CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.II

Excise Appeal No.71114 of 2018

(Arising out of Order-In-Appeal No.NOI-EXCUS-001-APP-0075-2018-19, dated 17.05.2018passed by Commissioner (Appeals) Central Tax, Noida)

M/s Eveready Industries India Ltd. ..... Appellant

(B-1, Sector-80, Phase-II
Noida, Uttar Pradesh 201301)

VERSUS

Commissioner, CGST, Noida ..... Respondent

(C-56/42, Sector 62, Noida, Uttar Pradesh)

AND

Excise Appeal No.70395 of 2021

(Arising out of Order-In-Appeal No.NOI-EXCUS-001-APP-28-21-22, dated - 31.05.2021 passed by Commissioner (Appeals) Central Tax, Noida)

M/s Eveready Industries India Ltd. ..... Appellant

(B-1, Sector-80, Phase-II
Noida, Uttar Pradesh 201301)

VERSUS

Commissioner, CGST, Noida ..... Respondent

(C-56/42, Sector 62, Noida, Uttar Pradesh)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant
Shri Abhishek Mukherjee, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70320-70321/2026

DATE OF HEARING: 28.07.2026
DATE OF DECISION: 01.09.2026

SANJIV SRIVASTAVA:

These appeals are directed against the Order-In-Appeal passed by the Commissioner (Appeals) Central Tax, Noida as detailed in the table below:-

S. No.	Appeal No.	Order-In-Appeal No.
1.	E/71114/2018	NOI-EXCUS-001-APP-0075-2018-19, dated 17.05.2018
2.	E/70395/2021	NOI-EXCUS-001-APP-0028-2021-22, dated 31.05.2021

2.1 The Appellant is engaged in the manufacture of primary cell and primary batteries classifiable under Heading 85061000 of schedule to Central Excise Tariff Act, 1985 and are registered with the Central Excise & Service Tax Department.

2.2 During the course of audit of the records of the Appellant it was observed that:-

(i) Primary Cell & Primary batteries allotted a code which read as DBB and the same was cleared to general customers through depot/distributor network. The said excisable goods being removed in the aforesaid manner were on payment of Central Excise duty arrived on the basis of assessable value arrived on the basis of the retail sale price affixed on the package of the said goods as per the provisions of Section 4A of CEA 1944.

(ii) Primary Cell & Primary batteries allotted a code which read as AAMJ and the same was removed to general customers through depot/distributor network including Lucknow Depot of the noticee on payment of Central Excise duty arrived on the basis of assessable value arrived on the basis of the retail sale price affixed on the package of the said goods as per the provisions of Section4A of CEA 1944.

(iii) Primary Cell & Primary batteries allotted a code which read as AAMJ 1015 which was bang removed to their factory located at Aishbag, Lucknow on payment of Central Excise duty on the assessable value arrived on the basis of CAS 4 costing under the provisions of Section 4 of CEA 1944.

The said goods were being further cleared for being co-packed with Torches manufactured by their own unit.

(iv) Primary Cell & Primary batteries coded as AAMJ 1015 are also removed to M/s PMS Flashmatics (P) Ltd, Haridwar and M/s ELIN Electronics Ltd., Solan (11P) on payment of Central Excise duty on the assessable value arrived under the provisions of Section 4 of CEA 1944 on the basis of contractual price.; both buyers availing area based Exemption.

(v) That M/s PMS Flashlight Pvt. Ltd. and M/s Ellin Electronics Ltd. are manufactures of Torches who are co-packing the Torches manufactured by them with AAMJ 1015 batteries purchased from the noticee. That the Torches co-packed with the batteries are sold to the noticee who in turn are doing the final sale of the co-packed products to the customers.

2.3 On further investigation of the matter, Appellant was asked to provide details as follows:-

(i) Difference between weight, manufacturing process and quantity/value of raw material contained in the batteries cleared u/s 4 of CEA 1944 (against POs) to M/s PMS Flashmatics (P) Ltd Haridwar/ M/s Ellin Electronics Ltd, Solan (H.P.) and those cleared under stock transfer to their Aishbagh unit at Lucknow(under CAS4).

(ii) The marketing pattern in respect of goods sold to M/s PMS Flashmatics(P)Ltd. Haridwar and M/s Ellin Electronics Ltd, Solan (H.P.), and the manner in which the said goods were sold to the ultimate consumers.

2.4 On examination of the sales invoices it was revealed that the noticee has cleared identical batteries to units located in Haridwar and Solan having same physical & chemical properties at two different prices i.e. at the rate of Rs. 2.13 per piece for 1015TFN1134 and at the rate of Rs. 2.20 per piece for R6 Power battery 1134-3UP. Further examination also revealed that the same said batteries i.e. 1015TFN1134 & R6 Power battery 1134-3UP have been removed at higher rate of Rs. 2.90 and Rs. 2.81 per piece to their Lucknow unit adopting CAS-4 method treating the value as transaction value under CEA 1944.

2.5 The Appellant was summoned and asked to provide following documents:-

1) Copy of Agreement executed between M/s Eveready Industries with M/s PMS Haridwar & M/s ELLIN Solan for supply of batteries to be sold by them co packed with torches.
2) MRP of torches manufactured by M/s PMS Haridwar & M/s ELLIN Solan which are copacked with batteries supplied by M/s Eveready Industries, Noida.
3) MRP of torches manufactured at their unit located in Lucknow which are sold Co-packedwith batteries on stock transfer by you under CAS-4.
4) All evidences and records /documents in support of their above contention.

2.6 On scrutiny of the documents provided, it was observed that:-

- There is no difference in weight, process of manufacture, capacity and quantity are quality of raw materials contained in the batteries that are removed to M/s PMS Flashmatics (P)Ltd, Haridwar & M/s Ellin Electronics Ltd, Solan(H.P.) with those batteries that are removed by them con the basis of stock transfer to their own torch manufacturing plant located at Ashbagh Lucknow.
- torches manufactured by M/s PMS Flashmatic (P) Ltd Haridwar and M/s Ellin Electronics Ltd Solan(H.P) are packed with the batteries sold by them to the said two units and the Torches packed along with the said batteries are once again sold back to them by the said two units.That the said batteries packed along with the torches purchased by them are sold to the customers by them.

2.7 On examination of the Memorandum of Understanding dated 01.07.2007 entered into between M/s Eveready Industries India Limited (the noticee) and M/s PMS Flashmatics Pvt. Ltd., Haridwar and Memorandum of Understanding dated 01/01/2007 entered into between M/s Eveready Industries India Limited (the noticee) and M/s Ellin Electronics Limited reveal that the Torches are manufactured by M/s PMS Flashmatics Pvt. Ltd., Haridwar and M/s Elin Electronics Limited as per the design and specification of M/s Eveready Industries India Limited(the noticee). That packing/Labelling and affixation of the Trade Mark on the products manufactured by M/s PMS Flashmatics Pvt. Ltd., Haridwar and M/s Elin Electronics Limited have to be strictly as per the instruction and specification given by M/s Eveready Industries India Limited (the noticee). That the said the delivery of the products has to be made to Eveready Industries India Limited (the noticee) and that the said manufacturers of the Torches shall not supply the products sold to M/s Evercady Industries India Limited to any third party whatsoever.

2.8 On the basis of the above, Revenue prima facie concluded that there was mutuality of business interest between the Appellant and M/s PMS Flashmatics Pvt. Ltd. Haridwar & M/s Elin Electronics Limited, Solan.

2.9 In view of the mutuality of business interest which so existed, it was alleged that the Appellant and the said two buyers of the battery were related to each other as per Section 4(3)(b)(iv) of the Central Excise Act, 1994 and the price at which the batteries were being sold by the Appellant to these two persons was not the sole consideration for the sale of goods. Accordingly, the transaction/contractual price needs to be rejected and the valuation of the goods needs to be done on the basis of the cost of manufacture in terms of Rule 8 read with Rule 4 of the Central Excise (Valuation) Rules. The relevant para of the Show Cause Notice with regards to the allegation against the Appellant are reproduced below:-

> *"20. Further, the facts regarding assessment and payment of Central Excise duty on the bus is of contractual price instead of value arrived on the basis of costing method in respect of sales macie to related persons, in the manner mentioned in the forgone paras, was not declared to the department in any manner whatsoever. It was revealed only*

during the course of that the party was determining the assessable in respect of goods sold to related persons on the basis of contractual price instead of resorting to cost of production method and it was also revealed that they had mutuality of interest in the business of the buyers and vice versa. They did not declare the above facts of in their ER-Is submitted to the department. This fact came into notice of the department at the time of audit, from examination of the Memorandum of Understanding, the marketing pattern of goods, invoices issued and the valuation of identical goods on the basis of costing adopted for stock transfer to their own unit It appears that the party has willfully suppressed the facts to evade the payment of duty inasmuch as with clear intent to evade payment of duty and therefore provisions under subsection(4) to Section 11A of the Central Excise Act, 1944 were attracted for invoking the extended period of five years for demand and recovery of the duty liability of Rs.4447291 along with interest under the provisions of Section 11AA of the said act. The party have also rendered them liable for penal action under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 in as much as they have contravened the following provisions of Central Excise Rules 2002 with the intent to evade payment of Central Excise duty.

(i). Rule-4, Rule-6 and Rule-8 of the Central Excise Rules, 2002 by not making correct assessment and payment of appropriate central excise duty in accordance with the provisions of Section 4 of the Central Excise Act-1944 read with provisions of Rule 8 and Rule of Valuation(Determination of Price of Excisable Goods) Rules 2000."

2.10 Show Cause Notice dated 05.08.2016 for the period November, 2013 to November 2014 was issued to the Appellant asking them to show cause as to why:-

(i) An amount of duty for Rs. 5,36,350/-, (Rupee Five lacs thirty six thousand three hundred fifty only) and Rs 3910941/- (Rupees thirty nine lacs ten thousand nine hundred forty one only) totaling to Rs. 4447291/-(Rupees Forty Four Lakhs Forty Seven Thousand Two Hundred Ninety one only) short paid should not be demanded and recovered from them under Section 11A (4) of the Central Excise Act. 1944 in case of excisable goods removed to M/s PMS Flashmatics(P)Ltd Haridwar ***(As per Annexure-A & B)***

(ii) Interest at applicable rates on amount at Sl No. (i) above, should not be demanded and recovered from them under Section 11AA of Central Excise Act, 1944.

(iii) Penalty should not be imposed on them in terms of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of Central Excise Act 1944 for the contraventions for provisions of CEA, 1944 & Central Excise Rules 2002.

2.11 Another Show Cause Noticed dated 03.12.2016 for the Period December 2014 to March 2016 stating the same facts and grounds was issued to the Appellant asking them to show cause as to why:-

(i) An amount of Rs. 6,22,770/- (Rs Six lakhs Twenty Two Thousand Seven Hundred and Seventy) [including cesses] and another amount of Rs.41,25,915/- (Rs Forty One Lakhs Twenty Five Thousand Nine Hundred and Fifteen) [including cesses] totaling to Rs.47,48,685/-.(Forty Seven Lakhs Forty Eight Thousand Six Hundred and Eighty Five) [including cesses] short paid should not be demanded and recovered from them under Section 11A(1) of the Central Excise Act' 1944 in respect of clearances made to M/s PMS Flashmatics (P) Ltd, Haridwar and M/s Elin Electronics Ltd- Solan. as per Annexure-A.

(ii) Interest at applicable rates on the amount at S.No. (i) above should not be demanded and recovered from them under Section 11AA of the Central Excise Act' 1944.

(iii) *Penalty should not be imposed upon them in terms of Rule 25 of the Central Excise Rules'2002 read with Section 11AC of Central Excise Act'1944.*

2.12 First two Show Cause Notices were adjudicated by the Order-In-Original No.72-73/DC/D-V/N-I/2016-17 dated 31.03.2017 holding as follows:-

ORDER

(i) I confirm the demand & order for recovery of Central Excise duty as short paid and aggregating to an amount of Rs. 91,96,976/- (Rs. Ninety One Lakh Ninety Six Thousand Nine Hundred and Seventy Six only) under Section 11A (4) of the Central Excise Act, 1944 along with interest at appropriate rate under Section 11AA of the Act, ibid, for the period from Nov.'13 to March'16 against M/s. Eveready Industries India Ltd., B-1/2, Sector-80, Phase-II, Noida, issued vide Show Cause Notices bearing C.Nos. V(1)Meerut-II/Tech/ SCN/Eveready/ 63/2014/874 dated 05.08.2016 and V(15) Adj/Eveready/D-V/N-I/135/2016/7077-79 dated 30.12.2016.

(ii) I also impose a penalty of Rs. 91,96,976/- (Rs. Ninety One Lakh Ninety Six Thousand Nine Hundred and Seventy Six only) upon M/s. Eveready Industries India Ltd., B-1/2, Sector-80, Phase-II, Noida, under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 for the violation of Rule 4, 6 and 8 of the Central Excise Rules, 2002 read with Rule 8 and Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. If the duty as determined and interest payable thereon is paid within thirty days of the date of communication of this order, the amount of penalty liable to be paid by such person shall be twenty five per cent of duty so determined, subject to the condition that such reduced penalty is also paid within the period so specified.

2.13 Statement of demand dated 15.02.2018 was issued to the Appellant demanding duty as follows:-

		Amount in Rs
Period	Diff. Assessable Value	Excise Duty @ 12.5%, demanded
01.04.16 to 31.03.17	29334310	3666789
01.04.17 to 30.06.17	6701841	837741
	3,60,36,151	45,04,530

2.14 Aggrieved Appellant filed appeal before the Commissioner (Appeals) against the order in original dated 31.03.2017 who modified the order to the extent of reducing the penalty imposed under Section 11AC for the period up to 14.05.2015 to 50%, by impugned order in appeal in Appeal No. E/71114/2018

2.15 Statement of demand was adjudicated as per Order-In-Original dated 07.08.2020 holding as follows:-

ORDER

(i) I confirm the demand & order for recovery of Central Excise duty as short paid of duty Amounting to Rs. 45,04,530/- (Rs. Forty Five Lakh Four Thousand Five Hundred and Thirty only) under Section 11A (1) of the Central Excise Act, 1944 for the period from 01.04.16 to 30.06.2017 against M/s Eveready Industries India Ltd., B-1/2, Sector-80, Phase-II, Noida, issued vide Show Cause Notices bearing C.No.V (30) Tech/DSCN/Eveready/D-V/N/66/2017/ 924 dated 16.02 2018.

ii. I confirm the demand of interest at appropriate rates on Rs. 45,04,530/- (Rs. Forty Five Lakh Four Thousand Five Hundred and Thirty only) under Section 11AA of the Central Excise Act, 1944.

(iii) I also Impose a penalty of Rs 45,04,530/- (Rs. Forty Five Lakh Four Thousand Five Hundred and Thirty only) upon M/s. Eveready Industries India Ltd B- 1/2, Sector-80, Phase-II, Noida under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 for the violation of Rule 4, 6 and '8 of the Central Excise Rules, 2002 read with Rule 8 and Rule 9 of the Central

Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

The dues so adjudged to be paid forthwith.

2.16 Aggrieved appellant filed appeal against this order which has been disposed of vide Order-In-Appeal No.NOI-EXCUS-001-APP-28-21-22 dated 31.05.2021 rejecting the appeal filed by the Appellant.

2.17 Aggrieved by the two Order-In-Appeal Appellant has filed these appeals.

3.1 We have heard Shri Atul Gupta, Advocate appearing on behalf of the Appellant and Shri Abhishek Mukherjee, Authorized Representative appearing on behalf of the Revenue.

3.2 Arguing for the Appellant, learned counsel submits that:-

a. The Impugned Order suffers from legal infirmities, inasmuch it was passed without considering the submissions made by the Appellant. Reliance has been placed on Kranti Associates Pvt. Ltd. & Another v. Sh. Masood Ahmed Khan & Others, 2011 (273) E.L.T. 345 (S.C.).
b. The appellant and the Torch manufacturing vendors are not within the realm of "related parties" as there is no direct or indirect mutuality of interest and the transactions were on principal-to-principal basis. Reliance has been placed on the following judgments:-
    - CCE, Aurangabad v. Goodyear South Asia Tyres Pvt. Ltd 2015 (322) E.L.T. 389 (S.C.).
    - Union of India vs. Atic Industries Ltd., 1984 (17) ELT 323 (SC)
    - Modi Senator (I) Pvt. Ltd. vs. C.C. (Imports and General), New Delhi 2009 (247) ELT 313 (Tri- Delhi) maintained by Supreme Court 30.09.2009
    - Bilag Industries Pvt. Ltd. Vs. CCE, Daman [2023(384) ELT 494 (S.C.)]

- Hello Mineral Water (P) Ltd. Versus Commissioner Of C. Ex., Noida reported at 2011 (266) E.L.T. 355 (Tri.- Del.)
- TTK Healthcare Ltd. v. CCE, Guntur reported at 2007 (207) E.L.T. 453 (Tri.- Bang.)
- Food & Health Care Specialities v. CCE, DELHI-IV, reported at [2015 (328) E.L.T. 92 (Tri. -Del.)]
- Eastern Bakeries Pvt. Ltd. v. Commr. Of C.Ex., Kolkata-VII reported at 2013 (293) E.L.T. 593 (Tri.- Kolkata).

c. The Appellant has correctly assessed the batteries sold to Torch manufacturing vendors at the transaction value and paid applicable duty. No differential duty is payable.

d. The prices for goods sold to PMS & Elin are comparable to the prices at which similar goods were sold to various other independent buyers.

e. Invocation of extended period of limitation under Section 11A(4) is not sustainable. Reliance has been placed on following judgements:-

- Anand Nishikawa Co. Ltd. v. CCE, 2005 (188) ELT 149 (SC)
- Commissioner of service tax-1, Kolkata v. Surya Vistacom Pvt. Ltd 2022 (66) G.S.T.L. 290 (Cal.)
- Continental Foundation v. CCE, 2007 (216) ELT 177 (SC);
- CCE v. Damnet Chemicals Ltd., 2007 (216) ELT 3 (SC).
- Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments, 1989 (40) ELT 276 (SC)
- *Padmini Products v. Collector of Central Excise, Bangalore,* 1989(43) ELT 195 (SC)
- *Cosmic Dye Chemical v. Collector of Central Excise, Bombay,* 1995 (75) ELT 721 (SC)

- *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995 (78) ELT 401 (SC).*
- Prolite Engineering Co. v. Union of India -1995 (75) E.L.T. 257 (Guj.)
- Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995 (78) ELT 401 (SC)
- *Ispat Industries Ltd. v. CCE,* 2006 (199) ELT 509 (Tri.-Mum.)
- *NRC Ltd. v. CCE,* 2007 (209) ELT 22 (Tri.-Mum.)
- *Chemicals &Fibres of India Ltd. v. CCE,* 1988 (33) ELT 551 (Tri.-Del)

f. Imposition of Penalty is not sustainable. Reliance is placed on the judgement of the Hon'ble Supreme Court in the case of UOI v. Rajasthan Spinning and Weaving Mills Ltd., 2009 (238) ELT 3 (SC)

g. The impugned order travels beyond the show cause notice

h. No interest is payable

3.3 Learned Authorized Representative for the Revenue reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of argument.

4.2 As the issues involved in both the appeals are identical, in fact the second appeal is in respect of the proceeding initiated by a statement of demand made following the Show Cause Notices considered in Excise Appeal No.71114 of 2018 we are referring to Order-In-Appeal in first appeal only. The impugned order records findings as follows:-

> ***"4. I have gone through the material available on record and appeal memorandum. The matter spans over the period November 2013 to November 2014 and December 2014 to March 2016 and is covered under two SCNs dated 05-08-2016 and 30-12-2016,***

respectively. The department's contention is based upon mutuality of business interest between the appellant and M/s PMS and M/s Elin. Both M/s PMS and M/s Elin received batteries from the appellant and after co-packing it with the torches manufactured by them sold them back to the appellant for ultimate sale to customers. Batteries being an MRP product is sold to M/s PMS and M/s Elin on transaction value under Section 4 of the CX Act. It has been noticed and even not controverted by the appellant that similar products are being sold to Lucknow unit of appellant at higher price under Section 4 of the CX Act. The appellant has contended that the difference is occurring due to the difference of transactions with the two vendors in comparison to other vendors. This does not sound a credible reason.

The appellant have entered into contract exclusively with M/s PMS and M/s Elin with specific purpose of combining their product with torch under their brand name. The torch is also being manufactured under design and specification of the appellant. The product so produced cannot be sold to anyone except the appellant. This single factor is enough to indicate that there is some mutuality of interest between the appellant and the alleged related party. Therefore the department's contentions are right. It is also not a case of interpretation of law.

The most obvious way in which the assessable value of goods can be ascertained is by comparing the clearance value with the ones which are being sold to independent buyers. In the present case, the department has arrived upon the differential duty by difference between actual duty paid and duty payable as per CAS-4 value of identical goods removed to

Lucknow unit of appellant. This appears reasonable too.

I agree with the differentiation arrived by the adjudicating authority in the impugned order, from the cases of M/s Atic Industries, Food & Healthcare Specialties, Goodyear South Asia Tyres Pvt. Ltd., Onida Saka Ltd., Leamak Healthcare Pvt. Ltd. and TTK Healthcare Ltd. (supra) which have been cited by the appellant in their support.

In the case of Hello Mineral Water (P) Ltd. (supra) the dispute pertained to the much higher price difference between the price at which the goods were sold to dealers and the price of goods at which the goods were sold by such dealers. In M/s Eastern Bakeries Pvt. Ltd. (sapra) case the manufacturer manufactured goods on behalf of M/s Britannia Industries Ltd. and supplied the same to them as per their specification.

None of these cited cases deals with a situation when the difference is happening in pricing of identical products cleared to different buyers. In the present case, the difference has been worked out from the details available from the very records of appellant themselves. Further none of these cases deals with a situation where goods are sold to a buyer who co-packs the goods received and sells back the goods wherefrom the goods are sold to ultimate customers. Amid the peculiar circumstances of the case, the revenue's stand is more reasonable. In Dynamic Electronics Ltd. (supra) case dispute pertained to a period from 09-03-1997 to 02-11-1998, i.e. before the introduction of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

The appellant have also quoted a number of cases against extended period invocation, facts being in *knowledge of the department through ER-1 returns, non-disclosure not amounting to suppression, being under bona fide belief, and matter of interpretation only. In this regard, I am of the view that mere mention of figures in periodic return is not enough to decide upon various issues particularly valuation aspect. The pattern of valuation cannot be adjudged by mere periodic returns. Such facts can only be unearthed during preventive measures like audit. Also one cannot be relieved of one's responsibility to discharge the duty liability mere by incorporating the figures in returns. The appellant, at one place is contending that there is no provision in the format of ER-1 returns to separately mention the clearances to related parties, at the same time they are seeking refutation of extended period invocation on the premise of ER-1 return filing.*

In Ispat Industries Ltd. (supra) case the fact of availing the balance 50 per cent credit in the subsequent financial year were available in the monthly returns. In NRC Ltd. (supra) case CESTAT under recall proceedings set aside the impugned order. The case dealt with the interpretation of legal proceedings as to whether the appellant could be considered as clearing and forwarding agents. Chemicals Sr Fibres of India Ltd. (supra) case was centered on classification list and case was supported with correspondences available on record.

The normal period of limitation for issuance of SCN was raised from one year to two years vide the Finance Act, 2016. SCN dated 30-12-2016 was issued after enactment of the Finance Act, 2016 thus it appropriately covers the demand for the period December 2014 to March 2016.

Further, it is a well settled law that in case of taxing statute, various penal provisions are in the nature of civil obligations and do not require any mens rea or willful intention. Hon'ble High Court of Madras in the case of Commissioner of Customs (Exports), Chennai Versus Bansal

Industries reported in 2007 (207) ELT 0346 (Mad.) observed that,-

"7. It is oft-repeatedly held that mens rea is not an essential ingredient for contravention of the provisions of a civil law. The Apex Court recently in Chairman, SEBI v. Shriram Mutual Fund [(2006) &SCC 361] held as under:

Mens rea is not an essential ingredient for contravention of the provisions of a civil Act. Unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default to complying with the statute has occurred and it is wholly unnecessary to ascertain whether such a violation was intentional or not. The breach of a civil obligation which attracts a penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."

As far as interest liability is concerned once the duty portion of a demand is confirmed the liability to pay interest is automatic and the assessee is bound to pay interest on the amount of duty, confirmed.

Explanation 1 to Section 11AC clarifies that in any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where no SCN has been issued before the date on which the Finance Bill, 2015 receives the assent of the President shall be governed by the provisions of section 11AC as amended by the Finance Act, 2015. Both the demand notices in present appeal have been issued after 14-05-2015, hence provisions of amended Section 11AC will be applicable in the case.

Proviso to amended Section 11AC(1)(c) stipulates that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 (i.e. 14-05-2015) receives the *assent of the President (both days inclusive), the penalty shall be fifty percent of the duty so determined.*

The use of "shall" in above proviso depicts that the benefit of above proviso is available to the appellant. Since the demand in present case falls within applicability of above proviso, the benefit of fifty percent penalty is extended to the appellant in terms of Section 11AC(1)(c). No exact date-wise data is available in the file.

In view of the above discussion, order dated 31-03-2017 is upheld to the "extent of demand and interest confirmation. However, penalty is reduced to fifty percent of the duty demand for the period upto 14-05-2015, in terms of proviso to Section 11AC(1)(c) of the CX Act. For remaining period penalty equal to the duty confirmed shall be payable by the appellant. Order dated 31-03-2017 is modified to this effect."

4.3 We find that the issue involved in the present case is related to determination of the value of the batteries cleared by the Appellant to the two units namely M/s PMS Flashmatics (P) Ltd., Haridwar & M/s Elin Electronics Ltd., Solan, Himachal Pradesh. Whether on the basis of the contractual price agreed mutually between the Appellant and the said units or on the basis of similar/like goods cleared by the Appellant after determination of the value as per Rule 8 of the Central Excise (Valuation) Rules (CAS-4) read with Rule 4 of the Central Excise Rules, Appellant have sought in the arguments made to project that the case is in relation to determination of value of the goods sold to the related persons.

4.4 We find from the tenure of the order that there exists buyback agreement between the Appellant and the two said units. Though the Order-In-Original records that there exists a relationship but the same is not the basis for determination of the value. If that was so, the valuation would have been proposed under Rule 9 of the Central Excise (Valuation) Act.

4.5 We have reproduced the allegations made against the Appellant in Show Cause Notice in Para 2 above. Rule 4 & Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is reproduced below for ready reference:-

> 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 difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable.
>
> RULE 8. Where whole or part of 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 of such goods that are consumed shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

4.6 We at this juncture take the documents produced by the appellant before the audit and also in course of enquiries for examination. Two documents which need to be examined are Memorandum of Understanding and the letter dated 15.02.2015 of the appellant in response to the queries made by the audit. The memorandum of understanding between the appellant and PMS Flashlight and ELIN Electronics Limited are identically worded. Though the MOU produced in the appeal is effective from 01.01.2007 for the period of five years i.e. upto 01.01.2012, we do not find any objection to the said MOU relied in the show cause notice and any stage of proceedings. They admit that they were operating as per the said MOU throughout the period in dispute. On sample basis we reproduce the MOU with ELIN below:

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (MOU) dated 01.01.2007 is made between Eveready Industries India Limited, having its registered office at 1, Middleton street, Kolkata 700 071 (hereinafter referred to as "EIIL") &Elin Electronics Limitedhaving its office at Elin Electronics Limited, Elin House, 4771, Bharat Ram Road, 23 Daryaganj, New Delhi -110002 and factory at Elin Electronics Limited,Village: BeliKhol, Post: Manpura – 174101, Teh: Nalagarh, District: Solan (Himachal Pradesh) (hereinafter referred to as "ELIN").

By virtue of this MOU, ELIN agrees to manufacture Flashlights at its manufacturing facility located at the above mentioned factory address and supply the same to EIIL for sale, on the terms and conditions mentioned below

Both parties have agreed to the following Terms and Conditions:-

1. **Product**:Flashlights
2. **Specification**: As per design and specification of EIIL.
3. **Quantity and Schedule**:As per PO released by EIIL from time to time.
4. **Packaging/Labelling & Trade Mark**: ELINshall strictly follow the packaging & labelling instructionsand specifications of EIIL in the manufacture of the said Product. ELIN shall affix only such trade mark as authorised by EIIL from time to time for the purpose of the manufacture of the said products for supply to EIIL only and shall have no right to the trademarks of EIIL. EIIL reserves the right to revoke the authority to affix the trademarks given to ELINhereinabove mentioned at its sole discretion and without assigning any reason.ELIN shall hold in trust and shall have no right of lien on labels, cartons, boxes, packaging material, or any other property of EIIL including moulds of various specifications, whatsoever.
5. **Delivery &Supply** :Products are to be delivered Ex Works (EXW) ELIN's premises of manufacture.ELIN agrees and undertakes that it shall not supply the products sold to EIIL to any third party whatsoever.
6. Quality: The Products shall strictly comply with the agreed specifications and reference sample of EIIL. EIILis at liberty to reject the Products not conforming to its specifications and design, damaged Products and/or damaged and incorrect packaging. ELIN shall replace the Products so rejected.EIIL shall have the right to conduct pre-shipment inspection at the premises of ELIN from time to time. Any inspection by EIIL shall not absolve ELIN from the liability on account of the requisite replacement. EIIL shall also have the right to impose penalty on ELIN, if the packaging specifications / norms are not adhered to by ELIN. ELIN hereby agrees and undertakes not to sell or deal in or trade in any manner whatsoever in the said rejected Products.
7. **Compliance** :Both Parties are responsible for obtaining necessary licences and certifications as required forthe said Products and for complying with all statutory laws, rules and regulations.
8. **Confidentiality** :Either party shall ensure that the confidentiality in reference to the agreement shall be maintained strictly and under no circumstances either party shall divulge any confidential information to any third party.
9. **Validity**:5years effective1st January 2007.
10. **Termination** : Either party may terminate this MOU by giving six months' notice in advance to the other party.
11. **Arbitration** : Both parties shall make best endeavour to resolve any dispute/disputes on the performance or non- performance of the points mentioned in the MOU or any other points arising during the course of contractual terms. However, disputes that cannot be resolved mutually shall be referred to the mutually agreed arbitrator whose decision will be binding on both the parties.
12. **Relationship of the parties** : The relationship between between the parties as established under this MOU will be and at all times remain one of independent contractors, and neither party will at any time nor in any way represent itself as being a dealer, agent or other representative of the other party or as having authority to assume or create obligations or otherwise act in any manner on behalf of the other party.
13. **Governing law** :This MOU and all transactions under it will be governed by the laws of India The parties submit to the non-exclusive jurisdiction of the courts of Kolkata.
14. **Assignment** : Neither party may assign this MOU or any Order or any part thereof without the written consent of the other party, such consent not to be unreasonably withheld.
15. **Variation** : No variation or amendment of this MOU or any Order will be valid unless made or confirmed in writing.

n the witness whereof of the parties hereto have executed those presents the day and the year first ierein above written.

For Eveready Industries India ltd	ForElin Electronics Limited
	For Elin Electronics Limited
Authorized signatory	Authorized signatory
	Witness

From the perusal of the above MOU it is evident that the M/s ELIN Electronics was manufacturing Flashlights in their premises and was co-packing the batteries supplied by the appellant along with their manufactured goods, packing and affixing the brand, trade mark of the appellant. The Flashlights co-packed with batteries were to be sold only to appellant.

4.7 We observe that appellant has in response to query made vide their letter dated 10.02.2015 reproduced below responded as follows:

CIN: L31402WB1934PLC007993
PH : (0120) 4802700 (50 Lines)
FAX: (0120) 4802727
WEB: : www.evereadyindustries.com

EVEREADY
INDUSTRIES INDIA LTD.
B-1/2, SECTOR-80, PHASE-II, NOIDA
GAUTAM BUDH NAGAR, U.P. - 201 305
PHONE: (0120) ~~3048027/28/29/30~~
FAX: (0120) ~~2568372~~

Date: 10.02.2015

The Superintendent (Audit)
Central Excise
Audit Group Circle 1B
Audit-IIMeerut Commissionerate
Ghaziabad

13.2.15

RUD-4

Dear Sir,

Sub: Central Excise Audit for the period November, 2013 to November, 2014 - C/reg.

This has reference to your letter C.No.V(1)Audit-II/Meerut/Circle-1B/IAR/63/2014 dated 17.01.2015 on the above subject.

You have advised by referring the earlier letter dated 30.12.2014 and 06.01.2015 to clarify/ inform the difference between weight, manufacturing process and quantity/ value of raw material contained in the batteries cleared under Section 4 of CEA Act, 1944 (under CAS-4) to M/s PMS Flashlight.Pvt. Ltd., Haridwar / M/s Elin Electronics Ltd., Solan (H.P.) as well as cleared under stock transferred to our Lucknow Plant.

You have also advised us to inform the marketing pattern of goods sold to M/s PMS Flashlight Pvt. Ltd., Haridwar / M/s Elin Electronics Ltd., Solan (H.P.) and how these goods reached to ultimate consumer.

Please note that we are selling 1015 (AA size) Battery to M/s PMS Flashlight Pvt. Ltd., Haridwar / M/s Elin Electronics Ltd., Solan (H.P.) based on the contractual price as agreed upon. Since the sale is to the Industrial Consumer, the assessee and buyers of the goods are not related and price is the sole consideration for sale, we had cleared the goods based on transaction value under Section 4 of the Central Excise Act, 1944.

Clearance of batteries to M/s PMS Flashlight Pvt. Ltd., Haridwar and M/s Elin Electronics Ltd., Solan (H.P.) were made by discharging duty liability under Section 4 since no additional consideration was received in those transactions. Please also note that M/s PMS Flashlight Pvt. Ltd. and M/s Elin Electronics Ltd. are manufacturer of torches and had bought these batteries for supply with their torches as accessory and they do not sell these batteries in retail as such.

TUV NORD
ISO 9001

REGD. OFFICE : 1, MIDDLETON STREET, KOLKATA-700 071

The label of batteries sold to M/s PMS Flashlight Pvt. Ltd. and M/s Elin Electronics Ltd. bear a declaration "NOT TO BE SOLD LOOSE. FOR SUPPLY WITH TORCHES." Thus, these batteries were incapable to be sold in retail and hence they did not attract provisions of Section 4A for payment of Central Excise Duty.

There is no difference in weight, manufacturing process and quantity of raw materials contained in batteries cleared under Section 4 of the Central Excise Act, 1944 (under transaction value) to M/s PMS Flashlight Pvt. Ltd., Haridwar / M/s Elin Electronics Ltd., Solan (H.P.) as well as cleared under stock transfer (under CAS-4) to M/s The Eveready Flashlight Plant, Aishbagh, Lucknow.

Torches are normally being sold in the market co-packed with batteries. M/s PMS Flashlight Pvt. Ltd., Haridwar / M/s Elin Electronics Ltd., Solan (H.P.)are normally selling torches to us. As they do not have any manufacturing facilities of batteries, they are buying batteries at an agreed price from us which are co-packed with Torches for final sale to the customers.

Hope we have clarified all of your queries raised in your letter C. No.V(1)Audit-IIMeerut/Circle-1B/IAR/63/2014 dated 17.01.2015.

Thanking you
Very truly yours
Eveready Industries India Ltd.

Pranay Roy
Authorised Signatory
Encl: As above

4.8 The facts that flashlights co-packed with the batteries supplied by the appellant were sent back to the appellant is admitted by the appellant in the letter above. From this letter it is also evident that appellant was clearing the same batteries to their own manufacturing unit (The Eveready Flashlight Plant Aishbag Lucknow) under stock transfer by determining the value under Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2008 as per CAS-4. The price determined on the basis of CAS-4 (cost amounting standards) which was much higher than that price at which the same goods were cleared to the said two units. If the Appellant was selling these goods at the price much less than the cost price of the batteries manufactured then they were incurring loss in perpetuity which could not have been the design for any business set up.

4.9 Admittedly, the Appellant was selling these batteries to the two buyers who in terms of the MOU were bound to manufacture torches as per specifications etc. prescribed by the Appellant and co-pack them alongwith these batteries, hence sell them to the

Appellant. Even if we conclude that there was no mutuality of interest between the Appellant and the two buyers contrary to the finding recorded in the impugned order, we are of the view that for such buyback agreement the price in respect of these two identified batteries was not at arm's length for the reason it was below the cost of manufacture of the said batteries.

4.10 The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai V/s Fiat India Pvt. Ltd. reported in 2012 (283) E.L.T. 161 (S.C.) has held as follows:-

> ***"43.*** *What can be construed from the plain reading of Section 4 of the Act and the interpretation that is given by this Court on the expression 'normal value' is, where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. Normal price, therefore, is the amount paid by the buyer for the purchase of goods. In the present case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over for nearly five years and the consideration being only to penetrate the market and compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. The existence of extra commercial consideration while fixing the price would not be the 'normal price' as observed by this Court in Xerographic Ltd.'s case (supra). If price is the sole consideration for the sale of goods and if there is no other consideration except the price for the sale of goods, then only provisions of Section 4(1)(a) of the Act can be applied. In fact, in Metal Box's case (supra) this Court has stated that under sub-Section (1)(a) of Section 4 of the Act, the 'normal price' would be the price which must*

be the sole consideration for the sale of goods and there cannot be any other consideration except the price for the sale of goods and it is only under such situation Sub-Section (1)(a) of Section 4 would come into play. In the show cause notices issued, the Revenue doubts the normal price of the wholesale trade of the assessees. They specifically allege, which is not disputed by the assessees, that the 'loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. It is true that in notices issued, the Revenue does not allege that the buyer is a related person, nor do they allege element of flow back directly from the buyer to the seller, but certainly, they allege that the price was not the sole consideration and the circumstance that no prudent businessman would continuously suffer huge loss only to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. This court in the case of Union of India v. Hindalco Industries - 2003 (153) E.L.T. 481, has observed that, 'if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section (1) of Section 4 of the Act could be made'. That the price is not the normal price, is established from the following three circumstances which the assessees themselves have admitted; that the price of the cars was not based on the manufacturing cost and manufacturing profit, but have fixed at a lower price to penetrate the market; though the normal price for their cars is higher, they are selling the cars at a lower price to compete with the other manufacturers of similar cars. This is certainly a factor in depressing the sale price to an artificial level; and, lastly, the full commercial cost of manufacturing and selling the cars was not reflected in the lower price. Therefore, merely because the assessee *has not sold the cars to the related person and the element of flow back directly from the buyer to the seller is not the allegation in the show cause notices issued, the price at which the assessees had sold its goods to the whole sale trader cannot be accepted as 'normal price' for the sale of cars.*

44. *We now deal with the second limb of the argument of Shri Bhattacharya, learned ASG that the loss price at which the goods are sold by the assessee clearly indicates or reflects that these goods are not "ordinarily sold" in terms of Section 4(1)(a) of the Act. He submits that admittedly assessees are selling their goods at 100% loss continuously for five years i.e. from the year 1996 to 2001 and therefore, the transactions of the assessees cannot fit into description of expression 'ordinarily sold'. While countering this argument, Shri Joseph Vellapally would submit that the selling price at which the goods are sold in the ordinary course of business by the assessee to all the buyers is the same or uniform without any exception. He would, therefore, contend that the goods are ordinarily sold in terms of Section 4(1)(a) of the Act. While adopting the submission of Shri Vellapally, Shri Lakshmi Kumaran would further contend, relying on Ship Breaker's case (supra) that this Court while explaining the meaning of the expression 'ordinarily sold', occurring in Section 14 of the Customs Act, 1962 which is in parimateria with Section 4 of the Act, would mean the sale where the goods are sold to un-related persons and price is the sole consideration. He would also contend that Section 4 of the Act was amended with effect from 1st April, 2000, to incorporate 'transaction value' as an 'assessable value' instead of 'normal price' and the expression 'ordinarily' was omitted. Therefore, the new Section is applicable to the transactions which took place for the period from July 2000 to June 2001. He would submit by relying on the decision of this Court in Elgi Equipment Pvt. Ltd.'s case (supra), that the word 'ordinarily sold' would* *mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. He would submit that in the present cases, the assessees are better placed as the entire sale is at the same price or rate, so the condition of the expression 'ordinarily sold' is being satisfied.*

45. *The expression 'ordinarily sold' is again not defined under the Act, but came up for consideration before this Court while construing the said expression under the Customs Act. This Court in Eicher Tractors Ltd., Haryana v. Commissioner of Customs, Mumbai, (2001) 1 SCC 315 = 2000 (122) E.L.T. 321 (S.C.) has held :*

"6. Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed, the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation - in the course of international trade. The word "ordinarily" necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale ....". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1-A) in accordance with the Rules framed in this behalf."

46. *In Ispat Industries Ltd. v. Commissioner of Customs, Mumbai, (2006) 12 SCC 583 = 2006 (202) E.L.T. 561 (S.C.), it is held :*

"14. From a perusal of the above provisions (quoted above), it is evident that the most important provision for the purpose of valuation of the goods for the purpose of assessment is Section 14 of the Customs Act, 1962. Section 14(1), has already been quoted above, and a perusal of the same shows that the value to be determined is a deemed value and not necessarily the actual value of the goods. Thus, Section 14(1) creates a legal fiction. Section 14(1) states that the value of the imported goods shall be the deemed price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade. The word "ordinarily" in Section 14(1) is of great importance. In Section 14(1) we are not to see the actual value of the goods, but the value at which such goods or like goods are ordinarily sold or offered for sale for delivery at the time of import. Similarly, the words "in the course of international trade" are also of great importance. We have to see the value of the goods not for each specific transaction, but the ordinary value which it would have in the course of international trade at the time of its import."

47. *In Varsha Plastics Private Limited &Anr. v. Union of India &Ors., (2009) 3 SCC 365 (at page 371) = 2009 (235) E.L.T. 193 (S.C.), it is observed :*

"19. Section 14(1) of the Act prescribes a method for determination of the value of the goods. It is a deeming provision. By legal fiction incorporated in this section, the value of the imported goods is the deemed price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade.

20. The word "ordinarily" in Section 14(1) is a word of significance. The ordinary meaning of the word "ordinarily" in Section 14(1) is "non- exceptional" or "usual". It does not mean "universally". In the context of Section 14(1) for the *purpose of "valuation" of goods, however, by use of the word "ordinarily" the indication is that the ordinary value of the goods is what it would have been in the course of international trade at the time of import. Section 14(1), thus, provides that the value has to be assessed on the basis of price attached to such or like goods ordinarily sold or offered for sale in the ordinary course of events in international trade at the time and place of transportation."*

48. *In Rajkumar Knitting Mills (P) Ltd. v. Collector of Customs, Bombay (1998) 3 SCC 163 (at page 165) = 1998 (98) E.L.T. 292 (S.C.), it is held :*

"7. ... The words "ordinarily sold or offered for sale" do not refer to the contract between the supplier and the importer, but to the prevailing price in the market on the date of importation or exportation."

49. *In Ashok Leyland Ltd. v. Collector of Central Excise, Madras, (2002) 10 SCC 344 (at page 348) = 2002 (146) E.L.T. 503 (S.C.), it is held :*

"The price of that commodity will remain the normal price at which those goods are ordinarily sold by the assessee to the public, in other words, the price at which they are sold in the market."

50. *In the context of Section 4(1)(a) of the Act, the word 'ordinarily' does not mean majority of the sales; what it means is that price should not be exceptional. In our considered opinion, the word 'ordinarily', by no stretch of imagination, can include extra-ordinary or unusual. In the instant cases, as we have already noticed, the assessees sell their cars in the market continuously for a period of five years at a loss price and claims that it had to do only to compete with the other manufacturers of cars and also to penetrate the market. If such sales are taken as sales made in the ordinary course, it would be anathema for the expression 'ordinarily sold'. There could be instances where a manufacturer may sell his goods at a price less than the* *cost of manufacturing and manufacturing profit, when the company wants to switch over its business for any other manufacturing activity, it could also be where the manufacturer has goods which could not be sold within a reasonable time. These instances are not exhaustive but only illustrative. In the instant cases, since the price charged for the sale of cars is exceptional, we cannot accept the submission of the learned counsel to give a meaning which does not fit into the meaning of the expression 'ordinarily sold'. In other words, in the transaction under consideration, the goods are sold below the manufacturing cost and manufacturing profit. Therefore, in our view, such sales may be disregarded as not being done in the ordinary course of sale or trade. In our view, for the purpose of Section 4(1)(a) all that has to be seen is : does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price under Section 4(1)(a) of the Act. This is the price which has been charged by the manufacturer from the wholesale purchaser or sole distributor. What has to be seen is that the sale made at arms length and in the usual course of business, if it is not made at arms length or in the usual course of business, then that will not be real value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the section. This Court in Raj Kumar Knitting Mills case (supra), while construing the said expression, has held that the word 'ordinarily sold' do not refer to contract between the supplier and the importer, but, the prevailing price in the market on the date of importation and exportation. Excise duty is leviable on the value of goods as manufactured. That* *takes into account manufacturing cost and manufacturing profit.*

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

52. *The next submission of Shri Bhattacharya, learned ASG, is that the price at which the cars sold by the assessees is not the sole consideration as envisaged under Section 4(1)(a) of the Act. He would contend that admittedly there exists a consideration other than the price, that is, to penetrate the market. He would also submit that the lower price would enable the assessee to generate higher turnover and this higher turnover is monetary consideration for the assessee received directly from various buyers. In other words, he would submit, the intention to penetrate the market is intertwined with receiving a higher monetary turnover. Therefore, the price is not the sole consideration. However, it is contended by learned senior counsel Shri Vellapally that the reason for the assessees for selling their cars at a lower price than the manufacturing cost was because the assessees had no foothold in the Indian market and, therefore, had to sell at a lower price than the manufacturing cost and profit in order to compete* *in the market. He would submit that the intention of the assessees to penetrate the market cannot be treated as extra commercial consideration as it does not flow from the buyer to the seller. Therefore, there is no additional consideration flowing from buyer to seller and whole transaction is bona fide.*

53. *Now what requires to be considered is what is the meaning of the expression 'sole consideration'. Consideration means something which is of value in the eyes of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. In other words, it may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other, as observed in the case of Currie v. Misa, (1875) LR 10 Ex. 153.*

54. *Webster's Third New International Dictionary (unabridged) defines, consideration thus :*

"Something that is legally regarded as the equivalent or return given or suffered by one for the act or promise of another."

55. *In volume 17 of Corpus Juris Secundum (p.420-421 and 425) the import of 'consideration' has been described thus :*

"Various definitions of the meaning of consideration are to be found in the text-books and judicial opinions. A sufficient one, as stated in Corpus Juris and which has been quoted and cited with approval is "a benefit to the party promising or a loss or detriment to the party to whom the promise is made..... At common law every contract not under seal requires a consideration to support it, that is, as shown in the definition above, some benefit to the promisor, or some detriment to the promisee."

56. *In Salmond on Jurisprudence, the word 'consideration' has been explained in the following words.*

"A consideration in its widest sense is the reason, motive or inducement, by which a man is moved to bind himself by an agreement. It is for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in consideration of such and such a fact that he agrees to bear new burdens or to forego the benefits which the law already allows him."

57. *The gist of the term 'consideration' and its legal significance has been clearly summed up in Section 2(d) of the Indian Contract Act which defines 'consideration' thus :*

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration to the promise."

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

59. *To attract Section 4(1)(a) of the Act what is required is to determine the 'normal price' of an excisable article which price will be the price at which it is ordinarily sold to a buyer in the course of wholesale trade. It is for the Excise authorities to show that the price charged to such selling agent or distributor is a concessional or specially low price or a price charged to show favour or gain in return extra-commercial advantage. If it is shown that the price charged to such a sole selling agent or distributor is lower than the* *real value of the goods which will mean the manufacturing cost plus manufacturing profit, the Excise authorities can refuse to accept that price.*

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

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

62. *Reference to the Citations : Shri Bhattacharya, learned ASG, submits that in view of the decision of this Court in Bombay Tyre International case (supra), the nominal price of the goods, even if it is sold for a loss price, for the purpose of assessable value under Section 4 of the Act, at least the manufacturing cost and manufacturing profit should be taken into consideration. In view of this decision, the learned counsel goes to the extent of saying the judgments relied upon by the opposite side on the decision of this Court in Guru Nanak Refrigeration (supra) and Bisleri International (supra) should be treated as per-incuriam. We cannot agree. In Bombay Tyre's case, the issue before the Court was whether the value of an article for the purpose of excise duty had to be determined by reference exclusively to the manufacturing cost and manufacturing profit of the manufacturer or should be represented by the wholesale price charged by the manufacturer which would include post-manufacturing expenses and post-manufacturing profits arising between the completion of manufacturing process and the point of sale by the manufacturer. It is relevant to notice at this stage, in the Bombay Tyre's case, this Court considered the scope of Section 4 before its amendment and after the new Section 4 was substituted with effect from 1-10-1975. This Court in the said case, after detailed consideration of rival contentions and after referring to several precedents of this Court has concluded that the levy of excise duty was on the manufacture or production of goods, the stage of collection need not in point of time synchronise with the completion of the manufacturing process while the levy had the status of a constitutional concept, the point of collection was located where the statute declared it would be. The Court further went on to observe when enacting the measure to serve as a standard for assessing the levy, legislature need not contour it along lines which spell out the character of the levy itself. From this stand point, 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 the excisable article must be limited to the manufacturing cost plus the manufacturing profit. The Court further was of the opinion, that a broad-based standard of reference may be adopted for the purpose of determining the measure of levy. Any standard which maintains a manner with the essential character of levy could be regarded as a valid basis for assessing the measure of levy. This Court in this decision also distinguished the view expressed in A.K. Roy &Anr. v. Voltas Ltd., 1977 (1) E.L.T. (J177) (S.C.), wherein this Court had held that the value for the purpose of Section 4 would include only the manufacturing cost plus manufacturing profit and exclude post-manufacturing cost plus manufacturing profit but exclude post-manufacturing cost and profit arising from post-manufacturing operation by observing that this Court in the aforesaid decision intended to say was that entire cost of the article plus profit minus trade discount would represent the assessable value and in that decision there was no issue on the question of including the post manufacturing cost and post-manufacturing profits. In conclusion, insofar as amended Section 4 of the Act, the Court has observed that the assessable value will be the price at which the goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade at the factory gate. However, firstly, the buyer should not be a related person and the price should be sole consideration for the same. This proposition is subject to Section 4(1)(a). Secondly, if the price of the excisable goods cannot be ascertained either because the goods are not sold or for any other reason, the value will have to be determined as per the Central Excise Valuation Rules.*

63. *Our attention was also drawn by learned counsel Shri Bhattacharya to the decision of this Court in Assistant Collector of Central Excise &Ors. v. M.R.F. Ltd., 1987 (27)*

E.L.T. 553 (S.C.), wherein the Court dealt with concept of post-removal expenses.

64. *Shri Vellapally and Shri Lakshmi Kumaran learned Counsel by placing reliance on Guru Nanak's case (supra) and Bisleri's case (supra) contends that the issue raised in these appeals is no more res integra. We cannot agree. In Guru Nanak's case, the facts are : the assessee therein was engaged in the manufacture of refrigeration and air-conditioning machinery. They had cleared the goods after approval of the price list by the department. The adjudicating authority being of the view that the assessable value declared by the assessee was low as compared to the cost of material used in the manufacture of the said machinery, had issued a show cause, to show cause why the assessable value should not be re-fixed and the duty fixed on the re-fixed assessable value after taking into consideration the cost of raw material plus manufacturing cost plus reasonable profit margin. The adjudicating authority after considering the reply filed had confirmed the show cause notice and had directed the assessee to pay the difference in excise duty. In the appeal filed before the Tribunal, the assessee had succeeded. In the appeal filed by the department, this Court was of the view that since in the show cause notice issued by the adjudicating authority there was no allegation that the wholesale price to the buyers was for consideration other than the one at which it was purported to be sold or that it was not at arms length and further, there was no allegation that there was any flow back from the buyer to the assessee and therefore, the department cannot take a stand that the normal price was not ascertainable for the purpose of valuation under Section 4(1)(a) of the Act and therefore, the Tribunal was justified in accepting the whole sale price as the correct price.*

65. *In Bisleri's case, the issue as noted by the Court was, whether the assessee had undervalued the aerated water*

(Beverages) by excluding two items, namely, the amounts received under credit notes as price support incentive and rent on containers as assessable value. The Court after referring to provisions of Section 4(1)(a) of the Act and the decision of this Court in Bombay Tyre's case (supra) has held that the amounts received under credit notes as price support incentives from supplier of raw materials cannot be included in the assessable value, since the department failed to prove that there was flow back of additional consideration from buyers of aerated waters to the assessee and further, the price was not uniformly maintained and favour of exra-commercial consideration was shown to the buyers of aerated waters (beverages). The Court has also observed that under Section 4, the price and sale are related concepts. 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 Section 4. In every case, it will be for the revenue to determine on evidence whether the transaction is one where extra-commercial consideration have entered and if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty.

66. *In our considered view, either the decision of Guru Nanak's case (supra) or the decision in Bisleri's case (supra) would assist the assessee in any manner whatsoever. We say so for the reason, that, in Guru Nanak's case, the department had accepted the price declared by the assessee and the narration of the facts both by the Tribunal and this Court would reveal that it was one time transaction and lastly, this Court itself has specifically observed that the view that they have taken, is primarily based on the facts and circumstances of the case. In the instant cases, the department never accepted the declared value. It is for this reason, provisional assessments were completed instead of accepting declared price by the assessee under Rule 9B of the Rules inter alia holding that during the enquiry, the* *assessees had admitted that they did not have any basis to arrive at the assessable value but they are selling their goods at 'loss price' only to penetrate the market. Secondly, as we have already noticed that for nearly five years the assessee was selling its cars in the wholesale trade for a 'loss price' and therefore, the conditions envisaged under Section 4(1)(a) of the Act, namely; the normal price, ordinarily sold and sole consideration are not satisfied. We further hold that the decision in Bisleri's case (supra) will also not assist the assessees for the reason that the issue that came up for consideration is entirely different from the legal issue raised in these civil appeals. Before we conclude on this issue, we intend to refer to the often quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and not for what may seem to follow logically from it. We may also note the view expressed by this Court in the case of Sushil Suri v. Central Bureau of Investigation &Anr. (2011) 5 SCC 708, wherein this Court has observed, "Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive." We do not intend to overload this judgment by referring to other decisions on this well settled legal principle.*

67. Reference to Valuation Rules : *Shri Bhattacharya, the learned ASG, contends that the assessees are not fulfilling the conditions enumerated in Section 4(1)(a) of the Act and therefore, the valuation has to be done in accordance with Section 4(1)(b) read with the 1975 Valuation Rules. He would submit that since the price of the cars sold by the assessee was not ascertainable, the*

Revenue is justified in computing the assessable value of the goods for the levy of excise duty under Section 4(1)(b) of the Act and the relevant rules. He would further submit that the Valuation Rules need not be applied sequentially. He would contend that all the Rules 3, 4, 5, 6 and 7 of the 1975 Valuation Rules specifically use the expression "shall...be determined", "shall be based" or "shall determine the value" and nowhere word "sequentially" occurs in these Rules, unlike Rule 3(ii) of the Customs Valuation Rules, 1988. He would submit that merely the presence of word "shall" does not imply that all the Rules has to be applied sequentially. He would further submit that in the facts and circumstances of the present cases, Rule 7 is the only applicable Rule in view of the decision in Bombay Tyre's case and assessing authority as well as the first appellate authority correctly adopted the application of this Rule.

68. *Per Contra, Shri Joseph Vellapally, would submit that only when the normal price is not ascertainable in terms of Section 4(1)(a), then Section 4(1)(b) read with the 1975 Valuation Rules would come into play to determine the nearest equivalent assessable value of the goods. He would contend that the Valuation Rules have to be applied sequentially, i.e. first, Rules 4 and 5 should be invoked in order to determine the assessable value and if Rules 4 and 5 are not applicable or assessable, value cannot be ascertained by applying the said Rules, and then only Rule 6 can be invoked. He would further submit that it is only Rule 6(b)(ii) of the 1975 Valuation Rules which contemplates determining of assessable value on the basis of cost of manufacture, only when the goods are captively consumed by the manufacturer and value of comparable goods manufactured by the assessee or any other assessee are not available.*

69. *Under Section 4(1)(b) of the Act, 1944, any goods which do not fall within the ambit of Section 4(1)(a) i.e. if* *the 'normal price' cannot be ascertained because the goods are not sold or for any other reason, the 'normal price' would have to be determined in the prescribed manner i.e. prior to 1st day of July, 2000, in accordance with Rules, 1975 and after 1st day of July 2000, in accordance with Rules, 2000.*

70. *Rule 2 of the 1975 Valuation Rules provides for definition of certain terms, such as "proper officer", "value" etc., Rule 3 of the above Rules, provides that the value of any excisable goods, for the purposes of Clause (b) of Sub-Section (1) of Section 4 of the Act be determined in accordance with these Rules. Rule 4 provides that the value of the excisable goods shall be based on the value of such goods by the assessee for delivery at any other time nearest to the time of removal of goods under assessment. Rule 5 provides that when the goods are sold in the circumstances specified in Clause (a) of Sub-Section (1) of Section (4) of the Act except that the price is not the sole consideration, the value of such goods shall be based on the aggregate price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. Rule 6 provides, that, if the value of the excisable goods under assessment cannot be made, then to invoke provisions of Rule 6 of the Rules, wherein certain adjustments requires to be made as provided therein. Rule 7 is in the nature of residuary clause. It provides that if the value of excisable goods cannot be determined under Rule 4, 5 and 6 of the Rules, the adjudging authority shall determine the value of such goods according to the best of his judgment and while doing so, he may have regard to any one or more methods provided under the aforesaid Rules. A bare reading of these rules does not give any indication that the adjudging authority while computing the assessable value of the excisable goods, he had to follow the rules sequentially. The rules only provides for arriving at the assessable value under* *different contingencies. Again, Rule 7 of the Valuation Rules which provides for the best judgment assessment gives an indication that the assessing authority while quantifying the assessable value under the said Rules, may take the assistance of the methods provided under Rules 4, 5 or 6 of the Valuation Rules. Therefore, contention of the learned counsel that the assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules cannot be accepted. In our view, since the assessing authority could not do the valuation with the help of the other rules, has resorted to best judgment method and while doing so, has taken the assistance of the report of the 'Cost Accountant' who was asked to conduct special audit to ascertain the correct price that requires to be adopted during the relevant period. Therefore, we cannot take exception of the assessable value of the excisable goods quantified by the assessing authority."*

4.11 From the above decision of the Hon'ble Supreme Court it is quite evident that the price at which the goods were being sold even if to the independent buyers and that price being much below the cost of manufacture then the same needs to be rejected and the value for determination for excise duty should be adopted as per the cost of manufacture in term of determined as per CAS-4.

4.12 In view of the specific and direct decision of the Hon'ble Supreme Court elucidating the issue involving the present appeal we do not find it necessary to determine with regards to existence of relationship between the Appellant and the buyers of the goods. Even if we hold that there was no relationship than also the value could not have been much less than the cost of manufacture in perpetuity.

4.13 We find that the Appellant was duly registered with the Department filing all the returns as required in terms of the Central Excise Act and Rules there under.

4.14 We find that the agreement etc. were all on record and the Revenue was well aware of the facts hence invocation of extended period of limitation for making the demand would not be proper. Thus, in respect of the Show Cause Notice dated 05.08.2016, we find that the entire demand is barred by limitation having being issued after the prescribed period of limitation.

4.15 Demands made for the subsequent period i.e. December 2014 to 2016 by Show Cause Notice dated 30.12.2016 and statement of demand dated 15.02.2018 for the period 2016-17 to 2017-18 is within the normal period of limitation. Accordingly, taking note of the decisions sited by the Appellant with regards to the invocation of extended period of limitation, we set aside the entire demand made for the period November 2013 to November 2014 and uphold the demand made for the subsequent period by the Show Cause Notice dated 30.12.2016 and for the period 2016-17 to 2017-18 by Statement of Demand dated 15.02.2018.

4.16 As we have held that extended period could not have been invoked, penalties imposed upon the Appellant by invoking Section 11AC needs to be set aside in lieu of the observations made by the Hon'ble Supreme Court in the case of **Union of India V/s Rajasthan Spinning & Weaving Mills reported at 2009 (238) E.L.T. 3 (S.C.)**

4.17 We also observe that penalty by Order-In-Original dated 31.03.2017 & 07.08.2020 has been imposed upon the Appellant by invoking the provisions of Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 for violation of Rule 4, 6 & 8 of the Central Excise Rules, 2002. The Commissioner (Appeals) has also upheld such penalties. It is not understood how can Rule 15 of CENVAT Credit Rules, 2004 be invoked in such a situation whereas Rule 15 is applicable only in the case where CENVAT Credit has been wrongly taken or utilized. The Adjudicating Authority and Commissioner (Appeals) have failed to take note of the fact that neither this Rule was not invoked in the Show Cause Notice or Statement of Demand nor is applicable in case of undervaluation of the goods. The penalty under show cause notice was proposed under Rule 25 of Central Excise Rules, 2002 read with Section 11AC for various contraventions but has been imposed under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC. This penalty needs to be set aside for this reason itself.

4.18 In view of the above, we modify the impugned orders by:-

(i) Setting aside the demand made by invoking the extended period.

(ii) Demands issued within normal period of limitation along with interest are upheld.

(iii) Penalties imposed under Section 11AC are set aside.

5.1 Both the appeals are partly allowed in the manner stated in para 4.15

(Pronounced in open court on 01.09.2026)

Sd/-
(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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