

(2020) 10 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 51050, 51200, 51201, 51202, 51264 Of 2017

**M/s Bharat Aluminium Co. Limited And Ors. @Hash Commissioner Of
Central Excise**

Date of Decision : 15-10-2020

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 4(5)(a), 9(b), 9(1)(b)
Central Excise Rules, 2002 — Rule 10A, 15, 25, 26
Central Excise Tariff Act, 1985 — Chapter No. 76 Central Excise Act, 1944 — Section 4(1)(a), 4(1)(b), 4(3)(b)(iv), 11A(1), 11AC, 32E, 32F
Customs Tariff Act, 1962 — Section 3
Central Excise Valuation (Determination Of price Of Excisable Goods) Rules, 2000 — Rule 8, 9, 10
Central Excise Valuation Rules, 2007 — Rule 10A(iii)

Citation : (2020) 10 CESTAT CK 0011

Hon'ble Judges : Anil Choudhary, J;C. L. Mahar, Technical Member

Bench : Division Bench

Advocate : Balbir Singh, Vivek Sharma, R. K. Mishra

Final Decision : Allowed

Judgement

1. All these appeals arise from common impugned order-in-original by which cenvat credit of Rs. 24,65,79,458/- availed by M/s Bharat Aluminium Company Limited (M/s Balco in short) on supplementary invoice raised by their job worker M/s Vedanta Aluminium Limited (VAL in short) have been disallowed alongwith levy of penalty under Rule 15 of Cenvat Credit Rules and further penalty of Rs. 5 crore have been imposed on M/s Vedanta Limited and on the other appellants of Rs. 2 lakhs each under rule 26 of the Central Excise Rules, 2002, who are the Officers of Balco and VAL.

2. Brief facts are that the appellant M/s Balco is inter alia engaged in the manufacture and clearance of 'Aluminium and Article thereof' falling under Chapter No. 76 of the First Schedule to the Central Excise Tariff Act, 1985 and is registered with the Central Excise Department vide Central Excise Registration No. AAACB1290NXM002.

3. The primary raw material for the purpose of manufacture of aluminium is 'Calcined Alumina' which is in turn manufactured from 'bauxite ore' extracted from mines. The appellant was initially having alumina refinery and aluminium smelter for which it was allocated own captive mines. However, the appellant is not permitted to sell bauxite extracted from the captive mines in the open market and therefore, on account of limitation of capacity of its refinery at Korba, the appellant was not able to use the bauxite fully from its captive mines. Accordingly, the appellant decided to get 'Calcined Alumina' manufactured on job work basis from VAL by using the bauxite extracted from its captive mines. This was found to be better and more cost effective method, than importing the deficit requirement of Calcined Alumina. Accordingly, M/s Balco entered into agreement for conversion with VAL, providing for supply of bauxite by M/s Balco and conversion to alumina at the plant of VAL at Lanjigarh, on job work basis. It was further provided that M/s Balco shall make arrangement for supply of bauxite to VAL from its mines located at different places. VAL shall convert bauxite to alumina using consumables, power and steam required for conversion to alumina as per the specifications agreed. M/s Balco shall lift alumina from VAL plant at Lanjigarh, as per the monthly mutually agreed schedule, alumina to be delivered by VAL ex-plant. The agreement also provided for payment of conversion charges for which VAL shall raise invoice on M/s Balco. Further, provided - inadmissible /vatable taxes like VAT, entry tax etc. paid by VAL on consumables and others used in job work shall be reimbursed by M/s Balco. M/s Balco shall also reimburse transportation charges and other expenses incurred by VAL on monthly basis. Further, taxes and duties as applicable as per the relevant laws shall be reimbursed by M/s Balco to VAL over and above the conversion charges.

4. Accordingly, the appellant - Balco supplied bauxite to VAL for conversion into Calcined Alumina on job work basis. It is pertinent to note that VAL did not avail the benefit of exemption of excise duty on manufacture of goods under job work, in terms of Notification No. 214/86-CE dated 25.03.1986. Accordingly, VAL discharged excise duty on the Calcined Alumina supplied to the appellant - Balco.

5. The appellant made payment of the processing charges alongwith the reimbursement of excise duty charged on Calcined Alumina, manufactured by VAL on job work basis.

6. The appellant availed the cenvat credit of the excise duty paid on 'Calcined Alumina' supplied by VAL as the same is used in the manufacture of dutiable goods i.e. aluminium and would qualify as 'inputs'. In other words, on the one hand the appellant made the payment (reimbursement) of excise duty to VAL, on other hand, Cenvat credit was availed by the appellant on such excise duty paid to VAL, as per Rules.

7. The appellant has been maintaining cenvat register to demonstrate the cenvat credit availed and is also making relevant disclosures in its periodical Statutory Returns. 8. In October, 2009, the Department issued a requisition memo to VAL

directing to produce records alongwith job work documents, and in the same month books of accounts, etc. of VAL were audited by the Department.

9. During the material period i.e. August, 2007 to July, 2010, VAL removed alumina on payment of central excise duty to their other unit at Jharsuguda and also to M/s Balco on the following basis:-

A.

Removal to the applicant's (VAL) other unit at Jharsuguda on 'stock transfer' basis referred as 'Inter Unit Transfer (ITU) Sales'.

C.E. duty paid on the basis of cost of production + 10% profit.

B.

Removal to BALCO, Korba based on purchase orders - referred as 'Direct Sale'

Aug. 07 - Nov. 08 - Based on London Metal Exchange (LME) average price and Dec. 08 onwards - Based on Alumina Spot Tender Price of the Govt. Owned company NALCO.

C.

Removal to BALCO, Korba of said goods obtained by job working on BALCO's input (Bauxite) under 'conversion agreement' - referred as 'Conversion Sale'.

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10. In case of goods removed by 'job worker' (VAL), the provision for valuation w.e.f. 01.04.2007 is as follows:-

Notification No. 9/2007-CE (NT) dt. 01.03.2007

Rule 10A. Where the excisable goods are produced or manufactured by a job-worker, on behalf of a person (hereinafter referred to as principal manufacturer) then,

(i) in a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

(ii) in a case where the goods are not sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time

nearest to the time of removal of said goods from the factory of job-worker,

(iii) In a case not covered under clause (i) or (ii) the provisions of foregoing rules, wherever applicable, shall mutatis mutandis apply for determination of the value of the excisable goods;

Provided that the cost of transportation, if any, from the premises wherefrom the goods are sold, to the place of delivery shall not be included in the value of excisable goods.

Explanation.- For the purposes of this rule, job-worker, means a person engaged in the manufacture or production of goods on behalf of a principal manufacturer, from any inputs or goods supplied by the said principal manufacturer or by any other person authorised by him.

11. The 'transaction value under Section 4(1)(a) being not applicable for transactions with M/s Balco, 'an inter-connected undertaking' having "interest, directly or indirectly, in the business of each other" (Sec. 4(3)(b)(iv) of the Act) 'related' to the applicant within the meaning of Section 4(1)(a) of the Act. Hence the Revenue's case is that duty should have been paid in terms of Rule 8 (i.e. virtually under the proviso to Rule 9, as the impugned goods were not sold by M/s Balco) of the Central Excise Valuation (Determination of price of Excisable Goods) Rules, 2000.

12. The appellant M/s VAL on understanding that there have been an error in valuation of alumina cleared to M/s Balco under job work arrangement, raised a supplementary invoice on M/s Balco for an amount of Rs.24,65,79,458/- dated 20.12.2009 which included duty + cess.

13. On completion of investigation at the end of M/s VAL, show cause notice dated 11.10.2010 was issued asking M/s VAL to show cause as to why duty of Rs. 64,70,09,162/- + cess totalling Rs. 66,64,19,436/- as per the calculation chart be not demanded and recovered under proviso to sub-section (1) of Section 11A of Central Excise Act alongwith interest and with proposal to appropriate the proposed demand from the amount of Rs. 66,64,19,436/- already deposited towards differential duty liability on the alumina removed during the period August, 2007 to August, 2010, alongwith proposal to impose penalty under Section 11AC read with Rule 25 of Central Excise Rules, 2002. Penalty was also proposed on four officers of M/s VAL under Rule 26.

14. Pursuant to raising of supplementary invoice on M/s Balco, M/s VAL had intimated the Department regarding payment of differential duty through supplementary invoices, on clearances by way of job work.

15. On 20.12.2010, M/s VAL filed an application before the Settlement Commission at Kolkata for settlement of the aforementioned show cause notice inter-alia stating as follows:-

"4.1 In the application for settlement, the applicants (VAL) submitted mainly the

following-

(a) Alumina manufactured by the applicants was disposed off/ removed by -

(i) clearance to Balco on conversion of bauxite received from them, on job work basis,

(ii) direct sale to Balco as per sale orders,

(iii) stock transfer to the applicant (VAL)'s own unit at Jahrsuguda.

(b) in respect of clearances to BALCO, duty was discharged from Aug. 07 - Nov. 08 on formula linked to price of Aluminium at London Metal Exchange (LME) and from Dec. 08 on "Alumina Spot Tender price of NALCO"- a Govt. Owned company.

(c) Stock transfers were made based on cost of production (COP) plus notional profit under Rule 8 of the Central Excise Valuation (Determination of price of Excisable Goods) Rules, 2000.

(d) Duty paid in all the above clearances, were taken cenvat credit at recipient units.

(e) VAL and BALCO are though "interconnected undertakings" as per the MRTTP Act, they did not have any mutuality of Interest in the business of each other.

(f) They did not follow Rule 9 or 10 of the valuation rules as neither the entire quantity was sold to BALCO nor the applicant (VAL) and BALCO had any mutuality of interest in the business of each other.

(g) The applicants ascertained that BALCO used to procure Alumina more or less at the same price from other sources on which the applicant discharged C.E. duty.

(h) They had deposited differential duty Rs. 66,64,19,436/- as demanded in the SCN and also interest Rs. 15,37,19,183/-.

(i) The entire quantity of Alumina cleared to BALCO were used by them for manufacture of dutiable final products at their end.

(j) Since Dec. 08, in respect of the quantities of Alumina cleared to BALCO as conversion agent or on direct sale basis, adopted the value of alumina on the basis of the spot tender price of NALCO, adopted more or less equal to FOB value of Alumina imported in Vizag Port. This price of Alumina which was available through various sources was the comparable price of Alumina at which NALCO sold Alumina in the market to various parties.

(k) The applicant was under "bona fide belief" that since the clearances to BALCO were to be treated as clearances to 'independent parties' and since the comparable price of Alumina was available in the market, the same was adopted for discharging duty on the quantities of Alumina cleared by them to BALCO.

(l) They were also under bona fide belief that only in case of stock transfer they were to follow COP + notional profit.

(m) In the present exercise the applicant stands to lose as crores of rupees was lying as unutilised credit, could be utilised to recover from BALCO during the material time, and would not have incurred interest liability of Rs. 15,37,19,183/-, and thus non-payment of duty resulted in gain to the Government to this extent.

(n) Payment of differential duty was not with any malafide intention but based on bona fide belief that valuation for removals to their own unit would be under Rule 8 of the Valuation Rules.

(o) Their bona fide belief was, however, incorrect in view of the decision in the case of Ispat Industries vs. CCE, Raigad - 2007 (209) ELT 185 and subsequent decisions. The applicants adopted this method, as the extra duty paid by debiting the cost of production was available as credit to its other unit.

(p) The entire exercise was revenue neutral, inasmuch as the duty paid was available as credit to BALCO. In support, they relied on the following cases laws-

(i) Amco Batteries Ltd. vs. CCE-2003 (153) ELT 7 (SC)

(ii) International auto Ltd. vs. CCE-2005 (183) ELT 239 (SC)

(iii) CCE vs. Narayan Polyplast Ltd. 2005 (179) ELT 20 (SC)

(iv) CCE vs. Narmada Chermatur Pharma-2005 (179) ELT 276 (SC)

(v) CCE vs. Textile Corporation -2008 (231) ELT 195 (SC)

(vi) CCE vs. Hamshedpur Beverages-2007 (214) ELT 321 (SC)

(vii) CCE vs. Coca Cola India (Pvt.) Ltd., -2007 (213) ELT 490 (SC).

(q) The applicants could have worked as a job worker under Notification No. 214/86-CE dated 25.03.1986 while BALCO could have cleared the bauxite in terms of Rule 4(5)(a) of the Cenvat Credit Rules, 2004 and the applicants could have manufactured alumina and cleared the same as a job worker without payment of duty in terms of Notification No. 214/86- CE. In such a scenario, as no duty was itself payable by the applicants, the show cause notice could not have been issued regarding the valuation of the goods. This also clearly proves that the applicants did not have any intention to defraud the government exchequer or to evade payment of duty as alleged in the show cause notice.

(r) As BALCO used the entire quantity of Alumina in or in relation to the manufacture of dutiable final products and since there is no dispute on the value adopted in respect of the aluminium products manufactured and cleared by BALCO, no duty would be payable by the applicants on alumina cleared to BALCO in this transaction and hence there was no revenue loss in terms of the law laid down by the Hon'ble Supreme Court in the case of International Auto Ltd. Vs. CCE- 2005 (183) ELT 239 (SC).

(s) While praying for immunity from penalty and prosecution, the applicants

submitted that in respect of all transactions with BALCO the applicants took reasonable steps to discharge appropriate duty on the basis of bona fide understanding of law. There was huge unutilised credit lying in the applicant's account, and duty paid would have been taken credit by BALCO, clearly showing absence of any intention to evade.

16. The said dispute was settled by the Settlement Commission at Kolkata vide Final Order No. F-282/CE/11/-SC (KB) dated 23.09.2011 with the following findings:-

"As per VAL, Balco was procuring Alumina from various other sources at more or less the same price at which VAL were discharging duty on Alumina supplied by them to BALCO on direct sale basis or on conversion basis. The quantum of Alumina procured by BALCO from VAL and other sources is as follows:-

Qty. in M.T.

Conversion basis

Sale basis

From other sources

2007-08

1,27,938

47,879

1,52,391

2008-09

2,41,839

1,15,694

1,23,575

17. It was further observed by the Commission that there were no bonafide reasons for discharging duty on the basis of LME prices of Alumina, or on spot tender price of NALCO. Apparently, VAL was clearing the goods at less price to BALCO, it appears for taxation benefit of Vedanta Group, profit has been generated in BALCO by adopting supply of Alumina at low price from BALCO. The plea of neutrality is not available to them as VAL and BALCO are different legal persons. It was further held that plea of bonafide is not acceptable.

18. With reference to issue of supplementary invoices by VAL to enable Balco take credit of the differential duty so paid during and after investigation, the Commission observed that since the issue is not before it, it need not go into it.

19. The Commission further noted that VAL has made true and full disclosure of their duty liability and co-operated fully and the entire amount of duty liability

has been deposited with interest thereon, and accordingly the Settlement Commission settles the dispute on the following basis:-

"Central Excise Duty: The Central Excise Duty in this case is settled at Rs. 66,64,436/-. This amount has already been deposited by the applicant, the same is ordered to be appropriated by the Commissioner within 30 days from the date of receipt of the order.

Interest: The applicant has paid interest amount of Rs. 15,37,19,183/-. There being no dispute from the Department regarding quantum of interest payable over and above the aforesaid amount, the same is ordered to be appropriated by the Commissioner within 30 days from the date of receipt of this order. Penalty:

Taking into account the facts and circumstances of the case, the Bench grants immunity to the applicant (M/s Vedanta Aluminium Limited) from penalty as is in excess of Rs.4,00,00,000/- (Rupees four crore only) and to the co-applicants Shri Rajesh Mohata from penalty as is in excess of Rs. 5,00,000/- (rupees Five lakh only), Shri TPK Patro from penalty as is in excess of Rs. 5,00,000/- (Rupees five lakh only), Shri P. S. Reddy from penalty as is in excess of Rs. 5,00,000/- (rupees five lakh only) and Shri Purushottam Kumar Choudhury from penalty as is in excess of Rs. 5,00,000/- (Rupees five lakh only) under the provisions invoked in the SCN. The amounts of penalty should be paid within 15 days from the date of receipt of this order under intimation to the Commissioner and the same should be appropriated by the Commissioner within 15 days thereafter.

Prosecution: The Bench grants immunity to all the applicants from prosecution under the Act and Rules made hereunder in so far as this case is concerned.

20. Subsequently, Commissioner of Central Excise, Raipur issued show cause notice to M/s Balco, M/s VAL and the other appellants herein, objecting to cenvat credit availed by M/s Balco on the supplementary invoices issued by M/s VAL in respect of additional duty paid by M/s VAL (as per supplementary invoices), alleging suppression of assessable value of clearances of calcined alumina, being aforementioned supplementary invoice dated 20.12.2009 for differential duty of Rs. 24,65,79,458/-, being in violation of Rule 9 of Cenvat Credit Rules. It was further alleged that scrutiny of contract between the parties dated 01.01.2008 revealed the price quoted for sale of 'calcined alumina' was linked to LME price. It was further observed in the show cause notice that during the course of scrutiny or enquiry, M/s VAL debited an amount of Rs. 24,65,79,458/- vide debit entry No. 2750, 2751 and 4929 all dated 20.12.2009 and intimated their Range Superintendent vide letter dated 21.12.2009, that as advised the clearances by them on job work fall under Rule 10A(iii) of Central Excise Valuation Rules, 2007, and duty has to be discharged on the basis of principles laid down in the case of Ujjagar Prints read with Board Circular. It was also stated by VAL that duty involved is Revenue neutral as the same is available as cenvat credit in the hand of Balco. M/s VAL has taken decision to remit the duty based on cost of production + 10% as in the case of clearance to their own unit at Jharsuguda by

way of stock transfer. Further, mentioning the facts at the end of VAL, referring to the show cause notice issued to M/s VAL alongwith the final order of Settlement Commission dated 23.09.2011. It was also observed in the show cause notice that VAL has deposited penalty as imposed by the Settlement Commission consequent to the final order. Subsequently, the Range officer of Balco have received the relied upon documents from the jurisdictional officer of VAL upon requisition.

21. Further, alleging collusion between Balco and VAL in the payment of differential duty of Rs. 24,65,79,458/- including cess, appears to be done with clear motive to avail credit of differential duty paid by VAL and disallowed the same alleging that the parties have undervalued the clearances under job work arrangement leading to evasion of duty, and the differential duty was paid vide supplementary invoice only in course of enquiry and investigation by Revenue. Thus, as per provision of Rule 9(b) of Cenvat Credit Rules which stipulates that supplementary invoice issued for recovery of excise duty which is short paid/ not paid due to suppression of facts or with intent to evade payment of duty, is not a valid duty paying document for availing cenvat credit. Accordingly, it was proposed to disallow the cenvat credit taken under the supplementary invoice alongwith proposal to impose penalty on Balco and the other appellants herein.

22. The appellant Balco contested the show cause notice stating the facts of the transaction being job work. Further, appellant Balco was entitled to claim the benefit of Notification No. 214/86, whereby the job worker is not liable to pay excise duty upon undertaking being furnished by the principal (Balco) before the appropriate Central Excise authority. It was further stated that the finished goods of Balco the Aluminium metal of various types, being dutiable, the situation is wholly revenue neutral as duty paid by VAL was available to Balco as cenvat credit. It was further urged that there is no case of suppression or fraud as the parties had adopted a reasonable basis of valuation of calcined alumina, the admissible input for Balco for manufacture of the finished goods. It was further stated that in the facts and circumstances there is no malafide in issue of supplementary invoice for differential duty by VAL. Further, such supplementary invoices were issued by VAL, on realising the mistake in the method of valuation of clearances to Balco under the job work arrangement. The supplementary invoices issued in December, 2009, whereas show cause notice was issued to VAL in October, 2010, almost about eleven months thereafter. Further, Balco has taken cenvat credit bonafide under proper intimation to the Department. Intimation of issue of supplementary invoice was also given by VAL to the Department in December, 2009 itself. It was also pointed out that Balco received the bauxite ore from their captive mines which they consumed in part in production themselves and cleared a part of the ore to VAL, under job work arrangement. Thus, VAL has no appropriate comparable price to value job work calcined alumina for paying appropriate excise duty. Thus, the parties bonafide linked the transaction price of calcined alumina to the price of aluminium as per LME, which is widely accepted. Further, stated that from December, 2008

onwards the excise duty was paid by VAL on the basis of calcined alumina spot tender price, as per NALCO (Government company) which was based on International Competitive Bidding method. Thus, in view of the reasonable method of valuation adopted for clearance under the job work arrangement, no malafide can be alleged. It was further pointed out that there is no loss of Revenue, the situation is wholly revenue neutral. Reliance was placed on the Ruling of the Apex Court in the case of Amco Batteries Ltd. vs. CCE-2003 (153) ELT 7 (SC). Further, taking of credit by Balco is within the scope of Rule 9(1)(b) of Cenvat Credit Rules, which restricts taking of credit only in case of wilful misstatement or suppression of facts or fraud. Under the admitted fact that there is no loss of revenue as Balco has cleared the final goods on payment of duty. Thus, the allegation of evasion of duty is bald and vague.

23. The other appellants also contested the show cause notice by filing their replies objecting to the show cause notice.

24. However, learned Commissioner was pleased to confirm the proposed disallowance of cenvat credit to Balco alongwith equal amount of penalty and also imposed penalty under Rule 26 on the other appellants vide impugned order-in-original. Hence these appeals.

25. Learned Senior Advocate Shri Balbir Singh appearing for the appellants urges the following:-

25.1. That Show cause notice dated 11.10.2010 came to be issued to VAL proposing to recover differential Excise Duty on the allegation that VAL had undervalued the goods cleared to the Appellant. That VAL approached the Settlement Commission against the said Show cause notice dated 11.10.2010. The Settlement Commission vide Final Order dated 23.09.2011 settled the matter and ordered appropriation of the settled duty along with interest and penalty and granted immunity from prosecution. That VAL took the matter further before the Hon'ble Calcutta High Court against the penalty amount imposed in the Order passed by the Settlement Commission. The Hon'ble Calcutta High Court (DB in Appeal), held on the reasoning that a 'settlement' is a 'package deal' and the penalty portion cannot be severed. Thus, upheld the penalty.

25.2 That Show cause notice dated 06.05.2013 (present dispute) came to be issued to the Appellant Balco & others proposing to deny Cenvat Credit availed by the Appellant in December 2009 amounting to Rs. 24,65,79,458/-, based on the Supplementary invoices issued by VAL. The Show cause notice dated 06.05.2013 alleged that excise duty was not paid suo motu by VAL and such liability had arisen on account of fraud, wilful misstatement or suppression of facts with intent to evade duty at the end of Vedanta aluminium Limited (VAL) and therefore CENVAT Credit availed by the Appellant was against rule 9 (1) (b) of the Credit Rules.

25.3 That the Impugned Order denied CENVAT Credit to the Appellant - Balco,

under Rule 9(1)(b) of the Credit Rules simply on the basis that, VAL in its settlement proceedings, settled its duty liability and deposited the penalty imposed by the Settlement Commission and thus mens rea stood established against VAL for committing fraud, collusion or willful misstatement and suppression of facts to evade payment of duty. In this manner, the Impugned Order simply placed reliance on the settlement proceedings in the matter of VAL to deny CENVAT Credit to the Appellant.

26. Being aggrieved by the Impugned Order, the Appellants filed the instant appeals before this Tribunal. The synopsis of the submission of the Appellant are as follows-

26.1 Rule 9(1)(b) of Credit Rules is not applicable as the issue at hand is not of a 'sale transaction'.

Relevant part of Rule 9(1)(b) of the Credit Rules reads as follows:

(1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be on the basis of any of the following documents, namely:-

(a) ...

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any provision of Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty."

(Emphasis supplied)

That Rule 9 (1)(b) applies only when goods are sold/ in sales transactions, as held in *Karnataka Soap & Detergents Ltd vs CCE 2010 (258) ELT 62 (Kar)*. It is settled position of law that transfer of goods under job-work arrangement would not amount to transfer of property in goods. Given this, it is clear that the transaction in question between the Appellant and VAL was a job-work arrangement and not a sales transaction. For this reason alone, Rule 9(1)(b) of the Cenvat Credit Rules has no application in the present matter.

In any case, it is pertinent to note that the Appellant is not permitted to sell Bauxite in the open market, hence there can be no question of sale in the instant case. That VAL was undertaking job work activity and processing the Bauxite

given by the Appellant into Calcined Alumina (on job work basis) in consideration for processing charges.

26.2 It is further submitted that the Department itself had treated the transaction as a stock transfer in the Show cause notice issued to VAL and levied Excise Duty at cost plus 10%. Given this, the Department cannot be permitted to take a contrary stand in Appellant's - Balco case by treating it as a sale transaction to deny CENVAT credit. Reliance is placed on Lloyd Electric & Engineering Ltd. V State of Himachal Pradesh 2015 (324) ELT 248 (S.C.). Given this, Rule 9(1)(b) is not applicable at all and the Impugned order is liable to be set aside on this ground alone.

The Impugned Order has failed to arrive at an independent finding on the alleged evasion of duty committed by VAL. In the absence of the same, CENVAT Credit has been incorrectly denied to the Appellant under Rule 9(1)(b) of the Credit Rules

26.3 It is submitted that the Impugned Order is erroneous by relying on the Settlement Commission's Order in the matter of VAL, for establishing mens rea on the part of VAL. The present Show cause notice dated 06.05.2013 and the Impugned Order have neither alleged nor undertaken any independent investigation against VAL to establish mens rea on its part. It is settled law that charge has to be established from the Show cause notice in question, and cannot be borrowed from another proceedings. In the absence of the same, the entire proceedings initiated vide Show cause notice dated 06.05.2013 and the findings arrived in the Impugned Order stand vitiated. Hence, CENVAT Credit under Rule 9(1)(b) of the Credit Rules could not have been denied to the Appellant at all.

26.4 In any case, allegation of suppression against VAL does not stand adjudicated by the proceedings of the Settlement Commission. It is settled principle of law that settlement of a matter does not tantamount to adjudication of the matter and thereby the Settlement Commission's Order dated 23.09.2011 cannot be regarded as an Order wherein charges levied by Show Cause notice dated 11.10.2010 against VAL stand confirmed. Reliance is placed on Ashwani Tobacco Cp Pvt Ltd vs UOI 2010 (251) ELT 162 (Del). It is settled law that settlement is different from adjudication. Given this, since the Show cause notice dated 11.10.2010 (on VAL) never came to be adjudicated, the same cannot be relied upon to establish mens rea against VAL and then deny CENVAT Credit to the Appellant. Further, mere filing of application to Settlement Commission and payment of duty would not amount to admission of guilt. The same stands settled by Hon'ble Delhi High Court in case of Agson Global Pvt Ltd vs Income Tax Settlement Commission & Ors. 2016(380) I.T.R 342 (Delhi). Reliance is also placed on the decision in the case of Bosch Chassis System India Ltd vs CCE 2008 (232) ELT 622 (Tri-LB) wherein it was held as follows:

In the above view of the matter, Issue Nos. 2 and 3 are 13. answered in the negative, that is, in favour of the assessee and against the Revenue, and it is

held that the mere filing of application before Settlement Commission under Section 32E of the Act for waiver of interest, penalty and immunity from prosecution and suomotu payment of duty as per show cause notice may not necessarily per se construed as admission of the allegations in the show cause notice as regards the fraud, collusion etc. Inference in this regard may be drawn from the contents of the application, that is, pleadings of the applicant and finding of the Settlement Commission, if any. Issue No. 1 pertains to the merits of the case and parties generally agreed that the same may be decided by the Division Bench at the stage of final disposal of the appeal.

26.5 It is also settled law that an order of settlement is between the Department and the assessee and it cannot be reopened as held in CCE vs Shreeram Capacitors Pvt. Ltd., 2017 (348) ELT 355]. It is also settled law that settlement of case is not an admission of guilt as held in Indian Oil Corporation Ltd vs CCE 2011 (274) ELT 561. Given this, the entire reliance placed in the Impugned Order on the settlement proceedings, without giving any independent finding on the conduct of VAL, and the failure to independently establish fraud, etc. on account of VAL, makes the Impugned Order incorrect in law.

26.6 In any case, the Settlement Commission itself in para 10.4 of its Order dated 23.09.2011 left the question open with respect to Cenvat Credit in the hands of the Appellant (para 10.4 of the Settlement Commission's Order, page 150 of the appeal paper books). Given this, reliance placed on the Settlement Commission's Order dated 23.09.2011 to deny CENVAT Credit to the Appellant is absolutely incorrect on the face of it.

26.7 Lastly, the Settlement Commission by invoking its powers under section 32F of the Central Excise Act 1944 settled the issue by accepting the duty liability and imposing penalty to arrive at a fair settlement. Payment of penalty in terms of section 32F of the Excise Act, cannot be equated with imposition of penalty under section 11AC of the Central Excise Act. Hence, the argument of the Revenue that mens rea under section 11AC stands established against VAL is absolutely incorrect in law. Given all of the above, the Impugned Order is incorrect in law.

The issue at hand is revenue neutral. Hence, the allegation of suppression is incorrect.

26.8 The Appellant submits that restriction under Rule 9(1)(b) is not applicable in the absence of intention to evade duty. In the present case, there could be no intention to evade payment of duty for the simple reason that the amount paid by VAL as duty was available as cenvat credit at the Appellant's end. It is submitted that suppression cannot be alleged in Revenue Neutral situations. The issue at hand is of a revenue neutral situation. Thus, the basis of fraud etc. cannot arise in the situation at hand. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Nirlon vs Commissioner of Central Excise 2015 (320) E.L.T 22 (S.C) wherein it was held as follows:

"We have ourselves indicated that the two types of goods were different in nature. The question is about the intention, namely, whether it was done with bona fide belief or there was some mala fide intentions in doing so. It is here we agree with the contention of the learned Senior Counsel for the appellant, in the circumstances which are explained by him and recorded above. It is stated at the cost of repetition that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty.

Therefore, it was not permissible for the respondent to invoke the proviso to Section 11A(1) of the Act and apply the extended period of limitation. In view thereof, we confirm the demand insofar as it pertains to show cause notice dated 25-2-2000. However, as far as show cause notice dated 3-3-2001 is concerned, the demand from February, 1996 till February, 2000 would be beyond limitation and that part of the demand is hereby set aside. Once we have found that there was no mala fide intention on the part of the appellant, we set aside the penalty as well".

26.9 It is also settled that there cannot be any reason for an assessee to suppress when it is entitled to Credit facility, as held in AMCO Batteries (153) ELT 7 (SC). In the instant case, even if it is assumed, though not admitted, that there was wilful misstatement and suppression at the end of job-worker, i.e. VAL, the restriction under Rule 9(1)(b) cannot be applied as there is no intention to evade payment of duty of Excise, as the same would be available to the Appellant as CENVAT Credit for clearance of its Final Product. Given the above, the Impugned Order is liable to be set aside.

26.10 That the Impugned Order has rejected the submission of revenue neutrality on the basis of an observation in the Order of Settlement Commission that "it appears that for taxation benefits of Vedanta group, profits have been generated in Balco by adopting supply of Alumina at a very low price". That the said contention is in complete ignorance of the fact that the supply of Calcined Alumina was on job-work basis and the Appellant merely paid processing charges and excise duty. Therefore, there being no sale, the question of generation of profits by the Appellant does not arise. This clearly goes to show that the Impugned Order has been passed without application of mind, and on this ground itself, the Impugned Order is liable to be set aside.

Benefit of Notification no. 214/86-CE is available at a later stage. Hence, denial of CENVAT Credit does not stand to reason

26.11 That VAL in any case, being a job worker was entitled to avail benefit of Notification No.214/1986. It is settled law, benefit of exemption Notification 214/1986-CE, if not claimed earlier, can be claimed at a later stage, as held in Neo Sacks Ltd. Vs CCE 2004 (177) ELT 206, Share Medical Care vs UOI 2007 (209) ELT 321(SC). That VAL is still entitled to claim the benefit of this Notification. Pursuant thereto, the entire issue of payment of additional duty by VAL and availment of CENVAT Credit by the Appellant, will simply not arise at all.

The Impugned Order has failed to recognize and deal with this argument of the Appellant.

Show Cause notice dated 06.05.2013 issued to the Appellant is completely time barred

26.12 It is submitted that Show Cause notice dated 06.05.2013 issued to the Appellant is completely time barred. That CENVAT Credit (on supplementary invoice) was availed by the Appellant in December 2009. That Show cause notice came to be issued to VAL on 11.10.2010 demanding excise duty from VAL. In fact, this Show Cause notice dated 11.10.2010 stood forwarded by the Ld. Commissioner of Central Excise, Bhubaneshwar-I to the Central Excise Division/Commissionerate of the Appellant [i.e. Assistant Commissioner, Central Excise, Bilaspur (Chhatisgarh)]. Thus, the Excise Division/Commissionerate of the Appellant was aware of the transaction as early as 11.10.2010. However, Show Cause notice came to be issued to the Appellant only on 06.05.2013. This itself shows that there has been a delay on the part of the Department in issuing Show cause notice dated 06.05.2013 to the Appellant.

26.13 In any case, the Appellant vide letter dated 19.01.2010 (about 40 months back) had informed its Ld. Superintendent, Central Excise Range, Korba about its transaction with VAL and it was also informed that the Appellant is availing CENVAT Credit of the excise duty paid by VAL for such clearances. Thus, the entire disclosure stood made by the Appellant to its Central Excise Commissionerate as early as January 2010. The above clearly shows that delay in issuing Show Cause notice dated 06.05.2013 is clearly attributable to the Revenue authorities and there was no concealment whatsoever at the end of the Appellant. This Show cause notice dated 06.05.2013 seeking to deny CENVAT Credit availed by the Appellant in December 2009, is therefore completely time barred as extended period of limitation is not applicable in the facts and circumstances of the case and delay was not attributable to the Appellant. Reliance is placed on the decision in Orissa Bridge and Construction Corp Ltd vs CCE 2011(264) ELT 14 (SC) and Transpek Industry Ltd vs CCE 1999(108) ELT 562.

26.14 In any case, when the first Show cause notice dated 11.10.2010 stood issued to VAL, then the second show cause notice dated 06.05.2013 to the Appellant was required to be issued within time as held in Nizam Sugar Factory vs CCE 2006 (197) ELT 465 (SC)]. Since the second Show cause notice was not issued within the prescribed time, it is untenable in law for this reason itself.

26.15 That the Impugned Order has not shown any evidence of suppression, positive act of evasion etc. at the end of Appellant for the purpose of invoking extended period of limitation, in issuing the Show cause notice. It is submitted that Revenue authorities have to establish mens rea, positive act of evasion etc. on the part of the Appellant for the purpose of issuing the Show cause notice on the basis of extended period of limitation. In the absence of any evidence or

reasoning to this effect, the Impugned Order is completely incorrect in law for invoking the extended period of limitation, and the penalty provisions against the Appellant. Reliance is placed on the decision in the matters of Tamil Nadu Housing Board vs CCE 1994 (74) ELT 9 (SC), CCE vs Chempar Drugs & Liniments 1989 (40) ELT 276 (SC), CCE vs HMM limited 1995 (76) ELT 497(SC). He prayed that the Impugned Order is liable to be set aside and appeal of the Appellants may kindly be allowed.

27. Learned Senior Counsel further urges that the impugned order has been passed in a mechanical way, without application of mind. There is no independent finding recorded. The impugned order is fully based on presumptions and assumptions as per the show cause notice in the case of VAL, and the order of the Settlement Commission. Further, M/s Balco was not made a co-noticee in the show cause notice issued to VAL.

28. Learned Authorised Representative appearing for the Revenue relies on the impugned order. He particularly refers to Question No. 5, from the statement of Shri Dinesh Mantri, Chief Financial Officer of Balco, which is as follows:-

"Q.-5. Have you received any supplementary invoices for the alumina supplied by M/s Vedanta Aluminium Ltd., Lanjigarh?

Ans. Yes, we had received the supplementary invoices issued by M/s Vedanta Aluminium Ltd., Lanjigarh on dated 20.12.2009 (30 nos.). Details already mentioned in the statement dated 20.03.2012 of my Manager Finance Shri Praveen Kumar Saharia. I perused the statement and I am agree for the same".

28.1 Learned AR further refers to the statement of Shri Praveen Kumar Saharia, Manager -Finance of Balco recorded on 20.03.2012, extract of which is reproduced as follows:-

"Q. No. 5 Have you received any supplementary invoices for the alumina supplied by M/s Vedanta Aluminium Ltd., Lanjigarh?

Ans. Yes, we had received the supplementary invoices issued by M/s Vedanta Aluminium Ltd., Lanjigarh on dated 20.12.2009 (30 nos.) and we had availed cenvat credit on it vide RG23 Part II entry No. 15320 to 15350 dated 31.12.2009. We had availed Rs. 23,93,97,532/- basic, Rs. 47,87,951/- Edu. Cess and Rs. 23,93,975/- H. Edu. Cess (Total Rs. 24,65,79,458/-) as Cenvat credit.

Q.9. Are you aware of provisions of Rule 9(b) of Cenvat Credit Rules, 2004? It stated that where additional amount of duty became recoverable from manufacturer on account of any non-levy or short levy by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provision of any provision of the Central Excise Act or rules made thereunder with intent to evade payment of duty, the supplementary invoices are not valid documents to avail cenvat credit. Why you have availed cenvat on these invoices as these invoices issued by your connected party and you are not entitled to avail the cenvat on these invoices.

Ans. At the time of taking the cenvat credit, it was the bonafide belief that we are entitled to take the cenvat credit on these supplementary invoices and we had availed such credit. Now our management is considering the merit of the case and they will decide the matter accordingly."

28.2 Learned AR further refers to statement of Shri G. Rajendran, Vice President, Indirect Taxes and the extract of which is as follows:-

"Q. No.13 Please explain the reason on the basis of which you have availed cenvat credit amounting to Rs. 24,65,79,458/- whereas rule 9(1)(b) of Cenvat Credit Rules, 2004 debar for availment of cenvat credit in those cases where there is suppression of facts, mis-statement, fraud, contravention of rule with intent to evade payment of duty as discussed and alleged in Show Cause Notice No. V(28)15/Adjn/11A/70/2010 dated 11.10.2010 issued by Commissioner, Central Excise, Bhubaneswar-I and held in the Final Order No. F-282/CE/11-SC(KB) dated 23.09.2011 passed by Settlement Commission in respect of appeal filed by M/s Vedanta Aluminium Ltd., Lanjigarh.

Ans. While availing and utilising the credit against supplementary invoices in December, 2009, we were not aware about any show cause notice and order as mentioned above.

Q. No. 15. Please go through the show cause notice No. V(28)15/Adjn/11A/70/2010 dated 11.10.2010 issued by Commissioner, Central Excise, Bhubaneswar-I wherein it is mention that officers of Central Excise department audited the books of account of M/s Vedanta aluminium Ltd., Lanjigarh during the period 12.10.2009 to 15.10.2009 and sought for documents regarding conversion sale of BALCO. Instead of providing the copy of conversion agreement and CAS-4 statement to the auditors, M/s Vedanta Aluminium Limited, Lanjigarh has debited an amount of Rs. 24,65,79,458/- towards short payment of duty covering the period August, 2007 to November, 2009 and intimated the department on 21.12.2009 intimating therein that they have discharged the duty keeping in view of decision of Apex Court in the Ujjagar Print Ltd. read with Board's Circular No. 619/10/2002-Cx dated 19.02.2002. In the light of above circumstances, do you agree that duty debited by M/s Vedanta Aluminium Ltd., Lanjigarh was arises due to their internal diligence they have discharged the differential duty of Rs. 24,65,79,458/- particularly in the condition where their books of accounts are annually audited?

Ans. I have seen and read the show cause notice mentioned above and sign on the same as a token of having seen it. I have taken the credit under the direction of Shri Dinesh Mantri our Chief Finance Officer also the letter submitted by me. The fact in the show cause notice are subsequent development with the supplier company which I was not aware when the credit was taken. Since I left Balco in August, 2011, I was not aware of the subsequent development of the company. The decision regarding payment of differential duty to M/s Vedanta Aluminium Ltd. Lanjigarh was taken by our Chief Finance Officer and Chief of Commercial

matter".

28.3 Learned AR further refers to the group structure which include the appellant company and VAL, from para 3.2.1 of the show cause notice issued to VAL which is reproduced for clarity:-

"3.2.1 Group structure of the company & holding of shares:

As per the Balance Sheet for the period ending 30.03.2008, in the notes forming parts of Accounts at Sl. No. 1 names of related parties & description of relation, is stated as:-

Holding Company:-

Immediate - Twinstar Holding Company

Ultimate -Vedanta Resources Holding Ltd.

Vedanta Resources P/L

Volcano Investments Ltd.

Fellow Subsidiaries:-

(i) Sterlite Industries India Ltd. (SIIL)

(ii) Hindustan Zinc Ltd.

(iii) Bharat Aluminium Co. Ltd.

(iv) Sterlite Paper Ltd.,

(v) Sterlite Energy Ltd. &^ a number of Companies

From the web page of Twin Star Holding Ltd., Vedanta Resources Pvt. Ltd., Sterlite Industries (India) Ltd., and Bharat Aluminium Company Ltd., the following information were gathered-

(i) Twin Star Holding Ltd., is the parent company of SIIL It holds more than 50% equity in SIIL

(ii) Vedanta Resources (P) Ltd., owns 59.9% in SIIL

(iii) Vedanta Resources (P) Ltd., owns 70.5% of share of VAL whereas SIIL owns 29.5% share of VAL

(v) SIIL owns 51% share in BALCO

(vi) SIIL is the promoter of VAL and its Annual Report 2008-2009 contains information/ performance of VAL & BALCO

The relationship as reflected in the Notes of Balance Sheet and the Holding of Shares placed in the web page of various Companies, it is seen that Balco is a fellow subsidiary of VAL. The ultimate holding company i.e. Vedanta Resources (P) Ltd., has control over its subsidiary companies through the ownership of

shares. The holding of shares, directly or indirectly, give the parent company the necessary votes to determine the composition of board of subsidiaries and so exercise control. Both VAL & Balco are owned and controlled by the same Group of Company. During recording of statement the GM(F) has confirmed to the above facts."

29. Learned AR also points out that three Directors are common as regard the appellant company and VAL. Thus, the appellant and VAL are under the same management. In this view of the matter, VAL was obligated to follow the valuation procedure under Section 4(1)(b) read with the Valuation Rules.

30. Learned AR also relies on the Division Bench order of Hon'ble Kerala High Court in CCE vs. VAL- 2016 4 TMI 932 wherein, in the case of appeal by Revenue against the order of the learned Single Judge setting aside the order of penalty imposed by the Settlement Commission framed the issue - whether the order of penalty passed by the Commission is severable and whether in the facts of the case learned Single Judge justified in setting aside the penalty imposed. The Hon'ble High Court setting aside the order of the Single Judge held that the order of Settlement Commission is by way of a package and the order of penalty cannot be segregated. Settlement of tax dispute cannot be accepted only in part. The order of settlement comes as a package and composite tax. Settlement is either to be accepted or rejected. Accordingly, learned AR prays for dismissing the appeals.

31. Having considered the rival contentions and after perusal of the records and the written submissions submitted by the appellant, we find that admittedly the transaction between BALCO and VAL is duly documented and properly recorded in the books of accounts of both the companies. We further find that the method of valuation adopted for clearance of calcined alumina from VAL to BALCO was under a business like formula based on the price of aluminium at LME. Further, from the facts on record, we find that there is no incentive for VAL to suppress the clearance value or pay lower tax. Whatever duty was payable as per the invoice, the same was to be paid by BALCO to VAL. Secondly, it has been demonstrated from the appeal paper book, being the extract of cenvat credit, that VAL alone had sufficient credit balance in their cenvat account exceeding Rs. 1 crore, whereas the duty payable was in few lakhs only and thus the cumulative credit balance in cenvat register of VAL was increasing from month to month. Further, it is evident from record that the parties suo motu changed the basis of valuation to the tender price of NALCO for calcined alumina (under International Competitive Bidding). We further find that the situation is wholly revenue neutral as BALCO is clearing their finished product on payment of duty, and whatever duty is charged by VAL is available to BALCO as cenvat credit. We further find that upon enquiry and investigation by Revenue, disputing the method of valuation of calcined alumina by VAL, on being so advised agreed to the valuation as suggested by Revenue and suo motu deposited the differential duty alongwith interest much prior to issue of show cause notice. VAL also bonafide

issued supplementary invoice to BALCO in December, 2009. Thus, we find that the issue is wholly interpretational in nature, and there is no element of fraud, suppression or intention to evade payment of duty. Reliance placed by Revenue on the show cause notice of VAL is erroneous and misconceived. We further find that the allegation by Revenue are bald and unsubstantiated. Only for the reason that VAL instead of contesting the show cause notice went for settlement before the Settlement Commission, no adverse inference can be drawn against the appellant BALCO. We further take notice of order of Settlement Commission, which cannot be used for making allegations against the appellant - Balco. We further find that the benefit of Notification No. 214/86-CE was available to BALCO i.e. they could have received calcined alumina from VAL without payment of duty, as prescribed. We further hold that the extended period of limitation is not warranted in the facts and circumstances, there being no suppression of facts or attempt to evade duty, etc.

31. Accordingly, we allow all the appeals and set aside the impugned order. The appellants shall be entitled to consequential benefit, in accordance with law.

(Pronounced on 15.10.2020).