or)*

*iii) which in relation to the goods specified in the third schedule, involves packing or re packing of such goods in unit container or labeling or re-labeling of containers, including the declaration or alternation of retails sale price on it or adoption of any other treatment on goods to render the products marketable to the consumer.*

*47. It is an admitted fact that no process is carried out on the excisable goods, manufactured in the factory of the manufacture, by the assessee in their other premises. It has also been brought on record that original packing of the said goods were even not removed at Customer Care Centre. Only some bought out items are placed together with the manufactured items in a combo pack just with the purpose of convenience so that both types of goods manufactured and bought out are conveniently available readily at the site where the goods are put to use first time after their clearance from the factory. Hence, it cannot be said that the 'Cable Jointing Kit' is produced or manufactured by using or consuming the excisable goods cleared from the factory of the assessee. Cable Jointing Kit is not at all a new product manufactured or produced by any process on any raw materials. It is only a new name given to a combo pack -Cable Jointing Kit - different than the goods contained in the combo pack. The excisable goods do not lose their identity in the combo pack. The goods are in their original form and packing in the combo pack. None of the goods contained in the pack lose their original qualities and identity. Here an example of a "Tool Kit" in a car can be considered. The tool kit contains different tools which have various independent uses. They can be used even if they are not packed together, but they are put in a pack for convenience of availability. It cannot be said that a tool kit is produced or manufactured by using different tools such as spanners, pliers, screwdriver etc. Here tool kit cannot be called*

*as new commodity manufactured by using different types of tools.*

*48. In a similar case of X1 Telecom Limited Vs Superintendent of Central Excise, Hyderabad reported in 1999 (105) ELT 263 (AP), the Hon'ble High Court of Andhra Pradesh observed that – "the identity of items placed in the kit is not changed. There is no transformation in the articles which are placed in the kit. They are marketable as such. Further, no process is involved except that all the articles are put together in one box. It is true that by placing all these articles in one box, the kit has a distinct name known as 'Cable Jointing Kit'. However, there is no change in the character and use of articles placed in the kit. Therefore, putting different articles in the kit does not amount to manufacture'. As I have already mentioned above, the name 'cable jointing kit' is given to the combo pack containing different articles having their own original identity, quality and use as well as marketability, as such."*

4.6 The reliance placed by the appellant on the decisions in the case of V.M. Salgaoncar & Bros. (P) Ltd and N.C. Budharaja and Co, to argue that scope of the word "production", is much wider than the "manufacture" would in our view will bring the "cable jointing kits" with the scope of Section 3 of the Central excise Act, 1944, and leviable to the duty of excise. In the case of Buddharaja, Hon'ble Supreme Court has observed as follows:

*"7……The words "manufacture" and "production" have received extensive judicial attention both under this Act as well as Central Excise Act and the various Sales Tax Laws. The word "production" has a wider connotation than the word "manufacture". While every manufacture can be characterised as production, every production need not amount to manufacture. The meaning of the expression "manufacture" was considered by this Court in Deputy CST v. Pio Food Packers8 among other decisions. In the said decision, the test evolved for determining whether manufacture can be said to have taken place is, whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct*

*commodity. Pathak, J. as he then was, stated the test in the following words: (SCC p. 176, para 5) 8 1980 Supp SCC 174 1980 SCC (Tax) 319: (1980) 46 STC 63 "Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place."*

*8. The word "production" or "produce" when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products which emerge in the course of manufacture of goods. ……..”*

*The submission of the appellants that activities undertaken by them at the depot were covered by the production, used in Rule 8, of valuation Rules, 2000, goes contrary to the observations of the Hon’ble Apex Court in case of Buddhiraja, read along with the decision of High Court of Andhra Pradesh in case of XI-Telcom, as in this Hon’ble High Court has clearly held that no new commodity has emerged. Therefore we are not in position to agree with the submissions made by the appellant on this account.*

*The decision in the case of Salagaoncar, is interpreting the word ‘Home Consumption” and also do not advance the case of the appellant, without going contrary to the decision of Hon’ble High Court of Andhra Pradesh. In this case Hon’ble Apex Court has observed as follows:*

*8. The Word “consumption” may involve in the narrow sense using the article to such an extent as to reach the stage of its non-existence. But the word “consumption” in fiscal law need not*

*be confined to such a narrow meaning. It has a wider meaning in which any sort of utilization of the commodity would as well amount to consumption of the article, albeit that article retaining its identity even after its use.*

*9. A Constitution Bench of this Court has considered the ambit of the word "consumption" in Article 286 of the Constitution in M/s. Anwarkhan Mahboob Co. v. State of Bombay (now Maharashtra) and Others [1961 (1) SCR 709]. Their Lordships observed thus :*

*"Consumption consists in the act of taking such advantage of the commodities and services produced as constitutes the "utilization" thereof. For each commodity, there is ordinarily what is generally considered to be the final act of consumption. For some commodities, there may be even more than one kind of final consumption ..... In the absence of any words to limit the connotation of the word "consumption" to the final act of consumption, it will be proper to think that the Constitution-makers used the word to connote any kind of user which is ordinarily spoken of as consumption of the particular commodity."*

*10. In another decision a two Judge Bench of this Court considered the scope of the words "consumption" vis-a-vis "use". (vide Kathiawar Industries Ltd. v. Jaffrabad Municipality : AIR 1979 SC 1721). There it was held that the precise meaning to be given to those words would depend upon the context in which they are used. It is in a primary sense that the word "consumption" is understood as using the article in such a manner as to destroy its identity. It has a wider meaning which does not involve the complete using up on the commodity.*

*11. In the context in which the expression "home consumption" is used in Section 46 of the Customs Act it does not warrant a construction that the commodity should have been completely used up. Even putting the commodity to any type of utility within the territory of India will tantamount to "home consumption".*

*In our view the impugned order cannot be faulted on this account."*

4.7 Since we are in agreement with the finding of the Commissioner in the impugned order that the goods cleared from the factory of the appellant were not consumed captively in

production of the finished goods, in our view Rule 8 of valuation Rules will not be applicable. Commissioner has in the impugned order distinguished the case law cited by the appellant in their favour stating as follows:

*"51. The assessee have also relied on a case law in a case of Commissioner of Central Excise, Nagpur Vs P. C. Pole Factory reported in 2006 (1999) ELT 865 (Tri-Mumbai) in their support. In this case, the goods manufactured i.e. P. C. Poles are used by the manufacturer captively themselves in transmission of electricity. This case differs from the instant case before me by a major aspect that the P. C. Poles were not sold whereas the goods manufactured and cleared by the assessee in case before me are sold as such from the Customer Care Centre. In this connection, the Hon'ble Supreme Court in the case of CCE Calcutta V Alnoori Tobacco Products 2004 (170) ELT 135 (SC) has held that facts of decision relied upon have to be shown to fit factual position of a given case and without such discussion, reliance could not be placed on a decision. In the instant case, the decisions relied upon by the assessee to defend their case are not similar to the facts of the present case and as such, I find the same to be irrelevant and not acceptable. They have further referred to the Ujagar Prints Case 1989 (39) ELT 493 for the purpose of valuation. Here, I observe that in the case of Ujagar Prints, the goods were manufactured on job work basis and were not sold by the job worker. Whereas in the case before me, the goods are manufactured by the assessee and also are sold by the assessee from a premises other than the factory of manufacture. The citation is of a period prior to the insertion of Central Excise Valuation Rules, 2000. As such, the citation is distinguishable from the present case and not relevant. Thus, I find that costing method in terms of Rule 8 of the Valuation Rules, 2000 adopted by the assessee for valuation of goods which are stock transferred to their Kalher Godown is totally wrong and has been adopted intentionally to evade Central Excise duty."*

4.8 In the case of Indian Hume Pipe Co. Ltd, the goods were not sold but were consumed by them at the project site of the project being executed by them on the turnkey basis. Since there was no sale of the goods cleared from the factory but were

consumed at the project site this decision is distinguishable from the facts of present case.

4.9 In case of Diffusion Engineering Ltd. tribunal has observed as follows:

*"5.1 Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 reads as follows :*

*"(8) Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods."*

*The expression used is 'production or manufacture of other articles'. The said rule nowhere envisages that the production or manufacture should be of excisable goods. Therefore, the argument of the Revenue that the goods should be used in the manufacture of 'other excisable goods' has no basis whatsoever.*

*5.2 It is not the case of the Revenue that the appellant has sold the goods. It is an admitted position that the appellant has utilised the goods in its factory in the repair of certain other articles. Therefore, the question of invoking Rule 5 of the Valuation Rules would not arise at all, as Rule 5 envisages sale of goods, which is not the case herein. Even if for a moment it is assumed that Rule 8 will not apply and in the absence of any specific provision under any other rules, resort will have to be made to Rule 11 which provides for using reasonable means consistent with the principles and general provisions of the Rules and sub-section (1) of Section 4 of the Act. Even if the provisions of Rule 11 are applied, the most appropriate rule will be Rule 8 and, therefore, even if it is held that Rule 8 will not apply, then even under Rule 11, the principles envisaged in Rule 8 should be followed. Therefore, viewed from this angle also, the discharge of duty liability following the provisions of Rule 8 is correct in law. Therefore, we do not find any infirmity in the order passed by the lower appellate authority."*

4.10 In the present case the appellants have in fact sold the goods from their depot after packing them along with the other brought out items. In the case of Diffusion Engineering the goods were never sold but were utilized captively in the repair of

certain articles. The facts of the case are clearly distinguishable as such.

4.11 In case Pest Control India (P) Ltd. the goods were cleared from the factory to the service centre for providing the service to their client under a contract. In that case the appellant had never sold the goods but have consumed them in their service centre and in facts of that case tribunal had observed as follows:

*"(d) CBEC under per the (1) & (2) of Greater No. MF(DR) F. No. 312/1/75-CX. 10, dated 8-8-75 had clarified that if goods are delivered in lots of different kind of packings, the values could differ depending upon the cost of packing. For comparison purposes of Rule 4 of the Central Excise (Valuation) Rules, 1975, material in such different packings cannot be comparable or 'SUCH GOODS'. Therefore, valuation has to be arrived at under Rule 6(b) (ii). Since the removals 'Service Centre' are for use and consumption on the assessees behalf, pursuant to the Service Contracts. Even in this case, for the same reasons the principles of Rule 6(b)(ii) would have to be applied. This would be so even under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 Rule 8 which take places of earlier Rule 6(b)(ii) of 1975 rules. This new rule does not relate to comparable goods but mandates that value should be one hundred fifteen per cent of the cost of manufacture and provides for "consumption" by or on behalf of the assessee. The term "consumption" need not be given a narrow meaning to limit it to mean that entity should "reach the stage of non-existence". A stage of 'sort of utilisation' of the Pesticides/Insecticides would well amount to "Consumption" by the Service Centre, even if the entity remains the same (See V.M. Salgaonkar and Bros P. Ltd., 1998 (99) E.L.T. 3 (S.C.), therefore, consumption by the Service Centre/Division would amount to Captive Consumption. Valuation has to be resorted to by applying Cost Construction Rules. Therefore, no merits are found in Revenue appeals 818 & the grounds taken therein.*

*(e) Valuation in this case of 'Service Centre' removals, has to be arrived at by applying Rule 6(b)(ii), Rule 8, as applicable at the time of removal. Except in cases where there is no change in package quantity removals to wholesale dealers and Service*

*Centre, which was claimed by the DR for certain types of Insecticides/Pesticides."*

The facts of that case are distinguishable and we do not find the said case applicable to the present case. Thus we are in agreement that the value could not have been determined by the application of Rule 8 of the Valuation Rules, 2000.

4.12 For determining the value under Rule 11 read with Rule 7, Commissioner observes in the impugned order as follows:

*"52. Having decided that Rule 8 of the Valuation Rules, 2000 will not be applicable in the instant case as there is neither sale at the place of removal nor the goods are cleared for further consumption in the manufacture of other goods, but are sold to the unrelated buyers in the same condition from their Customer Care Centre at Kalher. Under such a situation, what should be the correct method of valuation of goods? The basic provisions of Section 4(1)(a) of the Central Excise Act, 1944 state that the assessable value when duty of excise is chargeable on excisable goods with reference to value will be 'transaction value' on each removal of goods, if following conditions are satisfied -*

- *The goods should be sold at the time and place of removal.*
- *Buyer and assessee should not be related*
- *Price should be the sole consideration for sale*
- *Each removal will be treated as a separate transaction and 'value' for each removal will be separately fixed*

*53. If any of the conditions is not fulfilled, the transaction value can be rejected. In the instant case, although goods are removed from the factory gate, they are not sold at factory gate but are sold from their Customer Care Centre. As such, it can be safely concluded that there is no sale at the time of removal and value cannot be determined under Section 4(1)(a) of the Central Excise Act, 1944. Section 4(1)(b) of the Central Excise Act, 1944 states that if the value cannot be determined under Section 4(1)(a), it shall be determined in such manner as may be prescribed by rules. Under these powers, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been made effective from 1.7.2000. Among these Rules, only Rule 7 and Rules of the Central Excise Valuation*

*(Determination of Price of Excisable Goods) Rules, 2000 deals with a situation where there is no sale at factory gate. As discussed earlier, applicability of Rule 8 has already been discarded as the said rule will be applicable only when the goods are consumed for manufacture of other goods by the assessee or by his agent on his behalf. As such, the recourse has to be taken to Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. As is evident and as admitted by the assessee, the goods cleared from the factory are sold in the original packing condition at their Building No. 2/Customer Care Centre along with other bought out items. This Building No. 2/Customer Care Centre is nothing but the depot of the assessee from where the goods are sold to unrelated buyers by themselves. Thus, when the goods are sold through depot, there is no 'sale' at the time of removal from factory. In such cases, price prevailing at depot (but at the time of removal from factory) shall be the basis of assessable value. The value should be 'normal transaction value of such goods sold from the depot at the time of removal or at the nearest time of removal from factory in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. In this connection, reliance is placed on para 5 of the Hon'ble Tribunal's decision in the case of Castrol India Ltd. V CCE, New Delhi 2000 (118) ELT 35 (Tri) (maintained by Hon'ble Supreme Court in 2000 (121) ELT A224] which is reproduced below.*

*5. "Time of removal" has also been defined with reference to the place of removal, namely depot, by sub-clause (ba) to clause (iv) of Section 4. That definition reads:*

*" "time of removal" in respect of goods removed from the place of removal referred to in sub clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory".*

*So, in the case of removal of goods from depot, the time of removal should be the time at which such goods were cleared from the factory. In other words, time and place of removal provided by Section 4(1)(a), in relation to goods removed from the depot will be the factory gate and depot, respectively. whenever goods are removed from depot, such goods are to be*

*valued with reference to the time when it was removed from the factory.*

*54. Now let us examine the valuation under Rule 7 read with Rule 11 of the said Valuation Rules which is proposed in the Show Cause Notice. This rule requires - i) the excisable goods are not sold by the assessee at the time and place of removal (from the factory), but are transferred to a depot, premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal, iii) where the assessee and the buyer of the said goods are not related and iv) price is the sole consideration for sale.*

*55. In the instant case, the excisable goods manufactured and cleared/removed from the factory are not sold at the time and place of removal i.e. at the factory gate. The goods sold from other place i.e. unit at Building No. 2 or Customer Care Centre at Kalher. There the goods were sold to buyers who were not related at an agreed price which was the sole consideration for sale. The goods removed from the factory are sold in their original form and packing after putting in a carton along with some bought out items from the other place. Because of the said situation, the valuation of the said goods has to be made as provided under Rule 11 of the Valuation Rules, 2000 read with rule 7 ibid which is the most appropriate rule in the prevailing situation and this stand is also supported by the Hon'ble Tribunal's decision in the case of Castrol India Ltd. cited supra. Further, the assessee have failed to declare to the department as to the value of goods (manufactured individual component) cleared from factory taken for arriving at the price of cable jointing kit which also included the bought out items. Therefore, I also observe that it is quite reasonable to arrive at the assessable value of the said excisable goods by apportioning the total sale value proportionately in the ratio of cost of excisable goods manufactured by the assessee to the price of bought out items, which together constitute the kit. Therefore, it is clear that the Central Excise duty on differential value as calculated in the Annexure to both the Show Cause Notices is recoverable from the assessee. I order accordingly."*

4.13 Appellant have contested the said findings by relying upon the decision in the case of Savita Chemicals, Otis Elevators and UTC Fire and Security India Ltd.

4.14 In case of Savita Chemicals the tribunal was concerned with the valuation of the goods removed from the factory to the depot and subsequently packed in retail packing and sold from the depot. The revenue intended to determine the value of the goods cleared in bulk on the basis of price charged by the goods sold in retail packing and tribunal observed as follows:

*"24. What the show cause notice seeks is to determine the price at which the packed goods are sold from the depot as the basis of valuation of the oil sold in bulk. No other construction can be put on the phrases used in the show cause notice.*

*25. Before the amendment made on 28-9-1996 whereby Clause (iii) was inserted in Section 4(4)(b), the factory gate was the place of removal for the determination of normal price. Where the goods were bonded, the warehouse gate was the place of removal. Where the goods were not at all sold at the factory gate but only at the depot gate, the depot gate price was adopted as the factory gate price after deducting cost of transportation from the factory gate to the depot gate.*

*26. The effect of the amendment was brought out in the C. B. E. C. Circular No. 251/86/96-CX, dated 14-10-1996, as reproduced in 1996 (87) E.L.T. (T) 48. The extract read as under:*

*"In the Finance Act of 1996, definition of 'place of removal' has been amended to include depot, consignment agents or any other place or premises from where the goods are sold by or on behalf of the assessee within its scope. However, time of removal for these other places of removal added in Section 4 shall be deemed to be the time at which such goods are cleared from the factory.*

*The significance of these changes is that sale price at any of these "places of removal" will be the normal price for levy of excise duty and there can be different assessable values for the same excisable goods depending upon the place of removal. It also means that duty will be required to be paid at the time of clearance of goods from the factory for those goods which are sold by the manufacturer at depot, consignment agents or any*

*other place etc. at a sale price of the place of removal i.e. depot, consignment agents etc. Where the goods are sold at the factory gate, there would be no problem."*

*27. This amendment has taken away the basis of the judgments which dictated that where the factory gate price was available that price would apply to all clearances, including those made from the depots. The effect of the amendment would be that at the factory gate itself the same goods would be valued differently, depending upon their final place of removal. The findings of the Collector reproduced in Para 22 above would seem to suggest that the goods which are destined to be sold from the depots would be leviable to the duty at price charged at such depots when assessed at the factory gate. Where the goods so moved from the factory gate are the same which were sold at the depot gate, this judgment cannot be faulted. But in the present case what was removed from the factory gate was oil in bulk in tankers and what was sold at the depots was oil packed in tins.*

*28. Section 4(1)(a) extracted above in Paragraph 23 speaks of "such goods". What is the interpretation of "such"? The New Shorter Oxford Dictionary defines this word as "Of the same kind or degree as something previously specified or implied contextually". The Law Lexicon by T.P. Mukherjee (Vol. 2) cites a number of judgments. The extract from the Rajasthan High Court in the case of Union of India v. Wajir Singh holds :*

*"Generally, the word 'such' refers only to previously indicated, characterised or specified. "Such" is an adjective meaning the one previously indicated or refers only to something which has been said before."*

*29. Shri Laxmikumaran cited departmental clarifications cited vide File No. 312/1/75/CX 10, dated 8-8-1975, when Section 4 was substituted in 1973 vide Section 22 of the Central Excise and Salt (Amendment) Act, 1973. The phrase "such goods" has continued to remain in the Section therefrom. In describing the expression "such goods", the Ministry gave the following clarification :*

*"(a) Such goods : The expression 'such goods' has been used in the generic sense and means not only the goods under assessment but also other goods of the same class. In other*

*words, the same goods manufactured by an assessee will be considered, as 'such goods'. The same goods manufactured by the assessee may be cleared at different times in different lots and different consignments and the goods of each lot or consignment will be 'such goods'. To illustrate, a company manufactures refrigerators of a particular brand and capacity: each of these refrigerators will fall in the category of 'such goods' (emphasis supplied).*

*Similar goods, for example, goods of different brands manufactured by another assessee are also not 'such goods'. Similar goods manufactured by another assessee are also not 'such goods': that may fall in the category of 'comparable goods'. Even homogeneous goods e.g., sugar or cloth manufactured by different manufacturers would only be comparable goods and would not constitute 'such goods'."*

*30. Thus the grouping of the goods was to be as per brands or capacities. Goods falling in a particular group would become "such goods" as far as the other goods in the same category or group are concerned. When these goods are placed in juxtaposition with the goods from another group they would not remain 'such goods' but would become comparable goods."*

The issue involved in the said case was interpretation of the phrase "such goods", and tribunal found that the manner in which the goods were sold from the depot were not covered by the said phrase, they disagreed to adoption of the sale value from the depot as the value for clearance of comparable goods from the factory. It is not even the case before us. In the case present case the issue is for determination of the value of the same goods without losing or modifying the identity, but sold along with the bought out items at the depot. Admittedly the value of the "bought items" could not be the part of the vale at which the goods were cleared from the factory. In case of Neycer India Ltd [2015 (320) ELT 28 (SC)] Hon'ble Supreme Court has observed as follows:

*"The Department/Revenue wanted to add the value of Handle assembly, Ball valve assembly, overflow assembly, Syphon assembly, Outlet flange assembly and Flush pipe assembly, while arriving at the valuation of the flushing cisterns manufactured by the respondent. It is an admitted position that the aforesaid*

*fittings are not manufactured by the assessee. It is also an admitted position that the assessee supplied the same to those buyers only who asked for that and in such a situation the assessee buys the aforesaid components from the market and supply to the buyers at their option. In these circumstances, the Tribunal has rightly declined to add the value of the aforesaid components which are not the part of flushing cistern manufactured by the assessee. Even otherwise, the amount of tax involved is not much. For these reasons we dismiss this appeal."*

Once the sale value from the depot is denuded of the value of the brought out item the value that would remain is the value of the goods as cleared from the factory. It is not the even the case that sale value from the depot of the cable jointing kit has been adopted for the purpose of the determining the value of the goods cleared from the factory.

4.15 In case of Otis Elevators, the issue in this case was valuation of the parts and components of the elevators, cleared from the factory to the site for use in installation of the elevator. Revenue had sought to determine the value of these parts on the basis of the total contract value of elevator. Definitely the goods which were captively consumed by Otis, under the work contract between them and their client for supply and erection of the lift could not have been determined on the basis of contract value. The facts of the said case are clearly distinguishable.

4.16 In case of UTC Fire and Security India Ltd., Hon'ble Supreme Court has observed as follows:

***"11.*** *What emerges from the aforesaid discussion is that though in the Show Cause Notice the Assistant Commissioner had mentioned the applicability of Section 4(1)(a) of the Act, even he abandoned that course of action while passing the order. In the final order passed by him, he accepted that the case was covered by Section 4(1)(b) of the Act and therefore, applied the Valuation Rules, 1975. Further, as per him, it is the Rule 4 which was applicable. On the other hand, as per the Commissioner (Appeals), Rule 4 was not applicable and he invoked Rule 6 of the Valuation Rules, 1975.*

***12.*** *Thus, one thing is clear. It is not a case where Section 4(1)(a) of the Act is applicable. That is the common case of the parties. As per Section 4(1)(a) of the Act, normal prices of the goods, viz., the prices at which such goods are ordinarily sold by the Assessee to a buyer, is to be taken into consideration, subject, of course, to the condition that the buyer is not a related person and the price is the sole consideration for the sale. In this case, as mentioned above, even the Assistant Commissioner in his final order, accepted that the case was covered by Section 4(1)(b) of the Act meaning thereby, he accepted the position that normal price of the goods in question was not ascertainable. It is only in such a situation that Section 4(1)(b) of the Act gets attracted. This provision further mentions that in such an eventuality, where the normal price of the goods is not ascertainable for the reasons given in the said provision, the criteria to ascertain the price mentioned is the "nearest ascertainable equivalent thereof". This is to be determined in such manner as may be prescribed. Manner is prescribed in the Valuation Rules, 1975. Therefore, we have to consider as to which Rules of the Central Excise (Valuation) Rules, 1975 is applicable. Since there is a dispute between the applicability of Rule 4 and Rule 6, we will like to reproduce these two Rules along with Rule 3 and Rule 7 as well in order to present the complete picture.*

*"**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 by the proper officer in accordance with these rules.*

***RULE 4.*** *The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the different in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable to the proper officer.*

***RULE 6.*** *If the value of the excisable goods under assessment cannot be determined under rule 4 or rule 5, and –*

*(a) where such goods are sold by the assessee in retail, the value shall be based on the retail price of such goods reduced by such amount as is necessary and reasonable in the opinion of the proper officer to arrive at the price at which the assessee would have sold such goods in the course of wholesale trade to a person other than a related person: Provided that in determining the amount of reduction, due regard shall be had to the nature of the excisable goods, the trade practice in that commodity and other relevant factors;*

*(b) where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf in the production or manufacture of other articles, the value shall be based -*

*(i) on the value of the comparable goods produced or manufactured by the assessee or by any other assessee :*

*Provided that in determining the value under this sub-clause, the proper officer shall make such adjustments as appear to him reasonable, taking into consideration all relevant factors and, in particular, the difference, if any, in the material characteristics of the goods to be assessed and of the comparable goods;*

*(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;*

*(c) where the assessee so arranges that the excisable goods are generally not sold by him in the course of wholesale trade except to or through a related person and the value cannot be determined under clause (iii) of the proviso to clause (a) of sub-section (1) of Section 4 of the Act, the value of the goods so sold shall be determined –*

*(i) in a case where the assessee sells the goods to a related person who sells such goods in retail, in the manner specified in clause (a) of this rule;*

*(ii) in a case where a related person does not sell the goods but uses or consumes such goods in the production or manufacture of other articles, in the manner specified in clause (b) of this rule;*

*(iii) in a case where a related person sells the goods in the course of wholesale trade to buyers, other than dealers and related persons, and the class to which such buyers belong is known at the time of removal, on the basis of the price at which the goods are ordinarily sold by the related person to such class of buyers.*

***RULE 7.*** *If the value of excisable goods cannot be determined under the foregoing rules, the proper officer shall determine the value of such goods according to the best of his judgment, and for this purpose he may have regard, among other things, to any one or more of the methods provided for in the foregoing rules."*

***13.*** *Rule 4 would be applicable only in those cases where value of "such goods" which are sold by the assessee for delivery at any other time nearest to the time of the removal of the goods under the assessment, appears to be reasonable to the concerned officer. Here, as already noted above from the detailed discussion in the order of Commissioner (Appeals), the goods cannot be treated as same or would fall within the description "such goods" as sold to the other buyers in loose form when they are used captively by the appellant in the turnkey projects. We find that the only mistake which is committed by the Commissioner is to refer to Rule 6(b) inasmuch as in the present case, the goods are not consumed by the appellant/ assessee itself but used in the turnkey projects/contracts meant for the third party. Thus, it was Rule 7 which should have been referred to by the Commissioner (Appeals) as none of the preceding rules would apply. To put it otherwise, it is the case of 'best judgment assessment'. However, we find that, that is the exercise otherwise undertaken by the Commissioner (Appeals) in accepting the costing of the goods which was placed by the assessee/appellant before the assessing officer and it was taken into consideration by the*

*Commissioner (Appeals). We have already reproduced para 11 of the said order."*

There is no dispute in the approach adopted by the Commissioner, with this decision of the Hon'ble Apex Court. Commissioner has also sought to adopt the said route and have determined the value by going to the Rule 11. There is no dispute with the fact that Rule 11 do not provide any specific method of valuation but provide for determination of the value, consistent with the principles laid down by the rule 4 to 10. We have earlier referred to the decision of the Apex Court in case of Grasim Industries, wherein it has been held that principles of valuation as per section 4 both pre and post amendments made in 2000 are not materially different. Before we proceed we are referring to principles of valuation of the goods sold from the place other than the factory gate have been expounded by the Hon'ble Apex Court.

4.17 In the case of Bombay Tyre international [1983 (014) ELT 1896 (SC)], Hon'ble Supreme Court has stated as follows:

*"12. We think we have shown sufficiently that while the levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of the manufacturing process. While the levy in our country has the status of a constitutional concept, the point of collection is located where the statute declares it will be. We shall return to this later when it is necessary to consider a submission in regard to the effect of transactions to or through "related persons".*

*13. We move on now to a different dimension, to the conceptual consideration of the measure of the tax. Section 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge, and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the section itself. Section 4 of the Act provides the measure by reference to which the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that section. It has long been*

*recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. In Ralla Ram v. The Province of East Punjab - (1948) F.C.R. 207, the Federal Court held that a tax on buildings under Section 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual value of such buildings remained a tax on buildings under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income-tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted could not be identified with the nature of the tax. The distinction was observed by a Special Bench of the Patna High Court in Atma Ram Budhia v. State of Bihar - AIR 1952 Patna 359, where a tax on passengers and goods assessed as a rate on the fares and freights payable by the owners of the motor vehicles. Atma Ram Budhia (supra) was referred to with approval by this Court in M/s. Sainik Motors, Jodhpur and Others v. The State of Rajasthan - (1962) 1 S.C.R. 517. This Court in that case repelled the contention that the levy was a tax upon income and not upon passengers and goods. It pointed out that "though the measure of the tax is furnished by the fares and freights it does not cease to be a tax on passengers and goods". The point was considered by this Court again in D.C. Gouse and Co. etc. v. State of Kerala & Anr. etc. - (1980) 1 S.C.R. 804, where reference was made to the measure adopted for the purpose of the levy of tax on buildings under the Kerala Building Tax Act. The Court examined the different modes available to the Legislature for measuring the levy, and upheld the action of the Legislature in linking the levy with the annual value of the building and prescribing a uniform formula for determining its capital value and for calculating the tax. In the course of its judgment, the Court cited with approval a passage from Seervai's Constitutional Law of India - Second Edition, Vol. 2 at page 1258.*

*"Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements : the person, thing or activity on which the tax is imposed, and the*

*amount of the tax. The amount may be measured in many ways; but decided cases establish a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax."*

*It is, therefore, clear that the levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it. The relationship was aptly expressed by the Privy Council : In Re. A Reference under the Government of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland), 1934 - L.R. 1936 A.C. 352, when it said :-*

*".....It is the essential characteristic of the particular tax charged that is to be regarded, and the nature of the machinery- often complicated-by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax."*

*The case was referred to by a Constitution Bench of this Court in R.R. Engineering Co. v. Zila Parishad Bareilly & Anr. - (1980) 3 S.C.R. 1, where the relationship was succinctly described thus :-*

*"It may be, and is often so, that the tax on circumstances and property is levied on the basis of income which the assessee receives from his profession, trade, calling or property. That is, however, not conclusive on the nature of the tax. It is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. As pointed out In Re : A Reference under Govt. of Ireland Act (supra), the measure of the tax is not a true test of the nature of the tax. Therefore, while determining the nature of a tax, though the standard on which the tax is levied may be a relevant consideration, it is not a conclusive consideration."*

*The principle was reaffirmed by this Court in The Hingir-Rampur Coal Co. Ltd. and Others v. The State of Orissa and Others - (1961) 2 S.C.R. 537, where the form in which the levy was imposed was held to be an impermissible test for defining in itself the character of the levy. It was observed :-*

*"..... the mere fact that the levy imposed by the impugned Act had adopted the method of determining the rate of the levy by*

*reference to the minerals produced by the mines would not by itself make the levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances."*

*It is apparent, therefore, that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this standpoint, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited to the manufacturing cost plus the manufacturing profit. We are of opinion that a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. In our opinion, the original Section 4 and the new Section 4 of the Central Excises and Salt Act satisfy this test.*

*14. Section 4 envisages a method of collecting tax at the point of the first sale effected by the manufacturer. Under the old Section 4(a), the value of the excisable article was deemed to be the wholesale cash price for which an article of the like kind and quality was sold, or was capable of being sold, at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market did not exist for such article at such place, then delivery was envisaged at the nearest place where such market existed. Section 4(b) declared that where such price was not ascertainable, the value would be deemed to be the price at which an article of the like kind and quality was sold or was capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, and if such article was not sold or was not capable of being sold at such place, at any other place nearest thereto. Then there was an Explanation which declared that no abatement or deduction would be allowed*

*except in respect of trade discount and the duty payable at the time of the removal of the article from the factory. The wholesale price was envisaged as a cash price in order to make it a uniform standard, because it was then a price freed from the burden of an increase on account of credit or other advantage allowed to a buyer, a factor which may vary from transaction to transaction and from buyer to buyer. The essential distinction between clause (a) and clause (b) of Section 4 appears to lie in this, that clause (a) is invoked when the wholesale cash price is ascertainable and clause (b) when the wholesale cash price cannot be ascertained.*

*15. As we have said, it was open to the Legislature to specify the measure for assessing the levy. The Legislature has done so. In both the old Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts, and price has a definite connotation. The "value" of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of Section 4.*

*21. Great reliance has been placed by the assessees on two important decisions of this Court in support of the contention that only the manufacturing cost and the manufacturing profit can be taken into account for assessing the "value" of an excisable article. The first case is A.K. Roy v. Voltas Ltd. (supra). The assessee manufactured air conditioners and water coolers and sold those articles from its head office at Bombay and at branch office in different towns in the country directly to consumers at list prices. The sales so effected amounted to about 90% to 95% of its production. It also sold the articles to wholesale dealers on terms which required them to sell the products at list prices, and that the assessee would sell them the articles at the listed price less 22% discount. The assessee contended before the excise authorities that the list price minus 22% discount allowed to the wholesale dealers would constitute the "wholesale cash price" for ascertaining the real value of the articles. The contention was accepted by the excise authorities, and assessments were made on that basis. Subsequently, the Superintendent of Central Excise began to assess the duty on*

*the basis of the retail price and not the wholesale cash price. The case was taken by writ petition to the High Court, which held that the duty fell to be assessed under the old Section 4(a) of the Central Excises and Salt Act on the basis of the wholesale cash price payable by the wholesale dealers, and not under Section 4(b) on the basis of the price of retail sales effected directly to the consumers. The case was brought in appeal to this Court. The Court observed that for the purposes of Section 4(a), it was not necessary for a wholesale market to exist in the physical sense of the term where articles of a like kind or quality are or could be sold. A wholesale market, it was observed, could also mean "the potentiality of the articles being sold on a wholesale basis". What was necessary was that the articles could be sold wholesale to traders. It was observed further that the application of Section 4(a) of the Act did not depend upon any hypothesis to the effect that at the time and place of sale any further articles of the like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was a `wholesale cash price', the clause was not inapplicable for want of sale of other goods of a like kind and quality. Later follow the words, which have brought on the present controversy :*

*"Excise is a tax on the production and manufacture of goods (see Union of India v. Delhi Cloth and General Mills (supra). Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely selling profit."*

*Those observations were made when the Court was examining the meaning of the expression "wholesale cash price". What the Court intended to say was that the entire cost of the article to the manufacturer (which would include various items of expense composing the value of the article) plus his profit on the manufactured article (which would have to take into account the deduction of 22% allowed as discount) would constitute the real*

*value had to be arrived at after off-loading the discount of 22%, which in fact represented the wholesale dealer's profit. A careful reading of the judgment will show that there was no issue inviting the Court's decision on the point now raised in these cases by the assessees.*

*The other case is Atic Industries Ltd. v. H.H. Dave, Asst. Collector of Central Excise and Ors., - (1975) 3 S.C.R. 563 = 1978 E.L.T. (J 444). The appellant, Atic Industries Ltd., was a manufacturer of dye stuffs. It sold its products to two wholesale buyers, 70% of its total production to one and 30% to the other. The price charged was a uniform price described as the "basic selling price" less a trade discount of 18%. The wholesale dealers in turn resold the dye stuffs to distributors and also directly to large consumers, including textile mills. The large consumers paid the basic selling price, while the distributors paid a higher price but subject to a trade discount. The distributors sold the product to consumers. The question arose as to how the value of the dye stuffs manufactured by the appellants should be determined under Section 4. The appellants contended that the value should be the price at which the appellants sold in wholesale to the two wholesale buyers, less a uniform trade discount of 18%. The excise authorities took the view that the value should be the price at which the wholesale buyers had sold the dye stuffs to the distributors without taking into account the discount given to the distributors. Before this Court, the excise authorities pressed the same contention, urging that Section 4(a) did not provide that in every case the wholesale price charged by the manufacturer should be taken into consideration and not the wholesale price charted by the wholesale buyers who sold the product also in wholesale to the next buyers. One of us (Bhagwati J.) spoke for the Court in that case, and delivered a closely enunciated and lucid exposition of the true legal position. It was explained :*

*"The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the*

*purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer's selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the later may in his turn sell the goods purchased by him from the manufacturer to different wholesale dealers at state level, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the Voltas' case (supra).*

*Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the goods for the purpose of excise.*

*There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arm's length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would represent the value of the goods for the purpose of assessment of excise. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of Section 4(a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis."*

*23. This case also does not support the case of the assessees. When it refers to post-manufacturing expenses and post-manufacturing profit arising from post-manufacturing operations, it clearly intends to refer not to the expenses and profits pertaining to the sale transactions effected by the manufacturer but to those pertaining to the subsequent sale transactions effected by the wholesale buyers in favour of other dealers.*

*25. Accordingly, we hold that pursuant to the old Section 4(a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old Section 4(a) the value must be determined as the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal.*

*26. Where the excisable article or an article of the like kind and quality is not sold in wholesale trade at the place of removal, that is, at the factory gate, but is sold in the wholesale trade at a place outside the factory gate, the value should be determined as the price at which the excisable article is sold in the wholesale*

*trade at such place, after deducting therefrom the cost of transportation of the excisable article from the factory gate to such place. The claim to other deductions will be dealt with later.*

*27. Finally, where the wholesale price of the excisable article or an article of the like kind and quality is not ascertainable, then pursuant to the old Section 4(b) the value of the excisable article shall be the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the assessee at the time and place of removal or if the excisable article is not sold or is not capable of being sold at such place, then the price at which it is sold or is capable of being sold by the assessee at any other place nearest thereto.*

*28. In every case the fundamental criterion for computing the value of an excisable article is the price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the manufacturer, and it is not the bare manufacturing cost and manufacturing profit which constitutes the basis for determining such value.*

*30. Where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the new Section 4(1)(b) provides that the nearest ascertainable equivalent thereof determined in such manner as may be prescribed shall be the value of the excisable goods for the purpose of charging the excise duty.*

*31. It will be noticed that the basic scheme for determination of the price in the new Section 4 is characterised by the same dichotomy as that observable in the old Section 4. It was not the intention of Parliament, when enacting the new Section 4 to create a scheme materially different from that embodied in the superseded Section 4. The object and purpose remained the same, and so did the central principle at the heart of the scheme. The new scheme was merely more comprehensive and the language employed more precise and definite. As in the old Section 4, the terms in which the value was defined remained the price charged by the assessee in the course of wholesale trade for delivery at the time and place of removal. Under the new Section 4 the phrase "place of removal" was defined by Section 4(b) not merely as "the factory or any other place or premises of production or manufacture of the excisable goods"*

*from where such goods are removed but was extended to "a warehouse or any place or premises wherein the excisable goods have been permitted to be deposited without payment of duty" and from where such goods are removed. The judicial construction of the provisions of the old Section 4 had already declared that the price envisaged under clauses (a) and (b) of that section was the price charged by the manufacturer in a transaction at arm's length. After referring to several cases, some of which have already been mentioned here earlier, this Court pointed out in Voltas Limited (supra) that the wholesale cash has to be ascertained only on the basis of transactions at arm's length. If there is a special or favoured buyer to whom a specially low price is charged because of extra-commercial considerations, e.g., because he is a relative of the manufacturer, the price charged for those sales would not be the "wholesale cash price" for levying excise under Section 4(a) of the Act. A sole distributor might or might not be a favoured buyer according as terms of the agreement with him are fair and reasonable and were arrived at on purely commercial basis."*

*38. The essential content of the reasons stated by learned Counsel proceeds on the assumption that a conceptual value governs the assessment of the levy. We have already examined the validity of the three principles underlying the concept, and we have indicated the extent to which they cannot be accepted. We have observed that the old Section 4 as well as the new Section 4 determine the value on the basis of the price charged or chargeable by the particular assessee, and the price is charged or is chargeable in respect of the article manufactured by him. The value of the excisable article is determined in that context. When that is so, the fundamental basis on which the argument has been raised on behalf of the assessees cannot survive. We may add that whether any further deductions can be claimed beyond those already mentioned in the statute will depend on the nature of those claims in the case of a particular assessee.*

*40. This brings to a close in these cases the question whether the value of an article for the purpose of the excise levy must be confined to the manufacturing cost and the manufacturing profit*

*in respect of the article. In our judgment, the question has to be answered in the negative.*

*47. We now proceed to the question whether any post-manufacturing expenses are deductible from the price when determining the "value" of the excisable article. The old Section 4 provided by the Explanation thereto that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new Section 4 provides by sub-section (2) that where the price of excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price. The new Section 4 also contains sub-section (4)(d)(ii) which declares that the expression "value" in relation to any excisable goods, does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale. Now these are clear provisions expressly providing for deduction, from the price, of certain items of expenditure. But learned counsel for the assessees contend that besides the heads so specified a proper construction of the section does not prohibit the deduction of other categories of post-manufacturing expenses. It is also urged that although the new Section 4(4)(d)(i) declares that in computing the "value" of an excisable article, the cost of packing shall be included, the provision should be construed as confined to primary packing and as not extending to secondary packing. The heads under which the claim to deduction is made are detailed below :*

*Storage charges.*

*Freight or other transport charges, whether specific or equalised.*

*Outward handling charges, whether specific or equalised.*

*Interest on inventories (stocks carried by the manufacturer after clearance).*

*Charges for other services after delivery to the buyer.*

*Insurance after the goods have left the factory gate.*

*Packing charges.*

*Marketing and Selling Organisation expenses, including advertisement and publicity expenses.*

*48. At the outset, we must make it clear that the contentions in this regard on behalf of the assessees proceeds on two broad bases. The first is that to determine the value of an excisable article, all expenses must be excluded which do not enter into the formula of manufacturing cost plus manufacturing profit. This follows from the principal plank of the assessees' case that the "value" must be confined to the manufacturing cost, and the manufacturing profit. For, it is said, that if the deductions claimed are allowed, the price would be brought down to the conceptual value. All post-manufacturing expenses are claimed from that perspective and within that context. The other basis on which the claim proceeds, is that the price at the factory gate and the price at a depot outside the factory gate are identical.*

*49. We shall now examine the claim. It is apparent that for purposes of determining the "value", broadly speaking both the old Section 4(a) and the new Section 4(1)(a) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old Section 4(a) or under the new Section 4(1)(a) is not ascertainable, the price is determined under the old Section 4(b) or the new Section 4(1)(b). Now, the price of an article is related to its value (using this term in a general sense), and into that value how poured several component, including those which have enriched its value and given to the article is marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included. Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling*

*charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to the buyer, namely after-sales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade. Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery."*

4.18 Hon'ble Supreme Court has in the case of **J G Glass [1998 (97) E.L.T. 5 (S.C.)]** held as follows:

*"16. On an analysis of the aforesaid rulings, a two-fold test emerges for deciding whether the process is that of "manufacture". First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist; secondly, whether the commodity which was already in existence will serve no purpose but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process. In the present case, the plain bottles are themselves commercial commodities and can be sold and used as such. By the process of printing names or logos on the bottles, the basic character of the commodity does not change. They continue to be bottles. It cannot be said that but for the process of printing, the bottles will serve no purposes or are of no commercial use.*

*23. Insofar as Civil Appeal No. 2882 of 1993 is concerned, the contention of the appellant has to be accepted on the facts of the case. It is not in dispute that the printing on the bottles is also carried out in the same factory where the bottles are*

*manufactured and the ultimate product which happens to be the excisable item at the gate of the factory is the printed bottle as such. Hence, the value of printed bottles including printing charges is the assessable value of the excisable goods and duty is chargeable thereon. The decision of the High Court is erroneous inasmuch as it has failed to take note of the fact that the printing on the bottles is also completed within the same factory premises. Hence, the appeal is allowed. The judgment of the High Court is set aside. The order of the Collector dated 7-7-1983 in F. No. RO-943/83 is restored."*

4.19 In case of Siddharta Tubes [2000 (115) ELT 32 (SC)] Hon'ble Supreme Court has held as follows:

*"2. The appellants manufacture mild steel pipes and tubes. About 30% of the production is cleared at that stage, and the product is then known as black pipe. The balance production is taken to separate shed in the appellants' factory premises and galvanised. The dispute is in relation to the galvanised black pipe. According to the appellants, what they clear is black pipe, the process of galvanisation is not a process of manufacture and no addition can be made to the assessable value of the black pipe on account of the galvanisation that subsequently occurred. The Tribunal rejected the contention. It said that the appellants themselves had, in their classification list, declared M.S. black pipes and galvanised pipes as their products. In such a situation, the mere fact that galvanisation was done subsequent to paying duty on the M.S. black pipes could not, by itself, be a ground for not including the cost of galvanisation in the assessable value of the black pipes subjected to the process of galvanisation. While that process did not amount to manufacture, it added to the intrinsic value of the product to make up the full commercial value which was realised by the appellants by charging a higher price for such pipes covering the cost of galvanisation.*

*3. We are in agreement with the view taken by the Tribunal. The mere fact that the process of galvanisation is carried on in another shed can make no difference. When the assessable value is to be calculated of the galvanised black pipe made by the appellants, the element of the cost of galvanisation must form a part thereof."*

4.20 In case of Siddharta Tubes [2006 (193) ELT 6 (SC)] Hon'ble Supreme Court has held as follows:

*"6. In the present case, the Commissioner on facts found that the assessee was clearing from its factory galvanized pipes classifiable under Heading 73.06. It was not disputed that the process of galvanization by itself did not amount to manufacture, but when the assessee was selling its product (m.s. galvanized pipes) manufactured out of H.R. coils after passing through various processes (including galvanization) then such a process gave value addition to the product and consequently, the cost of galvanization had to be included in the assessable value. Galvanization added to the quality. Galvanization increased the value of pipes. It enriched the value of goods and, therefore, the cost incurred by the assessee for galvanization was required to be included in the assessable value.*

*7. At the outset, we may state that value is the function of price under Section 4(4)(d)(i) of the Act. The concept of "valuation" is different from the concept of "manufacture". Under Section 3 of the Act, the levy is on the manufacture of the goods. However, the measure of the levy is the normal price, as defined under Section 4(1)(a) of the Act. It is not disputed that galvanization as a process does not amount to manufacture. However, on facts, it has been found by the Commissioner that the process of galvanization has taken place before the product is cleared from the place of removal, as defined under Section 4(4)(b). Further, on facts, the Commissioner has found that galvanization has added to the quality of the product. It has increased the value of the pipes. Hence, the costs incurred by the assessee for galvanization had to be loaded on to the sale price of the pipes. Therefore, the cost had to be included in the assessable value of m.s. galvanized pipes. We do not find any error in the reasoning of the adjudicating authority.*

*8. In the case of Union of India & Others v. Bombay Tyre International Ltd. reported in AIR 1984 SC 420, this Court observed as follows :*

*".....the price of an article is related to its value, and into that value one has to pour several components, including those which enrich the value of the product and which give to an article its marketability in the trade. Therefore, the expenses incurred on*

*account of the several factors, which have contributed to the value of the product up to the date of sale, are liable to included in the assessable value."*

*9. Recently, this Court in the case of Procter & Gamble Hygiene & Health Care (supra), has observed as follows :*

*"9. This case relates to valuation. At the outset, we would like to clarify certain concepts under the Excise Law. The levy of excise duty is on the "manufacture" of goods. The excisable event is the manufacture. The levy is on the manufacture. The measure or the yardstick for computing the levy is the "normal price" under Section 4(1)(a) of the Act. The concept of "excisability" is different from the concept of "valuation". In the present case, as stated above, we are concerned with valuation and not with excisability. In the present case, there is no dispute that AMS came under sub-heading 3402.90 of the Tariff. There is no dispute in the present case that AMS was dutiable under Section 3 of the Act. In the case of Union of India & Others etc. v. Bombay Tyre International Ltd. etc. reported in AIR 1984 SC 420, this Court observed that the measure of levy did not conclusively determine the nature of the levy. It was held that the fundamental criterion for computing the value of an excisable article was the price at which the excisable article was sold or was capable of being sold by the manufacturer. It was further held that the price of an article was related to its value and in that value, we have several components, including those components which enhance the commercial value of the article and which give to the article its marketability in the trade. Therefore, the expenses incurred on such factors inter alia have to be included in the assessable value of the article up to the date of the sale, which was the date of delivery.*

*10. In the case of Sidhartha Tubes Ltd. v. Collector of Central Excise reported in 2000 (115) E.L.T. 32, this court held that the process of galvanization, though did not amount to "manufacture", resulted in value addition and, therefore, the galvanization charges were includible in the assessable value of the M.S. black pipe.*

*11. The concepts of "manufacture" and "valuation" are two different and distinct concepts. In the present case, we are*

*concerned with valuation. Value is the function of price under Section 4(1)(a) of the said Act..."*

*10. In the case of Hindustan Polymers v. C.C.E. reported in 1989 (43) E.L.T. 165, this Court has held that the normal price for which goods are sold at the factory gate has to be taken as the assessable value and addition thereto has to be made where, in addition to the price, the manufacturer levied a charge for an item which was intrinsically necessary to place the manufactured goods on the market.*

*11. In the present case, we find that the product cleared from the factory was m.s. galvanized pipes. Galvanization had given value addition to the m.s. pipes. The process of galvanization was incidental to the manufacture of the m.s. galvanized pipes and, therefore, the cost of that process was rightly included in the assessable value. We do not find any error in the concurrent findings recorded by the Commissioner and by the Tribunal."*

4.21 Undisputedly the appellants have offered the goods for sale for the first time in normal course of trade at depot only, which are their fully owned service centers. The actual place of removal as per the definition of place of removal, as section 4, as have been interpreted by the Hon'ble Apex Court umpteen number of times has to be the depot only. Even if the arguments of the appellant are accepted, then also in view of the decisions of Hon'ble Apex Court specifically in case of Sidharta Tube, the value will be determined only on the basis of sale price from depot. We have find that the form in which the goods have been sold at depot are in package comprising of the goods cleared from the factory of appellant and other bought items packed together in a carton. Hence the sale price of the goods comprise of the sale price of the goods manufactured by the appellant and the sale price of the goods trade by the appellant. It is in view of this show cause notice and impugned order has proposed determination of the value of the manufactured goods by application of formula as follows:

A X C /(B + C)

where: A is Total net sale price of the kits excluding excise duty

B is total landed cost/price of the bought out items

C is total landed cost/price of excisable goods

This approach is consistent with the principles as per Rule 11 of the Valuation Rules, 2000.

4.22 Now on the issue of limitation and imposition of penalties Commissioner has observed as follows:

*"56. As regards the assessee's claim that they had informed the Central Excise department about their activity on various occasions, let us examine the contention. It can be seen from their letter dated 12.11.1993, they have not informed how the goods manufactured will be assessed to duty as regards their assessable value is concerned. In the letter, more important and significant communication is their 'Protest regarding classification of the manufactured items. Hence, rest other things were immaterial with reference to the situation prevailing at the material time. Another vital fact is that these Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which incorporate rule 8 were not in existence in the year 1993. As such, I that the communication letter dated 12.11.1993 is not at all significant in the present case,*

*The assessee has made an attempt to enjoy extra benefit out of the said letter which is futile effort. Their letter dated 27.3.2002 to the Range Superintendent was for intimating the extension of kitting facility and revision of ground plan accordingly. Thereafter, they themselves accommodated them as regards valuation of manufactured goods within the scope of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which sounds that their case was suitable to the situation mentioned in the said rule 8 and declared their method of valuation accordingly, which itself was a mis-declaration on their part, because they were well aware that they were not using the manufactured goods for consumption in the production or manufacture of other articles, which was pre-requisite for valuation under Rule 8. On the contrary, they informed the department they were going to make cable jointing kits by putting together the bought out items and manufactured duty paid components. They did not inform that they were not going to carry any process or even will not remove the packing*

*of the duty paid goods, but would be selling the duty paid goods as such along with some bought out items by keeping the duty paid goods in tact in their original packing condition in which they were cleared from the factory. The communication by the range superintendent and letter dated 4.4.2002 was regarding request for de-registering Building No. 2 and approval of fresh ground plans, having no bearing over valuation of goods.*

*57. From the above discussions, I conclude that M/s Raychem RPG Ltd. with intent to evade Central Excise duty, considered themselves or posed as if they were rightly covered within the scope of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, when they were aware that they were not using the excisable goods manufactured and cleared by them for consumption in production or manufacture of other articles, but the goods were sold by them from their other premises without any process done on them. By putting manufactured components and bought out articles in a single packet/carton which is termed as 'cable jointing kit', the assessee have just facilitated the user of such goods for use whenever necessary. Further, it is also a fact that the user does not use all the components at a time from the said kit, but uses only the components required at the material time. It is not the case that individual components manufactured in the factory of the assessee cannot be marketed or that components so manufactured cannot be put to use independently. Thus, the assessee have willfully adopted the costing method for the purpose of payment of Central Excise duty even though they could have very well assessed the goods manufactured in the factory with the sole intention of undervaluing and evading Central Excise duty. The assessee have contended that at Building No. 2/Customer Care Centre, the goods manufactured in the factory are cleared for captive consumption for further use in the manufacture of articles. But the fact is that no manufacturing activity is being carried out on the components manufactured in the factory after their removal from the factory. This has amounted to a mis-statement on the part of the assessee. Hence the extended period of demand under proviso*

*to sub section (1) of Section 11A of the Central Excise Act, 1944 is rightly invoked in the Show Cause Notice dated 11.5.2007.*

*58. As regards proposal for invoking penal action under Section 11AC of the Central Excise Act, 1944 in the Show Cause Notice dated 11.5.2007, I find that entire exercise of mis-declaring the removal of goods from the factory under the guise of captive consumption at Building No. 2/Customer Care Center was with the sole intention of evading Central Excise duty. It is not believable that value of individual components manufactured in the factory cannot be determined or that they do not have any records to show the price of such individual components manufactured, although this valuation of components has been done in their Balance sheet. It is also not believable that valuation (selling price) of the kit as a whole, which includes manufactured components as well as certain bought out items, can be arrived at while selling the goods, but value of components manufactured in the factory cannot be determined. Thus, the recourse taken by the assessee to arrive at the transaction value of the goods on the basis of costing method in terms of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is nothing, but to undervalue the goods with the sole intention of evading Central Excise duty and thereby, defraud exchequer of its legitimate dues. For this act and omission on the part of the assessee, I also hold that M/s Raychem RPG Ltd. are liable to penalty under Section 11AC of the Central Excise Act, 1944. The assessee are also liable to pay appropriate interest in terms of Section 11AB of the Central Excise Act, 1944 on the demand amount held to be payable by/recoverable from them.*

*59. As regards penalty clause invoked in the Show Cause Notice dated 28.12.2007, I find that I find that the assessee have deliberately followed the modus operandi of clearing the manufactured components from their factory under the guise of captive consumption at Customer Care Centre with the sole intention to undervalue and evade the payment of correct Central Excise duty. The goods cleared in such a manner under the guise of captive consumption is in contravention of the Central Excise Act, 1944 and rules made thereunder and as*

*such, these goods are liable to confiscation. As such, the assessee have also rendered themselves liable for penal action in terms of Rule 25 of the Central Excise Rules, 2002. The assessee are also liable to pay appropriate interest in terms of Section 11AB of the Central Excise Act, 1944 on the demand amount held to be payable by/recoverable from them. I find that entire exercise of mis declaring the removal of goods from the factory under the guise of captive consumption at Building No. 2/Customer Care Center was with the sole intention of evading Central Excise duty. It is not believable that value of individual components manufactured in the factory cannot be determined or that they do not have any records to show the price of such individual components manufactured, although this valuation of components has been done in their Balance sheet. It is also not believable that valuation (selling price) of the kit as a whole, which includes manufactured components as well as certain bought out items, can be arrived at while selling the goods, but value of components manufactured in the factory cannot be determined. Thus, the recourse taken by the assessee to arrive at the transaction value of the goods on the basis of costing method in terms of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is nothing, but to undervalue the goods with the sole intention of evading Central Excise duty and thereby, defraud exchequer of its legitimate dues. For this act and omission on the part of the assessee, I also hold that M/s Raychem RPG Ltd. are liable to penalty under Section 11AC of the Central Excise Act, 1944. The assessee are also liable to pay appropriate interest in terms of Section 11AB of the Central Excise Act, 1944 on the demand amount held to be payable by recoverable from them.*

*60. As regards proposed penal action on Shri Kapil M. Gohil, Senior Manager (Finance) and Company Secretary, who has pleaded that i) the Company has started paying duty as per the impugned method of Valuation from 1.4.2002 whereas he was resumed in the company on 4.10.2004, i.e. at a later date; ii) he did not advise the company to adopt the method of valuation and the said manner of payment of duty on the goods and thereby did not play any role in the alleged non-payment of*

*duty; iii) he was not benefited by the said non-payment of duty by the company; iv) he had no knowledge that the goods were liable to confiscation; v) he believed and continued to believe that the appropriate duty liability was discharged on the goods and therefore, the same cannot be confiscated and vi) the Show Cause Notice only seeks to recover the alleged short payment of duty from the company and there is no proposal to confiscate the goods.*

*61. It can be seen from the statement of Shri Kapil Gohil that though he said that he was handling day to day matter pertaining to banking, treasury, legal and secretarial, but in his statement as well as in the reply to the Show Cause Notice, he has not only defended the act of short payment by the company, but has vouched for correctness of the method adopted by the company by giving his detailed statement as well as reply to the Show Cause Notice. Hence, his innocence cannot be accepted. Further, as regards his argument about confiscation of goods, it is certain that the goods in respect of which duty was evaded, were liable to confiscation. Only because the goods are not available for confiscation, there is no proposal for confiscation in the Show Cause Notice. Therefore, Shri Kapil Gohil, Senior Manager (Finance) of the company, making assertive statement regarding Central Excise matters like method of valuation, dutiability, marketability, excisability of goods cannot be considered as an innocent and lay man for Central Excise. Had he been not concerned with Central Excise matters, he would have kept quiet about the matters related to Central Excise. Mere difference in dates of commencement of offence and the date of joining of service by Shri Gohil will not make very large difference as regards the role and responsibility of the officer, which are otherwise proved by the statements made by him. I therefore hold him responsible and liable to penal action under Rule 26 of the Central Excise Rules, 2002. However, I am inclined to impose lighter penalty considering period of his tenure in the total period of demand which is from 1.4.2002 to 31.3.2007."*

4.23 We are not in agreement with the findings recorded by the Commissioner on the issue of limitation. Undisputedly all the

facts were in the knowledge of the revenue and in fact have been corresponded between the revenue and appellant since 1993. For the clearance of the said goods either by adopting the value determined on the basis of cost construction method prior to 1994, appellants would have filed Price List as per Rule 173 C of the erstwhile Central excise Rules, 1944 and thereafter price declarations with the department. These price lists would have been considered and approved by the appropriate authorities throughout. Commissioner does not deny the correspondences between the appellant and the revenue since 1993 on the issue. When the entire issue was in knowledge of the revenue since 1993, we do not find ourselves in agreement with the findings recorded by the Commissioner for invoking extended period of limitation in the present case. Since we do not find any merits in the order invoking extended period of limitation, the penalty imposed under Section 11AC cannot be sustained and needs to be set aside.

4.24 In the issues relating to interpretation of the provisions of the Central Excise Act, 1944 and the Rules made thereunder, consistently it has been held that a change of view in the interpretation of the provisions of the statue and adopting a view that is contrary to the view adopted earlier as a matter of long standing practice, the revenue the appellant cannot be faulted and penalties imposed under Rule 25 too cannot be sustained.

4.25 We also find that Commissioner has imposed penalty on the appellant 2 under Rule 26, we are not in position to sustain the same for the reasons as stated in para 4.24.

4.26 Thus in effect the appeals filed by the appellant are allowed to the extent of setting aside the

- demands beyond the normal period of limitation.
- Setting aside the penalties imposed on the appellants.

4.27 Since the entire demand of duty in the appeals filed by the revenue is within normal period of limitation and we have held that demand will, sustain on merits, these appeals are allowed to this extent only. We do not sustain confiscation of the goods, imposition of fine and penalties by the adjudicating authority vide his order in original.

5.1 Appeal No E/941/2008 filed by M/s Raychem RPG Limited is partly allowed to extent of setting aside demand beyond the normal period of limitation and all the penalties imposed on them under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002

5.2 Appeal No E/942/2008 filed by Shri Kapil Gohil is allowed.

5.3 Appeal No E/85535/2013 filed by revenue is partly allowed to the extent of demand of duty and interest only.

(Order pronounced in the open court on 06.05.2022)

**(Sanjiv Srivastava)**
**Member (Technical)**

**(P. Dinesha)**
**Member (Judicial)**

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