DIN: 20210664WT000000C5FD

आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599	फैक्स/ FAX : 079-2754 4463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. V.72/15-44/Denovo-Ambica/2010 DIN

आदेश की तारीख़ / Date of Order : 24.06.2021

जारी करने की तारीख़ / Date of Issue : 24.06.2021

द्वारा पारित/Passed by -

अमरजीत सिंह / AMARJEET SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–08 to 19/2021-22

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के

विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।

(The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide SCN No. V.72/3-101/DA/98 dt.2.9.98, V.72/3-119/DA/98 dt.29.9.98, V.72/3-118/DA/98 dt.29.9.98, V.72/3-159/DA/98 dt.8.12.98, V.72/3-51/DA/99 dt.31.03.99, V.72/3-65/DA/99 dt.30.6.99, V.72/3-146/DA/99 dt.10.9.99, V.72/3-03/DA/00 dt.25.01.00, V.72/3-46/DA/2000 dt.09.05.00, V.72/3-47/DA/00 dt.09.5.00, V.72/3-03/DA/2000 dt.18.9.00 and ARV/Ambica.SCN/97 dt.22.01.98. issued to M/s Ambica Re-rolling Mills, Saijpur Bogha, Near G.D. High School, Naroda Road, Ahmedabad .

BRIEF FACTS OF THE CASE:

M/s.Ambica Re-rolling Mills, Saijpur Bogha, Near G.D. High School, Naroda Road, Ahmedabad (hereinafter referred to as 'the assessee) are engaged in the manufacture of M.S.Angles, Bars, Channels and rods falling under CH72 of Central Excise Tariff Act, 1985. The assessee had opted for payment of duty under Compounded Levy Scheme under Section 3A of Central Excise Act, 1944 and Rules made there under.

2. Accordingly, Commissioner had **provisionally** fixed Annual Production Capacity (APC) to the Unit at 76891 MT for the year 1997-98 and duty liability was worked out to to Rs.19,22,275/- per month from September 1997 onwards. However the assessee had not paid Central excise duty as per provisional fixation of APC and short paid Central Excise duty of Rs.76,89,100/- during the period September 97 to December 97.

3. Subsequently, Commissioner **had finally fixed** the Annual Production Capacity of the assessee at 11611 MT for seven months from Sept.97 to March 98 vide letter F.No.IC/16-596/MP/97/P dt.23-3-98 for its Structural Mill. As per the above fixation the monthly production capacity was 1658.714 MT and duty liability per month was worked out to Rs.4,97,614/-. Accordingly the assessee was directed to pay Central Excise duty of Rs.34,83,300/- for seven months for its Structural Mill. However, on verification of the returns submitted by the assessee, it had been noticed that the assessee had paid Central Excise duty of Rs. 12,27,518/- only for the period Sept.97 to March 98, instead of Rs.34,83,300/- and thus short paid Central Excise duty amounting to Rs.22,55,782/-. The assessee had short paid the duty considering the closure of Structural Mill and availed abatement from duty during the period of its closure on their own accord without obtaining any Order for the abatement from Commissioner.

4. Similarly on the basis of above APC fixation, the duty liability for the period April 1998 to July 1998 was worked out to Rs. 19,90,456/- and the assessee had not paid any amount of duty during April 98 to July 98. Thus the entire amount of Rs. 19,90,456/- which was not paid by them was outstanding against the assessee.

5. Hence, Show Cause Notices was issued to the assessee vide F.No.ARV /Ambica/SCN/97 dt.22-1-98 by Superintendent of Central Excise, AR V, Division-I, Ahmedabad; and vide F.No.V.72/3-101/DA/98, dt.2-9-98 and vide V.72/3-119/DA/98, dt.29-9-98 by Assistant Commissioner, Central Excise, Division I, Ahmedabad, for recovering Central Excise duty amounting to Rs.76,89,100/-, Rs.22,55,782/- and Rs. 19,90,456/- respectively, under Rule 96ZP of CER 1944 read with the provisions of Section 3A and Section 11A of Central Excise Act, 1944, along with interest and also for imposition of penalty under Rule 96ZP(3) and Rule 173Q of the Central Excise Rules, 1944

6. Similarly, in respect of its Bar Mill, Commissioner had fixed the Annual Production Capacity as under :

S N	Period	Annual Production Capacity	Prorata APC Per month	F.No. and Date of Order
1	Sept.1997 to March1998	15678 MT	2239.74 MT	IV/16-596/MP/97 /P dt.23-3-98
2	Sept 1998 to March1999	10175 MT	1453.57 MT	IV/16-596/MP/97 /Pdt.27-11-98
3	April 1999 to March 2000	17442 MT	1453.500MT	IV/16-596/MP/97/ dt.12-8-99

7. As per above fixation, **monthly duty liability** for the period September 1997 to August 1998 was worked out to Rs.6,71,914/-(2239.74 X Rs.300/- PMT) and for the period from September 1998 to March 2000 was worked out to Rs.2,18,035/- (1453.57 X Rs.150/- PMT) in respect of Bar Mill.

8. Further, on verification of returns submitted by the assessee, during the period from September 1997 to March 2000, it had been noticed that the assessee had not paid Central Excise duty liability as per Annual Production Capacity fixed by the Commissioner. Since, the assessee failed to pay Central Excise duty liability within the stipulated time limit the following Show Cause Notices were issued to the assessee by Assistant Commissioner, Central Excise, Division I, Ahmedabad, for recovering Central Excise duty under Rule 96ZP of

CER 1944 r/w Section 3A and 11A of Central Excise Act, 1944, along with interest and also for imposition of penalty under Rule 96ZP(3) and Rule 173Q of the Central Excise Rules, 1944.

S N	SCN F.No. and date	Period	Duty required to be paid	Duty	Duty sho paid
1	V.72/3-118/DA/98 dt.29-9-98	April 98 to June 98	2015742	669077	1346665
2	V.72/3-159/DA/98 dt.8-12-98	July 98 to Sept.98	2015742	200000	1815742
3	V.72/3-51/DA/99 dt.31-3-99	Oct.98 to Dec.98	654108	500000	154108
4	V.72/3-65/DA/99 dt.30-6-99	Feb 99 to Mar 99	436072	Nil	436072
5	V.72/3-146/DA/99 dt.10-9-99	April 99 to Aug.99	1090125	nil	1090125
6	V.72/3-03/DA/00 dt.25-1-00	Sept.99 to Dec99	872100	175500	696600
7	V. 72/3-46/DA/2000 dt.9-5-00	Jan.2000	218025	Nil	218025
8	V.72/3-47/DA/00 dt.9-5-00	Feb2000	218025	Nil	218025
9	V.72/3-03/DA/2000 dt.18-9-00	Mar.2000	218025	Nil	218025
		TOTAL	7737964	1544577	6193387

9. HISTORY OF THE CASE:

9.1 The above Show Cause Notices were made answerable to the Commissioner, Central Excise, Ahmedabad II, vide corrigendum issued from F.NO. V.54/15-156/Dem/2000, dated 23.2.2005 and dated 16.3.2005.The same were adjudicated by the Commissioner vide OIO No.147 to 158/Commr/2005, dated 23.3.2005, vide which the total demand of Rs.1,04,39,625/- was confirmed along with interest under Section 3A of Central Excise Act, 1944 read with Rule 96ZP of Central Excise Rules, 1944 and the demand of Rs.76,89,100/- was dropped. Penalty of Rs 50 Lakhs was imposed under Rule 96ZP of the Central Excise Rules, 1944.

9.2 The above OIO was appealed against by the assessee in the Tribunal and subsequently CESTAT remanded back the OIO to the adjudicating authority vide CESTAT Order no. A/596/WZB/AHD/10, dated 01.06.2010.

9.3. During the course of adjudication, the judgment of the Hon'ble High Court of Gujarat rendered in the case of M/s. Krishna Processors was examined, wherein it was held that Rule 96ZO, 96ZP and 96ZQ of the Central Excise Rules, 1944, having been omitted vide Notification No. 6/2001-CE(NT), dated 01.03.2001, without any saving clause, no proceeding could continue under these Rules thereafter; and that Section 38 A of the Central Excise Act applies only in respect of Rules, Notifications or Orders and does not apply to any Section.The Department had filed SLP in the Apex Court against the said order of the Hon'ble High Court and thus the adjudication of the Show Cause Notices under consideration, was kept pending awaiting decision of the Hon'ble Apex Court in the said matter.

9.4. When the matter was decided by the Hon'ble Supreme Court vide its judgment dated 24.11.2015, the Show Cause Notices were again taken up for adjudication. The details of the decision is discussed in the forthcoming paras.

9.5. Now,again during the course of adjudication, it was noticed that in a similar issue in the case of M/s. Arbuda Alloys Pvt. Ltd., Ahmedabad, the Department had filed an appeal before the Hon'ble High Court of Gujarat against an order of the Tribunal, which had held as under:

> *Compounded Levy Scheme-Section 3 A of the Central Excise Act, 1944 and Rule 96ZPof erstwhile Central Excise Rules, 1944-Omission thereof without saving clause-Applicability on proceedings initiated prior to omission-Since adjudication order passed long after omission of impugned provisions, demand not sustainable, notwithstanding that proceedings initiated prior to such omission-Rule 96ZP ibid-Section 3A of Central Excise Act,1944.*

9.6. The Department had filed an appeal against the abovementioned order of the Tribunal before Hon'ble Gujarat High Court on the following ground:

> *"Whether, the Customs,Excise and Service Tax Appellate Tribunal was justified in holding that the adjudication order which was passed after the omission of Section 3A of the Central Excise Act, 1944 is not sustainable despite the fact that the proceedings had been initiated prior to 1.3.2001?"*

9.7. The SCNs were again kept pending adjudication awaiting the decision of the Hon'ble High Court of Gujarat in the said matter.

9.8. The Departmental appeal was admitted by the Hon'ble High Court of Gujarat, vide its order dated 14.3.2016.The Tax appeal filed by the Department was disposed off on monetary

grounds by the Hon'ble High Court, vide its order dated 16.1.2020, wherein it was held as under:

> *"8. In the present case, there is no challenge to the constitutional validity of any particular Provision, Act or Rule nor there is any challenge to the legality, validity of any Notification/Instruction/Order or Circular. In such circumstances, the Instruction dated 17th August 2011 referred to in Paragraph-4 of the Instruction dated 22.8.2019, will have no application.*
> *9. In view of the monetary limit prescribed by the Ministry of Finance, Department of Revenue, this appeal is disposed of accordingly. However, we keep the substantial question of law as framed by this Court vide order dated 14.3.2016 open to be adjudicated in an appropriate appeal."*

9.9. In light of the above order dated 16.1.2020, the aforementioned Show Cause Notices have been taken up for adjudication.

PERSONAL HEARING

10. Personal hearing was granted to the assessee on 18.2.2021, 10.6.2021 and 21.6.2021, however, the Notices of the Personal hearing were returned by the postal authorities, with the remark "Left". Hence, after providing three opportunities for personal hearing,the cases were taken up for decision after duly observing the principles of nature justice. I also rely on case laws of M/s. Devi Dayal V /s UOI as reported in 2002 (144) ELT 5209 (Del) as dismissed by Hon'ble Supreme Court as reported in 2003 (151) ELT A 288, M/s. Saketh India Ltd. Vs UOI as reported in 2002 (139) ELT 267 (Del.), Gopinath Chem Tech Ltd., Vs CCE, Ahmedabad-II as reported in 2004 (171) ELT 412 (Tri.Mumbai) and Sardar Metal Industries Vs CCE, Meerut as reported in 2003 (160) ELT 324 (Tri.Del), in support of the view that principles of natural justice is not being violated in deciding these cases.Further, I am left with no option but to rely on the earlier Defence replies dated 29.9.98 and 28.10.98, submitted by the assessee in reply to the Show Cause Notices to examine and decide the issues.

11. DEFENCE REPLY:

11.1. The assessee vide letter dt.29.9.98 submitted reply to the Show Cause Notice dated 2.9.98 issued for recovery of Central Excise duty short on Structural Mill and vide their letter dated 28.10.98, they had submitted their reply to SCN dated 29-9-98. In their reply dated 29.9.98, they had challenged the validity of the Show Cause Notice as being issued by Assistant Commissioner who is not the Officer competent to issue the notice under Section 3A or under Rule 96ZP.

11.2 They further submitted that in the case of UOI & Others Vs Supreme Steel & General Mills & Others, Hon'ble Supreme Court had held that pending the appeal, the Union Government shall not take any penal or coercive measure under the Notification dt.10-3-98. **It was further held that it was open to the manufacturer to submit the application for determination of capacity on the basis of actual production and if any such application is submitted, the same shall be duly considered by the competent authority in accordance with the Rules.**

11.3. According to the above decision, they had submitted application vide letters dated 13-5-98 and 1-9-98 for payment of duty liability on the basis of actual production and also requested to adjust the excess duty liability paid against the duty liability from the month of May 98 onwards. Since, they had paid duty on the basis of actual production; there was no question of short payment of duty and also recovery of interest and imposition of penalty.

11.4. In their reply dated 28-10-98, they submitted that their Structural mill was dismantled with all machinery from its installed position w.e.f. 31.3.98 and they had intimated the Department vide their letter No.AMB/391/97-98 dt.31-3-98, with reasons; and thereby they had stopped all the production of Angles, Channels & Sections. As there was no machinery for production of such goods the question of levy of duty does not arise at all. They further submitted that they had filed declaration under Rule 173B No.1/98-99 dt.1-4-98, wherein they had mentioned that there will not be any production of goods. In the light of above, there was no short levy of duty and hence recovery of duty, interest and imposition of penalty is not warranted and hence they requested to drop the

proceedings initiated against them.

11.5. They submitted that since the case before the Supreme Court was being contested by their Association viz. All India Re-rollers Association and since they were also a member of the Association, the Interim Order of Hon'ble Supreme Court was applicable to them. Hence till the matter is decided by Hon'ble Supreme Court, they pleaded to keep the case pending. According to the above decision, they had submitted application vide letter dated 13-5-98 and discharged their duty liability on the basis of actual production. They further submitted that considering duty liability on the basis of actual production, during the months of September 1997 to April 1998, they had paid excess duty of Rs.14,01,077/- and after adjusting the excess duty paid by them against the duty liability of subsequent months, considering duty already paid by them, at the end of April 1999, their duty liability came to Rs.156519/- only, which they had paid along with interest in the month of Nov.99. They also submitted details of such excess payment and adjustment of duty vide their reply. They further submitted that since 15-4-1999, there was no production in their Bar Mill.

11.6. They further pleaded that since the matter is still pending before Hon'ble Supreme Court they pleaded to keep this case pending till the case is finally decided by Hon 'ble Supreme Court. In view of above, since, they had paid duty on the basis of actual production as per interim Order of Supreme Court, there was no short levy, and hence question of recovery of duty and interest does not arises. As regards imposition of penalty they submitted that since there is no short levy and evasion of duty penalty cannot be imposed. Moreover, Supreme Court in its interim Order also directed that no penal action should be taken against the assessees.

DISCUSSION AND FINDINGS

12. I have carefully gone through all the cases and related records before me. All the Show Cause Nnotices were issued to the assessee for short payment of duty as against duty liability fixed on the basis of Annual Production Capacity as determined by the Commissioner. Going through the facts of the case, I find that the assessee had initially opted for payment of duty under Compounded Levy Scheme and opted for lump sum payment of duty under Sub Rule (3) of Rule 96ZP of Central excise Rules, 1944 and thereafter switched over to actual production basis under Sub Section 4 of Section 3A of Central Excise Act,1944, in light of Hon'ble Supreme Court's Interim Order dated 21.4.1998, as reported in 1998 (77) ECR 41 (SC) in the case of Supreme Steel & General Mills.

13. The Government while introducing Compounded Levy Scheme had inserted Section 3A to Central Excise Act, 1944, wherein the goods falling under CH 72 viz. Ingots and Bills of Non alloy steel and Hot re-rolled steel products made by Re-rolling mills were notified for the purpose of levy of excise duty on the basis of annual capacity of production of the factory in the background of vast evasion in this sector of industry.

14. As a consequence separate Rules had also been notified for determination of annual capacity of production for both the above category of goods. Since, the present issue is regarding Hot re-rolled steel products only, hereinafter, I confine the discussion in respect of such goods only. A separate set of Rules, known as Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 for Hot re-rolled steel products, was introduced in exercise of powers conferred by Sub Section (2) of Section 3A of Central excise Act, 1944 vide Not.No.32/97 CE (NT) dt.1-8-97, as amended, vide Not.No.45/97-CE (NT) dt.30-8-97 and simultaneously Rule 96ZP was inserted under Central Excise Rules, 1944 vide Not.No.33/97 CE(NT) dt.1-8-197 as amended vide Not.No.44/97-CE (NT) dt.30-8-1997, prescribing a set of procedures, guidelines, conditions etc. for the proper and effective implementation of the Scheme.

15. As per the said Rules the annual production capacity of the mills was to be determined by the Commissioner of Central Excise in terms of the above Rules and thereafter the assessee was liable to pay duty based on such determination by the Commissioner. The factors which are relevant for determining the annual production capacity, formula for determining the annual production capacity, rate of

duty, time limit for payment of duty, interest rate and penalty for non payment of duty were also prescribed under the said Rules. In addition to above, necessary provisions were incorporated providing relief to the assessee if annual production capacity determined by the Commissioner is disputed by them, provision for re-determining the same were provided under Section 3A(4), under these provisions, facility to make any changes in installed machinery or any part thereof which tends to change the value of parameters, facility to claim abatement for closure or non production of hot re-rolled products were provided, during any continuous period not less than seven days. The above provisions and conditions were contained under Rule 96ZP (1) and (2) of Central excise Rules, 1944. Apart from providing all the above concessions under Sub Rule 3 of Rule 96ZP, it also provided for an option under which a manufacturer of re-rolled product can opt to discharge the duty liability under Section 3A by payment of a lump sum amount every month calculated as 1/12 of the amount obtained by multiplying the annual capacity with a factor of 300. It was a self contained and full fledged independent scheme. Notification No.50/97-CE dt.1-8-97, as amended further provides concessional rate of duty @ Rs.150/- PMT, if the nominal diameter is less than 160mm.

16. The present issue before me is between the applicability and interpretation of sub Section (4) of Section 3A of Central excise Act, 1944 and Sub Rule (3) of Rule 96ZP of Central excise Rules, 1944.

16.1 Sub Section (4) of Section 3A reads as under:

> *"Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under Sub Section (2) Central excise Officer after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and re-determine the amount of duty payable by the assessee with reference to such actual production at the rate specified in Sub Section '(3)."*

16.2 Rule 96ZP (3) reads as under:

> *"Notwithstanding anything contained elsewhere in these Rules, a manufacturer may, in the beginning of each month from 1' day of Sept.97 to 31s' day of March 98 or any other financial year, as the case may be, and latest by the tenth of each month, pay a sum equivalent to one-twelfth of the amount calculated at the rate of Rs.300/- multiplied by the annual capacity in metric tonnes, as determined under Sub Rule (3) of Rule 3 of the Hot-Re-rolling Mills Annual Capacity Determination Rules, 1997, and the amount so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of Sept.97 to the 31st day of March 98 or any other financial year, as the case may be, **subject to the condition that the manufacturer shall not avail of the benefit, if any, under the proviso to Sub Section (3) or under Sub Section (4) of Section3A of the Central excise Act, 1944 (1 of 1944).***

17. In terms of the **provisions of sub-section (2) of Section 3A of the Central Excise Act, 1944,** the duty was required to be paid on the said goods on the basis of determined capacity of production by the Commissioner of Central Excise under Hot Re-rolling Steel Mills Annual Capacity of Determination Rules, 1997. Further, as per **sub-section (4) of Section 3A of the CEA, 1944,** if the actual production of notified goods is less than the production determined under **sub-section (2) of Section 3A of CEA, 1944** then the Commissioner of Central Excise after giving an opportunity to the assessee, re-determines the amount of duty payable by the assessee with reference to such actual production.

18. I find that provision of Section 3A (4) and Rule 96ZP (3) contains two different set of procedures to be adopted at the option of the assessee for payment of duty under the Scheme. In other words, procedures prescribed under Rule 96ZP (1) to which Section 3A (4) is attracted is an alternative to procedure prescribed under Rule 96ZP (3). Besides, for availing the benefit of Rule 96ZP(3), it is stipulated in the Rule itself, as reproduced above that the assessee had to forego their claim for availing the benefit of Sub Section 3 and 4 of Section 3A. Hence, it is clear that the assessee cannot opt for both the Rules, taking advantage of provisions of the Rules whichever is beneficial to them for discharging their final duty liability.

19. In the present Show Cause Notices before me, I find that on introduction of Compounded Levy Scheme, the assessee submitted necessary application for payment of duty under this Scheme, declaring the requisite details. Based on the application, the

Commissioner of Central Excise, Ahmedabad had finally fixed APC at 11611 MT for the period from September 1997 to March 1998 in respect of Structural Mill and at 15678 MT in respect of their Bar Mill. From the records I find that the assessee had paid entire duty liability of Rs.47,03,400/- involved on Bar Mill on a date later than the stipulated date of payment along with interest due thereon. However, in respect of Structural mills, they had not paid their entire duty liability. The assessee discharged their duty liability considering the period during which the mills was operational and thus paid Central Excise duty of Rs.12,27,518/- only as against duty liability of Rs.34,83,300/-, as such they claimed suo motto abatement of Rs.22,55,782/- for the period during which they claimed that the Structural Mill was closed. The assessee had availed the option for payment of duty under the provisions of Sub Rule 3 of Rule 96ZP of Central Excise Rules, 1944. Since the facility for claiming abatement was not provided for assessee under the provisions of Rule 96ZP(3), the Commissioner had therefore rightly rejected the assessee's claim and had also rejected the assessee's request for availment of scheme in Mill wise, vide letter dt.IV/16-596/MP/97-P dt.28-4-98. Thus in consequence to the explicit provision as made under Rule 96ZP(3), restricting the benefit of Sub Section 4 of Section 3A of Central excise Act, 1944, I agree with the then Commissioner's decision in rejecting their claim of abatement.

20. Meanwhile, the Hon'ble Supreme Court in the case of M/s. Supreme Steel & General Mills, vide their Interim Order dated 21.4.1998, had ordered as under:

"While the matters are pending in this Court the Union Government shall not take any penal or coercive measure under the Notification no. 07/98-Central Excise (N.T.) dated March 10, 1998. It will be open to the manufacturers to submit applications on the basis of the actual production and, if any such application is submitted the same shall be duly considered by the competent authority in accordance with the rules."

21. In light of the above Interim order of the Hon'ble Supreme Court, the assessee by way of their own interpretation of the Order and calculation, calculated their duty liability on the basis of so called actual production of each month and arrived at a conclusion that during the period from September 1997 to April 1998 that they had in fact paid duty along with interest to the tune of Rs.14,01,077/-, in excess of what they ought to have paid on quantity of goods actually produced and they adjusted such excess amount of duty towards their duty liability of goods actually produced by them in the subsequent months. Hence the assessee from the month of May 98 started adjusting the excess duty amount so arrived by them towards their duty liability from the month May 1998 onwards on their own. They had also intimated the Department about their intention and the calculation arrived at by them, vide their letter dt.13.5.1998. This exercise was done by them on their own will and volition by way of filing a simple intimation letter to the Department, whereas the Hon'ble Supreme Court vide their Interim Order had ordered that *it will be open to the manufacturers to submit applications on the basis of the actual production and, if any such application is submitted the same shall be duly considered by the competent authority in accordance with the rules.* It is pertinent to note here that the intimation letter was not considered or decided by the department vis-à-vis the Interim order of the Supreme Court and in spite of this, the assessee had opted out of lump sum payment of duty under Sub Rule (3) of Rule 96ZP of Central excise Rules, 1944 and switched over to payment of duty on actual production basis under Sub Section 4 of Section 3A of Central Excise Act, on their own will.

22. I find that the assessee had grossly misinterpreted Hon 'ble Supreme Court's interim Order assuming the Interim Order was entirely in their favour. Thus they jumped to the conclusion that Hon'ble Supreme Court had given them full liberty to pay duty on the basis of actual production under Section 3A(3) of the Central Excise Act, 1944. However, the Order itself stipulates the assessee to submit an application and wait for its consideration by the Commissioner in accordance with the Rules i.e. under Sub Section 4 of Section 3A 1944. However, I do not find anything on records to suggest that necessary initiative had been taken by the assessee to pay duty under Sub Section 4 of Section 3A of CEA 1944, rather they only filed a simple letter dated 13-5-98 to the Department. On going through the assessee's letter dated 13-5-98, I find that it is just an intimation declaring their intention to pay duty on the basis of actual production and a request to adjust the excess duty liability paid by them, from May 98 onwards. However, during the period from May 98 to August 98, they suo motto calculated their duty liability based on actual production of each month and adjusted the 'so called' excess duty paid by them against the duty liability. Once it got exhausted in the month of August 98, they paid duty from Sept.98 to April 99 on the basis of actual production.

23. This contentious issue was already brought before Hon' ble Supreme Court of India, in the case of M/s. Venus Castings (P) Ltd., and M/s. Supreme Steels and General Mills. The cases related to Induction Furnace Units were covered under Rule 96ZO of Central excise Rules, 1944. As mentioned earlier, while introducing Compounded Levy Scheme, Government

had covered Induction Furnace Units and Hot Re-rolling Mills under the set of provisions of Rule 96ZO and 96ZP respectively and the provisions and conditions prescribed under both the Rules, run parallel to each other. The above two cases were finally decided by Hon' ble Supreme Court. The former case was decided on 5.4.2000 as reported in 2000 (117) ELT 273 (SC) and the latter was decided on 15.10.2001 as reported in 2001 (133) ELT 513 (SC). In the case of Venus Castings (P) Ltd., relying on various judgments passed by Hon' ble High Court of AP and Allahabad, Hon' ble Supreme Court had taken the decision that **"the assessee if they availed the procedure under Rule 96ZO(3) of Central excise Rules, 1944 at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Central excise Act, 1944 which is specifically excluded"**

24. In the case of M/s. Supreme Steel and General Mills, relying on Venus Castings decision, Hon' ble Supreme Court held that **"two procedures namely one as provided under Sub Section 4 of Section 3A of the Central excise Act and the other as provided under Sub Rule 3 of Rule 96ZO of Central excise Rules are alternative procedures and the assessee has to opt for one. Once having done so he cannot claim the benefit of the other.** While deciding the case of M/s. Venus Castings due consideration of the findings and decision was also given to the procedures prescribed for Hot-re rolling unit and hence the ratio of above judgment squarely applicable to the Hot re-rolling mills cases as well.

25. The Hon'ble Supreme Court of India, in its judgment in the case of M/s.Venus Castings P. Ltd., reported in 2000 (117) E.L.T. 273 (S.C.) has held as under:

> *" Iron and steel rolling mills - Production capacity based duty - Annual capacity of production - Redetermination of - Section 3A(4) vis-a-vis Rule 96ZO(3) - Assessee, if they have availed of the procedure under Rule 96ZO(3) of Central Excise Rules, 1944 at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Central Excise Act, 1944 which is specifically excluded*
>
> *- By reason of the assessee having exercised his desire of paying duty based on total furnace capacity the determination of annual capacity of production is not determined by the Revenue as the procedure adopted obviates determination of production. In the absence of determination of production the question of its determination on the basis of actual production as detailed in Section 3A(4) of the Act does not arise. The schemes contained in Section 3A(4) of the Act and Rule 96ZO(3) or Rule 96ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. Thus the two procedures do not clash with each other. If the assessee opts for procedure under Rule 96ZO(1) he may opt out of the procedure under Rule 96ZO(3) for a subsequent period and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of combining the procedure under Rule 96ZO(1) to which Section 3A(4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lumpsum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax. [paras 9, 10]*
>
> *Interpretation of statute - In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision there- to - If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. [para 11]*
> *Taxing statute - Composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment."*

Paras 10 and 11 of the said judgment reads as under:

10. The schemes contained in Section 3A(4) of the Act and Rule 96ZO(3) or Rule 96ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. Thus the two procedures do not clash with each other. If the assessee opts for procedure under Rule 96ZO(1) he may opt out of the procedure under Rule 96ZO(3) for a subsequent period and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of combining the procedure under Rule 96ZO(1) to which Section 3A(4) of the Act is

attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lumpsum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

11. The learned Counsel for the respondent contended that the Rule 96ZO(3) is contrary to Section 3A(4) of the Act and, therefore, should be held to be ultra vires or read the relevant rules in such a manner as to allow the procedure prescribed under the provisions of Section 3A(4) to be followed. Section 3A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3A provides special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a licence fee and not on production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax [See : State of Kerala & Anr. v. Builders Association of India & Ors., 1997 (2) SCC 183]. In this context, the learned Counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the Section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh high Court in Sathawahana Steels & Alloys (P) Ltd. v. Government of India (supra) and the similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 M/s. Jalan Castings (P) Ltd. v. Commissioner of Central Excise & Ors. disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd., Kanpur Nagar v. Commissioner of Central Excise, Allahabad & Anr. (supra).

26. The Hon'ble Supreme Court of Inda, in its decision in the case of M/s. SUPREME STEELS AND GENERAL MILLS, reported in 2001 (133) E.L.T. 513 (S.C.), has held as under:

"Production capacity based duty - Actual capacity of production - Section 3A(4) vis-a-vis Rule 96ZO(3) - Option - Manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule (3) of Rule 96ZO on the basis of total furnace capacity installed and thereafter to switch over to actual production basis under Section 3A(4) of the Central Excise Act, 1944 in case it is less than the duty payable under Rule 96ZO(3) of Central Excise Rules, 1944. - It was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with sub-rule (3) of Rule 96ZO on the basis of total furnace capacity installed as provided therein. The manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule (3) of Rule 96ZO and thereafter to switch over to actual production basis under Section 3A(4) of the Act, in case it is less than the duty payable under sub-rule (3) of Rule 96ZO. The said sub rule is quite clear that the option under it is available subject to the condition that once having opted for it, benefit if any under sub-section (4) of Section 3A of the Central Excise Act, 1944 shall not be available. [para 3]"

3.In so far Rule 96ZO is concerned, Shri A.K. Ganguli, learned counsel appearing on behalf of the manufacturers submitted that the part of sub-rule 3 which provides that in case excise duty is paid according to the said sub rule in that event the manufacturer shall not avail of the benefit under sub-s. (4) of Section 3A of the Central Excise Act, 1944 is bad. The relevant part of sub-rule (3) of Rule 96ZO reads as under :-

" Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year as the case may be pay a sum of rupees five lakhs per month in two equal instalments the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year as the case may be *subject to the condition that the manufacturer shall not avail of the benefit, if any, under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944)*:

Provided that for the month of September, 1997 the Commissioner may allow a manufacturer to pay the sum of rupees five lakhs by the 30th day of September, 1997 : (emphasis supplied). Provided....."

The submission is that final liability for payment of excise duty would be assessable at the end of the year; therefore in case a liability on the basis of actual production is less the manufacturer should be allowed the benefit of sub-section 4 of Section 3A of the Central Excise Act, 1944. It is contended that sub-rule 3 of Rule 96ZO cannot take away any benefit which may accrue to the manufacturer under the provisions of the Act. The argument however does not appeal to us. It was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with sub-rule 3 of Rule 96ZO) on the basis of total furnace capacity installed as provided therein. The manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule 3 of Rule 96ZO and thereafter to switch over to actual production basis under Section 3A(4) of the Act, in case it is less than the duty payable under sub-rule 3 of Rule 96ZO. The said sub rule is quite clear that the option under it is available subject to the condition that once having opted for it, benefit if any under sub-s. (4) of Section 3A of the Central Excise Act, 1944 shall not be available. We find that the controversy sought to be raised stands finally settled by a decision of this Court reported in JT 2000 (4) SC 77 - Commissioner of Central Excise & Customs v. M/s. Venus Castings (P) Ltd. It has been clearly held that two procedures namely one as provided under sub-s. (4) of Section 3A of the Central Excise Act and the other as provided under sub-rule 3 of Rule 96ZO of Central Excise Rules are alternative procedures and the assessee has to opt for one. Once having done so he cannot claim the benefit of the other.

27. I find that the feasibility of opting for payment of lump sum duty under Compounded Levy Scheme under Sub Rule (3) of Rule 96ZP of Central Excise Rules, 1944 and thereafter switching over to payment of duty on actual production basis under Sub Section 4 of Section 3A of Central Excise Act has been decided by the Hon'ble Supreme Court vide the above judgments. By way of the above judgments,the Hon' ble Supreme Court had held that once the assessee opts for payment of duty under Rule 96ZP(3) he cannot opt for payment of duty under Sub Section (4) of Section 3A of CEA 1944. During the FY 1997-98, the assessee had opted for payment of duty under Rule 96ZP (3) and thus, the assessee cannot opt for payment under Sub Section (4) of Section 3A during the same period 1997-98. Rather he is bound to pay duty as per APC fixed by the Commissioner.

28. In view of the above, I do not find any merit or justification in assessee's action of calculating their duty liability on the basis of actual production i.e. under Sub Section 4 of Section 3A on their own during the period 1997-98, as the same was not prescribed under the existing law and was in violation of the procedures prescribed under the Compounded Levy Scheme and Section 3A of the Central Excise Act,1944. Accordingly the so called excess duty arrived at by the assessee will not arise at all. Further, I also conclude that the assessee has not adhered to the prescribed procedures to pay duty under Sub Section 4 of Section 3A of Central Excise Act, 1944. For the subsequent FY i.e. 1998-99 and 1999-2000 also Commissioner has fixed APC as per letter No.IV/16596/MP/97 dt.27-11-98 and IV/ 16-596/MP/97 dt.12-8-99 at 17442 MT per annum for Bar Mill. Apparently, the then Commissioner had not considered the assessee's request for payment of duty on the basis of actual production and the same was rightly rejected.

29. Another argument put forth by the assessee is that their Structural mill was dismantled w.e.f. 1-4-1998 and the entire production was stopped and the mill was closed down since 15.4.1999. They claimed that since there was no production of any goods since 15.4.1999 and

there was no duty liability since 15-4-1999. However, I find that no evidence was brought forward by the assessee to suggest that their application for dismantling the mill and closure of production was considered by the Commissioner. Thus there was no prior intimation by the assessee and consequently the prescribed procedures set forth under such circumstances like verification etc. were not conducted by the department. This implies that there was no evidence of the assessee closing down the mill with effect from 15.4.1999 and consequently no evidence is present to confirm the ceasing of production.

30. In view of the above discussion, I conclude and hold that the assessee is not empowered to switch over to actual production basis under Sub Section 4 of Section 3A of Central Excise Act as they had under initially opted for payment of duty under Compounded Levy Scheme and opted for lump sum payment of duty under Sub Rule (3) of Rule 96ZP of Central excise Rules, 1944 All the show cause notices were issued to the assessee for short payment of duty as against duty liability fixed on the basis of Annual Production Capacity as determined by the Commissioner. The assessee was not lawfully allowed to jump from one scheme to another as per their own whims and without adhering to the prescribed conditions under the said Rules, which were mandatory and not optional in nature.If the assessee intended to pay duty on the basis of actual production, they should have opted out of the Compounded Levy Scheme by following the prescribed procedures. I find that the assessee on one hand opted to claim abatement under the Compounded Levy Scheme and simultaneously also intended to pay duty on the basis of actual production. Both the above manners of payment of Central Excise duty were mutually exclusive and it was clearly ordained that the assessee had to chose either of the methods for payment of duty and they could not change the manner of payment of duty as per their own whims without adhering to the conditions prescribed under the said Rules. In the cases in hand, I find that on one hand the assesee claimed abatement under the Compounded levy Scheme and on other hand they also intended to pay duty on the basis of actual production basis. In the case of the assessee, I find that there was short payment of duty throughout the entire period when the Scheme was in operation. I find that throughout the period under contention, the assessee had deliberately misinterpreted the relevant Rules and the judgment of even the Apex court, with the sole intention of evading payment of duty and in their own interest.In view of the above, I hold that the assessee is liable to pay the Central Excise duty as per the APC fixed by the Department.

31, Having concluded thus above, I hereby take up the 12 Show Cause Notices individually and decide the same as under.I find that the Show Cause Notices can be divided into two categories i.e. one for Structural Mill and the other for Bar Mill.

A) STRUCTURAL MILL:

1)SCN F.No.V.72/3-101/DA/98 dt.2-9-98- Amount 22,55,782/-
PERIOD; SEPT. 97 TO MARCH 98

31.1. In this case, the assessee had paid duty on prorata basis only for the period during which the Mill was functional. Since, facility of abatement is not provided under Rule 96ZP (3) of Central excise Rules, 1944, the assessee was liable to pay entire duty liability as per APC fixed, irrespective of the fact whether the Mill was operational or closed. Hence, I confirm the amount of Rs.22,55,782/- under Rule 96ZP of Central Excise Rules, 1944 read with Section 3A and Section 11 A of the Central Excise Act, 1944 and hold that the same be recovered from the assessee along with interest.

2) SCN F.No.V.72/3-119/DA/98 dt.29-9-98- Amount Rs.19, 90,456/-
PERIOD OF SCN: APRIL 98 TO JULY 98

31.2. The assessee had not paid duty claiming that the Structural Mill was dismantled w.e.f 1-4-1998 and hence no production was carried out by them in the said Mill. However, the then Commissioner vide letter dt.IV/16-596/MP/97P dated 28-4-98, while rejecting their claim for abatement had also not allowed the assessee's request for availment of scheme under Rule 96ZP (3) Mill wise and not factory wise. Hence, taking full cognizance of the then Commissioner's decision, I confirm the demand of duty amounting to Rs.19,90,456/- under Rule 96ZP of Central Excise Rules, 1944 read with Section 3A and Section 11 A of the Central Excise Act, 1944 and hold that the same is required to be recovered from the assessee along with interest.

B. BAR MILL:

1) SCN F.NO.ARV/AMBICA/SCN/97 DT.22-1-98 - for Rs. 76, 89,100/- PERIOD - SEPT.97 TO DEC.97

31.3. In this case the Commissioner vide letter F.No.IV /16-596/MP/97-P dated 23.10.97 provisionally fixed APC at 76891 MT for the Mill and accordingly, the duty liability for the period Sept.97 to Dec.97 comes to Rs.76,89,100/-. Thereafter vide letter F.No.IV/16- 596/MP/97.P dt.23.3.98, the APC was finally fixed at 15678 MT for Bar Mill and 11611 MT for structural Mill, and accordingly duty liability for the period Sept. 97 to Dec. 97 for Bar Mill was worked out to Rs.47,03,300/- and for Structural Mill it was worked out to Rs.34,83,300/-. Out of the said amount the assessee had paid Rs.49,15,000/- for Bar Mill along with interest and paid Rs. 12,27,518/- for the Structural Mill. Hence there is no short payment of duty on Bar Mill for the said period. For the short payment of duty of Rs.22,55,782/- in respect of structural mill, for a separate SCN as per Sr.No.A(1) above was issued, the demand of which has been confirmed against the assessee in the above para.

31.4. I rely on the report dated 18.12.2001, issued by the Superintendent, erstwhile AR-V, Division-I, Ahmedabad-I, vide which it was reported as under:

> *"2. Out of the above total final duty liability of Rs. 47,03,400/- fixed for Bar Mill the assessee had paid Rs. 49,15,000/- (Rs. 47,03,405/- for duty payment and Rs.2,08,758/- for interest payment) upto 31.03.98. Whereas, against total final duty liability of Rs.34,83,300/- fixed for Structural Mill, the assessee had only paid Rs.12,27,518/-. Considering the interest element to be paid at the rate of 18% p.a. for Bar Mill duty liability the assessee had paid all the sum due to them upto 31.3.98. Whereas, for Structural Mill, for outstanding duty liability of Rs.22,55,782/-, a separate SCN dated 2.9.98 issued from F.No.V.72/3-101/DA/98....*
>
> *3. Therefore, in view of the above, SCN dated 22.1.98 issued from F.No. AR-V/Ambica-SCN/97 of Rs.76,89,100/- has become redundant."*

31.5 Since, the SCN was issued as protective demand on the basis of provisional fixation of APC, on final fixation of APC this SCN does not have any validity and hence I drop the said demand of Rs.76,89,100/-

2) F.No.V. 72/3-118/DA/O8 dt.29-9-98 Apr.98 to June 98 for Rs.13,46,665/-
3) F.No.V.72/3-159/DA/98 dt.8-12-98 July 98 to Sept.98 for Rs. 18,15,742/

31.6 In the above SCNs, for the period May 98 to Aug 98, short payment of duty is due to adjustment of excess amount of duty and interest purportedly arrived at by the party and supposedly paid during Sept.97 to March 98. Since, the demand for Sept 97 to March 98 stands confirmed as above, it is implied that there was no excess payment of duty. And that the assessee had short paid/not paid the Central Excise duty for the said period as per the APC fixed. Therefore, I confirm the demands of duty amounting to Rs.13,46,665/- and Rs.18,15,742/- under Rule 96ZP of Central Excise Rules, 1944 read with Section 3A and Section 11 A of the Central Excise Act, 1944 and hold that the same is required to be recovered from the assessee along with interest.

31.7. The other Show Cause Notices to be decided are as under:

Sr No.	SCN F.No. and date	Period	Duty demanded
4	V.72/3-51/DA/99 dt.31-3-99	Oct.98 to Dec.98	154108
5	V.72/3-65/DA/99 dt.30-6-99	Feb99 to Mar99	436072
6	V.72/3-146/DA/99 dt.10-9-99	Apri l99 to Aug.99	1090125
7	V.72/3-03/DA/00 dt.25-1-00	Sept.99 to Dec99	696600
8	V. 72/3-46/DA/2000 dt.9-5-00	Jan.2000	218025
9	V.72/3-47/DA/00 dt.9-5-00	Feb2000	218025
10	V.72/3-03/DA/2000 dt.18-9-00	Mar.2000	218025

31.8 In all the above 7 Show Cause Notices, the short payment of duty is on account of the assessee switching over to actual production basis under Sub Section 4 of Section 3A of Central Excise Act when they had initially opted for payment of duty under Compounded Levy Scheme and opted for lump sum payment of duty under Sub Rule (3) of Rule 96ZP of Central

Excise Rules, 1944. As discussed elaborately in the foregoing paras, it has been concluded that once once the assessee opts for payment of duty under Rule 96ZP(3) he cannot opt for payment of duty under Sub Section (4) of Section 3A of CEA 1944, without following the prescribed procedures. Therefore, I confirm the demand of duty short paid by the assessee in the SCNs at Sr. no. 4 to 10 above under Rule 96ZP of Central Excise Rules, 1944 read with Section 3A and Section 11 A of the Central Excise Act, 1944 and order that the same should be recovered from the assessee along with interest.

PENALTY UNDER RULE 96 ZP OF CENTRAL EXCISE RULES, 1944:

32. During the course of earlier adjudication, the judgment of the Hon'ble High Court of Gujarat rendered in the case of M/s. Krishna Processors was examined, wherein it was held that Rule 96ZO, 96ZP and 96ZQ of the Central Excise Rules, 1944, having been omitted vide Notification No. 6/2001-CE(NT), dated 01.03.2001, without any saving clause, no proceeding could continue under these Rules thereafter; and that Section 38 A of the Act applies only in respect of Rules, Notifications or Orders and does not apply to any Section.The Department had filed SLP in the Apex Court against the said order of the Hon'ble High Court and thus the adjudication of the SCNs was kept pending awaiting decision of the Hon'ble Apex Court in the said matter. The matter was decided by the Hon'ble Supreme Court vide its judgment dated 24.11.2015, in the case of SHREE BHAGWATI STEEL ROLLING MILLS

33. The Hon'ble High Court of Gujarat, in the case of M/s. Krishna Processors, reported in 2012 (280) E.L.T. 186 (Guj.), has held as under:

> *Central Excise Rules, 1944 - Erstwhile Rule 96ZQ(5)(ii) invalid - Constitutionality of penalty - In view of its mandatory nature, assessee was liable to penalty equal to amount of duty in case of delay of only one day and even in cases where they were not at fault in making deposit of duty within prescribed time limit - This was in contrast to Section 11AC of Central Excise Act, 1944, which even in serious cases of fraud, collusion, wilful mis-statement, etc., provides for levy of only 25 per cent of penalty where amount was paid within 30 days - In that view, Rule ibid was violative of Article 14 of Constitution of India, as it discriminated between two classes of persons viz. independent processors of textile fabrics and other manufacturers who were not covered by it - In view of nature of penalty even for one day's delay, penalty under Rule ibid was unreasonable restriction on right of assessee to conduct business under Article 19(1)(g) of Constitution - Also, as penalty is in nature of additional tax, it was not within limitation of taxing power of State under Article 265 of Constitution of levy or collection of tax with authority of law - Supreme Steels and General Mills [2001 (133) E.L.T. 513 (S.C.)] did not conclude the issue of constitutionality of Rule ibid as subject matter of challenge there was vires of Rule 96ZO ibid and Section 3A ibid, which was not prosecuted in view of consensus between the parties. [paras 20.10, 20.11, 20.12, 20.13, 20.14, 20.6, 22]*
> *Central Excise Rules, 1944 - Erstwhile Rule 96ZO(5)(ii) - Vires of imposition of penalty for delay in payment of duty outstanding at end of month - Quantum of penalty equal to amount of duty outstanding or Rs. 5,000, whichever is greater - HELD : Rule 96ZQ ibid was framed under Section 37 of Central Excise Act, 1944, and sub-section (3) thereof prescribes that penalty could not exceed Rs. 5,000/- - In that view, imposition of penalty equal to amount of duty was without authority of law. [paras 20.6, 20.14, 22]*

34. The Hon'ble Supreme Court of India, affirmed the above decision, vide its judgment in the case of M/s. KRISHNA PROCESSORS, reported in 2009 (237) E.L.T. 641 (S.C.),and held as under:

> *Penalty - Delayed payment of duty - Compounded levy scheme - Vires of Rule 96ZQ(5)(ii) of erstwhile Central Excise Rules, 1944 - Said Rule imposing penalty equal to amount outstanding at end of stipulated period challenged as being ultra vires constitution and beyond legislative competence of Rule making authority -*

35. The Hon'ble Supreme Court of India, in its judgment in the case of M/s. SHREE BHAGWATI STEEL ROLLING MILLS, reported in 2015 (326) E.L.T. 209 (S.C.), has held as under:

> *"Penalty - Quantum of - Equivalent to amount of duty under Rules 96ZO, 96ZP and 96ZQ of erstwhile Central Excise Rules, 1944 - They were ultra vires Central Excise*

Act, 1944, arbitrary and unreasonable, and hence violative of Articles 14 and 19(1)(g) of Constitution of India, and would not be saved by Article 19(6) thereto - Assessee who paid delayed amount of duty after 100 days was put on same footing as assessee who paid duty only after one day's delay - It amounted to treating unequals as equals, and hence violative of Article 14 - It ignored circumstances of force majeure which may prevent bona fide assessee from paying duty in time - In circumstances where there was no fault of assessee in making deposit of duty in time, mandatory penalty of an equivalent amount of duty was compulsorily leviable - Also, when contrasted with other provisions of 1944 Act itself, penalty under these provisions was excessive. - The direct and immediate impact upon the fundamental right of the citizen is that he is exposed to a huge liability by way of penalty for reasons which may in given circumstances be beyond his control and/or for delay which may be minimal. The possibility of achieving the object of deterrence in such cases can be achieved by imposing a less drastic restraint. In point of fact when we contrast these provisions with Section 37 of the Act, it becomes clear how arbitrary and excessive they are. Under Section 37(3), the statute itself provides in all cases where no other penalty is provided by the Act that a penalty not exceeding ₹ 5,000 alone can be levied. Sub-section (4) is even more telling. Even in cases where there is a clandestine removal of excisable goods, and cases where the assessee intends to evade payment of duty, the assessee is liable to a penalty not exceeding the duty leviable on such goods or ₹ 10,000 whichever is greater. It will be noticed that the Act is very circumspect in laying down penalty provisions. Penalties in given circumstances extend only to ₹ 5,000 and ₹ 10,000 which are small amounts. Further, even where clandestine removal and intent to evade duty are present, yet the authorities are given a discretion to levy a penalty higher than ₹ 10,000 but not exceeding the duty leviable. In a given case, therefore, even where there is wilful intent to evade duty and the duty amount comes to say a crore of rupees, the authorities can in the facts and circumstances of a given case, levy a penalty of say ₹ 25,00,000 or ₹ 50,00,000. This being the position, it is clear that when contrasted with the provisions of the Central Excise Act itself, the penalty provisions contained in Rules 96ZO, 96ZP and 96ZQ are both arbitrary and excessive. A penalty can only be levied by authority of statutory law, and Section 37 of the Act, as has been extracted above does not expressly authorize the Government to levy penalty higher than ₹ 5,000. This further shows that imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make rules 96ZO, 96ZP and 96ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down Rules 96ZO, 96ZP and 96ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Article 14, 19(1)(g) and are ultra vires the Central Excise Act. [paras 35, 36, 38, 39]"

Paras 32 and 39 read as under:

32. We now come to the other appeals which concern themselves with penalties that are leviable under Rules 96ZO, 96ZP and 96ZQ. Since the lead judgment is a detailed judgment by a Division Bench of the Gujarat High Court reported in Krishna Processors v. Union of India, 2012 (280) E.L.T. 186 (Guj.) and followed by other High Courts, we will refer only to this decision.

39. A penalty can only be levied by authority of statutory law, and Section 37 of the Act, as has been extracted above does not expressly authorize the Government to levy penalty higher than Rs. 5,000/-. This further shows that imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make Rules 96ZO, 96ZP and 96ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down Rules 96ZO, 96ZP and 96ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Articles 14, 19(1)(g) and are ultra vires the Central Excise Act.

36. Lastly, CBIC, vide its circular dated **F. No. 116/2/2018-CX 3,dated** 16th of February, 2018, has enlisted the orders of Supreme Court. High Court and CESTAT, accepted by the Department and on which no review petitions, SLPs have been filed. The relevant portion of the Circular is reproduced as under:

"3. This exercise has been undertaken as an endeavor to reduce litigations so that cases on similar questions of law or identical case on facts pending in your jurisdictions can be decided.

PART I:

1. (a) **Decision of the Hon'ble High Court of Rajasthan dated 29.02.2016 in the case of Savitri Concast Ltd. in DB C.W.P 4784/2012, 5285/2012 & 5286/2012,**

(b) Decision of Hon'ble Punjab & Haryana High Court dated 14.09.2015 passed in CEA No. 20 of 2015 in the case of Commissioner, Central Excise Commissionerate, Chandigarh-I vs M/s Quality Steels, Mandigobindgarh,

(c) Decision of the Hon'ble High Court of Gujarat dated 13.10.2015 in Tax Appeal No. 1581 of 2007 in the case of M/s Kohinoor Dyg & Ptg Mills (P) Ltd., Surat.

1.1 Department has accepted the aforementioned decisions where the Hon'ble High Courts dismissed the departmental appeals relying on the decision of the Hon'ble Supreme Court dated 24.11.2015 in the case of M/S Shree Bhagwati Steel Rolling vs Commissioner of Central Excise & Others.

1.2 In the case of M/S Shree Bhagwati Steel Rolling vs Commissioner. Of Central Excise & Others, the Hon'ble Supreme Court examined the question of law whether interest and penalty provisions under rules 96 ZO, 96 ZP and 96 ZQ which were framed to effectuate the provisions of section 3A of the Central Excise Act, 1944 are consistent with the provisions of the Act and held that they are ultra vires. An excerpt from the judgment is reproduced below,

"...imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make rules 96ZO, 96 ZP and 96 ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down rules 96ZO, 96 ZP and 96 ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Article 14, 19(1) (g) and are ultra vires the Central Excise Act."

37. In view of the above judgments and the circular dated F. No. 116/2/2018-CX 3,dated 16th of February, 2018, I conclude that no penalty is imposable under Rule 96ZP of the Central Excise Rules, 1944.

PENALTY UNDER RULE 173Q OF THE CENTRAL EXCISE RULES, 1944:

Rule 173Q of the Central Excise Rules, 1944: Confiscation and penalty.:

(1) Subject to the provisions contained in section 11AC of the Act and rule 57AH, if any manufacturer, producer, registered person of a warehouse or a registered dealer,-

(d) contravenes any of the provisions of these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater.

I find that penalty has been proposed against the assessee under Rule 173 Q of the Central Excise Rules, 1944. Rule 173Q deals with confiscation and penalty in circumstances wherever there is short payment or non payment of Central Excise duty as provided in the Central Excise Act and Central Excise Rules, without the requirement of proof of mens rea. There is nothing in the statute indicating the need to establish the element of mens rea. From the facts of the case it is apparent that the assessee had failed to comply with the provisions of the Central Excise Act and Rules, and thus they have rendered themselves liable to penalty under the provisions of Rule 173 Q. There is nothing in Rule 173Q which mandates that mens rea/intention on the part of the assessee needs to be established; and the provisions under this Rule is plain and unambiguous. Thus I hold that the assesse is liable to penalty under Rule 173 Q of the Central Excise Rules, 1944.

38. In view of the discussions in the foregoing paras, I hereby pass the following Order:

ORDER

1) I confirm the demand of Central Excise duty amounting to Rs.1,04,39,625/- (Rs. One crore Four lakhs Thirty Nine thousand Six hundred Twenty five only) involved in the following Show Cause Notices under Rule 96ZP of Central Excise Rules, 1944 read with Section 3A and Section 11 A of the Central Excise Act, 1944 and order the same to be recovered from the assessee.

SR. NO	SCN NO. AND DATE	PERIOD	Duty demanded
1	V.72/3-101/DA/98 dt.2-9-98	Sept. 97 to March 98	2255782
2	V.72/3-119/DA/98 dt.29-9-98	April 98 to July 98	1990456
3	V.72/3-118/DA/98 dt.29-9-98	April 98 to June 98	1346665
4	V.72/3-159/DA/98 dt.8-12-98	July98 to Sept.98	1815742
5	V.72/3-51/DA/99 dt.31-3-99	Oct.98 to Dec.98	154108
6	V.72/3-65/DA/99 dt.30-6-99	Feb99 to Mar99	436072
7	V.72/3-146/DA/99 dt.10-9-99	April99 to/Aug.99	1090125
8	V.72/3-03/DA/00 dt.25-1-00	Sept.99 to Dec99	696600
9	V. 72/3-46/DA/2000 dt.9-5-00	Jan.2000	218025
10	V.72/3-47/DA/00 dt.9-5-00	Feb 2000	218025
11	V.72/3-03/DA/2000 dt.18-9-00	Mar.2000	218025
	TOTAL		10439625

2) I drop the demand of Rs.76,89,100/- involved in Show Cause Notice No. ARV/Ambica.SCN/97, dated 22.1.98,as per para no.s 31.3 to 31.5 above.

3) I order recovery of Interest under Rule 96ZP of erstwhile Central excise Rules, 1944

4) I do not impose any penalty on the assessee under Rule 96ZP of Central Excise Rules, 1944.

5) I impose a penalty amounting to Rs.5,00,000/- (Rupees Five Lakhs only) on the assessee under Rule 173 Q of the Central Excise Rules, 1944 and order the same be recovered from them.

6) The above mentioned Show Cause Notices issued to M/s. Ambica Re-rolling Mills are hereby disposed-off in the above terms.

(Amarjeet Singh)
COMMISSIONER,
CGST & CENTRAL EXCISE,
AHMEDABAD (NORTH)

BY REGISTERED AD/HAND DELIVERY

F. No. V.72/15-44/Denovo-Ambica/2010

Date : .06.2021

To
M/s.Ambica Re-rolling Mills,
Saijpur Bogha,
Near G.D. High School,
Naroda Road, Ahmedabad

Copy to:
(i) The Chief Commissioner, Central GST, Ahmedabad Zone, Ahmedabad.
(ii) The Deputy/Asst. Commissioner, Central GST, Division III, Ahmedabad North.
(iii) The Superintendent, Central GST, Range II, Division III, Ahmedabad North
(iv) Guard File