

केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX

प्लॉट नं. 6776-बी/1, 'सिद्धि सदन' बिल्डिंग,
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
नारायण उपाध्याय मार्ग, भावनगर-364001
NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.
दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा

By R.P.A.D.

फाईल सं. V/15-05/Adj/DGCEI/HQ/2009
F. No.

आदेश की तारीख : 22/03/2011
Date of Order :
जारी करने की तारीख : 22/03/2011
Date of Issue :

पारितकर्ता

Passed by

श्री एन के भुजबल

SHRI N. K. BHUJABAL

आयुक्त , केन्द्रीय उत्पाद शुल्क एवम सेवा कर, भावनगर

Commissioner , Central Excise and Service Tax, Bhavnagar

मूल आदेश संख्या Order-in-Original No : 1 to 4/BVR/Commissioner/2011

1. आदेश की यह प्रति जिसको जारी किया गया है उनके व्यक्तिगत उपयोग के लिए निःशुल्क भेजी जा रही है ।
1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.
2. यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है , तो इस आदेश के विरुद्ध सीमा शुल्क , केन्द्रीय उत्पाद शुल्क एवं सेवा कर अपीलीय प्राधिकरण , ओ-20 , मेघानी नगर , नया मानसिक अस्पताल संकुल , अहमदाबाद को केन्द्रीय उत्पाद शुल्क अधिनियम की धारा 35-बी की उपधारा 1(a) की शर्तों के आधार पर अपील कर सकता है । धारा 35-बी (1) (परंतुक) (a) से (d) के अंतर्गत मामले जैसे कि हानि , छूट , बॉण्ड के अंतर्गत निर्यात , शुल्क क्रेडिट के मामले , आवेदन के पुनरीक्षण के मामलों में आवेदन भारत सरकार के संयुक्त सचिव , राजस्व विभाग , वित्त मंत्रालय , नई दिल्ली को बंधनकर्ता रहेगा ।
2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.
3. अपील फॉर्म E.A.-3 में केन्द्रीय उत्पाद शुल्क (अपील) नियम , 2001 के नियम 3 के उपनियम 2 में विनिर्दिष्ट व्यक्ति द्वारा की जानी चाहिए ।
3. The Appeal should be filed in form EA.-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.
4. केन्द्रीय उत्पाद शुल्क अधिनियम , 1944 की धारा 35-B के अंतर्गत अपील इस आदेश की प्राप्ति के तीन माह के अंदर दर्ज करवानी होगी ।
4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).
5. यह अपील चार प्रतियों में दाखिल की जाए और जिसके विरुद्ध अपील की गई है , उस आदेश की समान संख्या में प्रतियां संलग्न की जाए (इन में से कम से कम एक प्रति अधिप्रमाणित होनी चाहिए) । उक्त अपील के समर्थक सभी दस्तावेज चार प्रतियों में भेजे जाए । उक्त अपील व्यक्तिगत रूप से रजिस्ट्रार के समक्ष प्रस्तुत की जाए या पंजीयक के नाम से रजिस्ट्री डाक द्वारा भेजी जाए । परन्तु उक्त रजिस्ट्रार के कार्यालय में प्राप्ति की तारीख नियत अवधि में होगी ।

5. 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. The appeal shall be presented in person to the Registrar or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. फीस का भुगतान न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के पक्ष में रेखांकित बैंक ड्राफ्ट द्वारा अधिनियम के प्रावधानों के अंतर्गत करना अपेक्षित है। यह ड्राफ्ट जहाँ पीठ स्थित है, किसी राष्ट्रीयकृत बैंक की किसी शाखा के नाम पर जारी किया जाए और उस उक्त अपील प्रपत्र के साथ डिमाण्ड ड्राफ्ट संलग्न किया जाना चाहिए।

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

- (क) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूपए 50,00,000/- (रूपए पचास लाख) से ज्यादा हो, रु. 10,000/- (रूपए दस हजार)
- (a) Where the amount of duty and interest demanded and penalty is levied is more than Rs.50,00,000/- (Rupees Fifty Lakhs), Rs.10,000/- (Rupees Ten Thousand);
- (ख) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) से अधिक हो लेकिन, रूपए 50,00,000/- (रूपए पचास लाख) से कम हो 5,000/- (रूपए पांच हजार)
- (b) Where the amount of duty and interest demanded and penalty levied is more than Rs.5,00,000/- (Rupees Five Lakhs) but not exceeding Rs.50,00,000/- (Rupees Fifty Lakhs), Rs.5,000/- (Rupees Five Thousand);
- (ग) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) अथवा कम हो, रूपए 1,000/- (रूपए एक हजार)
- (c) Where the amount of duty and interest demanded and penalty levied is Rs.5,00,000/- (Rupees Five Lakhs) or less, Rs.1,000/- (Rupees One Thousand);

7. इस आदेश की प्रतिलिपि पर न्यायालय शुल्क मुद्रांक अधिनियम, 1970 की अनुसूची 1 मद 6 के अंतर्गत निर्धारित 50 पैसे का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए।

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. उक्त अपील फॉर्म के साथ शुल्क / दण्ड की अदायगी का प्रमाण संलग्न किया जाना चाहिए।

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. अपील पर रु. 5 (रूपए पांच) का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए।

9. Appeal should bear a Court Fee Stamp Rs. 5/-.

10. पूर्ण जानकारी हेतु केंद्रीय उत्पाद शुल्क (अपील) नियम, 2001 एवम CEGAT (कार्यविधि) नियम 1982 देखें।

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,

1. **M/s. Ultratech Cement Ltd.**
(Gujarat Cement Works)
Post Kovaya,
Distt. Amreli - 365 541

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice No. (i) DGCEI/AZU/36-69/29 dated 9.11.2009, (ii) V/15-15/Dem/Adj/HQ/2010-11 dated 29.06.2010, (iii) V/15-31/Dem/HQ/2010-11 dated 30.07.2010 and (iv) V/15-41/Dem/HQ/2010-11 dated 29.09.2010 issued to M/s. Ultratech Cement Ltd. (Gujarat Cement Works), Post Kovaya, Distt. Amreli - 365 541.

BRIEF FACTS OF THE CASE :-

M/s. Ultratech Cement Ltd., Gujarat Cement Works, Post. Kovaya, Dist Amreli-365541 (herein after referred to as "GCW" for the sake of brevity) are engaged in the manufacture of Ordinary Portland Cement (OPC) and Pozzeleno Portland Cement (PPC) falling under Chapter heading 2523 of the First Schedule to the Central Excise Tariff Act, 1985. They are holding Central Excise registration No. AAACL6442LXM007 and are paying Central Excise duty on the Cement cleared by them.

2. Following Show Cause Notices (SCNs) have been issued to M/s. GCW, proposing (i) assessment of clearance of their final product to their own Ready Mix Concrete units (herein after referred to as "RMC") and other units and final products consumed captively, in terms of Rule 4 of the Central Excise Valuation (Determination of price of Excisable goods) Rules, 2000 (herein after referred to as "Valuation Rules, 2000") instead of Rule 8 read with Rule 9 of Valuation Rules, 2000; (ii) demand and recovery of differential Central Excise duty under Section 11A(1) of the Central Excise Act, 1944 (herein after referred to as "CEA, 1944"); (iii) recovery of interest at appropriate rate under Section 11AB of CEA, 1944; and (iv) penalty under Rule 25 of the Central Excise Rules, 2002 (herein after referred to as "CER, 2002") read with section 11AC of CEA, 1944.

Sr. No.	SCN F.No. and Date	Amount of differential Central Excise Duty (₹)	Period	Issuing Authority
1	DGCEI/AZU/36-69/2009 dated 09.11.2009	3,84,21,710/-	Mar, 2008 to May, 2009	Additional Director General, DGCEI, AZU,
2	V/15-15/Dem/Adj/HQ/2010-11 dated 29.06.2010	21,88,585/-	June, 2009	Addl. Commr.
3	V/15-31/Dem/HQ/2010-11 dated 30.07.2010	35,44,971/-	July, 2009 and Aug., 2009	Addl. Commr.
4	V/15-41/Dem/HQ/2010-11 dated 29.09.2010	1,54,85,317/-	Sept., 2009 to Mar., 2010	Commissioner

3. As per the SCNs an intelligence was received in the Directorate General of Central Excise Intelligence (DGCEI), Regional Unit (RU), Vadodara to the effect that M/s. GCW was evading payment of Central Excise duty by way of under valuation of Cement cleared to their own units viz. M/s. Ultratech Cement Limited, Ready Mix Concrete Units situated at various locations in the country and on the Cement consumed by them captively or for their own use. Accordingly, a team of officers of DGCEI, RU, Vadodara visited the factory of M/s. GCW on 09.06.2009. During the visit, it was revealed that the unit was clearing Cement in loose and packed condition to their various customers, to their own RMC and was using it captively. It was also revealed that M/s. GCW was clearing cement in loose condition to its own units viz. Navi Mumbai Cement Unit (herein after referred to as 'NMCU' for the sake of brevity), situated at Plot No. 53 & 54, Dronagiri Industrial Area, Sector-1, Navi Mumbai and Mangalore Cement unit (herein after referred to as 'MCU' for the sake of brevity) situated at Beach road, Panambur, Mangalore. The clearance of Cement to these two units was done by sea route in Coastal vessels in loose condition. The duty on Cement during the relevant period was to be paid at specific rate (₹ 400/- per M.T., ₹ 290/- per M.T. and ₹ 230/- per M.T.) or at ad valorem rates, whichever is higher.

4. For the clearances to RMC, NMCU, MCU and for captive consumption, M/s. GCW was adopting assessable value of 110% of Cost of production as per Rule 8 of the Central Excise Valuation Rules, 2000. Effectively, since the Specific rate of duty would be higher for such clearances, they were paying Central Excise duty at specific rate for such clearances. For clearances to their independent customers from the factory, there are two types of clearances viz. loose and packed. Cement in loose condition are mainly cleared to bulk buyers, who are the end users and in such case, the unit is paying Central Excise duty ad valorem on normal Transaction value (as per Section 4 of CEA, 1944) or Specific rate (whichever is higher). In case of clearance of Cement in packed condition (50 kg. bags), the duty was being paid ad valorem if the same were sold directly to the end users on MRP (as per Section 4A of the CEA, 1944) in case of sale in retail market. As stated earlier, GCW was clearing Cement in loose as well as packed condition to their own RMC units. In such case, the assessable value was arrived at 110% of the Cost of Production in terms of Rule of Central Excise Valuation Rules.

5.1 A Statement dated 09.06.2009 of Shri Ashish Mehta, working as Dy. General Manager (Finance & Accounts) in M/s. UCL, Kovaya, Dist. Amreli was recorded under Section 14 of the CEA, 1944, which is reproduced herein under:

We are clearing our final product in pack of 50 kgs and also clearing loose. Loose Cement is cleared through oceanic route i.e. in the vessels to our own units at Navi Mumbai (known as Navi Mumbai Cement Unit) and Mangalore (known as Mangalore Cement Unit). On being asked as to how the Assessable value is arrived for such clearances as there is no sale, I state that the assessable value is arrived on the basis of Cost of Production + 10% of Cost of production in terms of Valuation of Excisable Goods Rules.

Further, I have been shown the invoices issued for the clearance of Ordinary Portland Cement (loose) to our own units viz. Navi Mumbai (known as Navi Mumbai Cement Unit) and Mangalore (known as Mangalore Cement Unit) for the financial year 2007-08. My attention is drawn to the fact that the clearance value of cement till 25.02.2008 is Rs. 3,588/- per metric ton. Whereas, from 01.03.2008, the price is drastically reduced to Rs. 2,800/- per metric ton.

On being asked to explain such reduction in clearance value, I state that at present I am not be able explain why there is such drastic reduction in the clearance value of Cement to our aforesaid units.

On being asked as to who is preparing the Cost sheet data for the Cement manufactured by our company, I state that I am supervising the preparation of Cost Sheet. On being asked I herewith produce the Cost sheet data of both OPC and PPC (both packed and loose) as per CAS-4 norms.

We are also clearing Cement in loose and packed condition to our own Ready Mix Concrete plants situated at Ahmedabad, Vadodara and Surat. On being asked as to how the Assessable value is arrived for such clearances as there is no sale, I state that in this case also the assessable value is arrived on the basis of Cost of Production + 10% of Cost of production in terms of Valuation of Excisable Goods Rules.

On being asked to state as to how the Assessable value for the clearance of goods from Terminals units i.e. our own units viz. Navi Mumbai and Mangalore is arrived at especially for the clearance to our own Ready Mix Concrete units, I state that I have no idea regarding this. The Assessable value is being decided at their end.

5.2 As discussed earlier, the Cement in loose condition was cleared by M/s. UCL, Kovaya to their coastal units viz. NMCU and MCU and these two units were further clearing Cement to their own RMC. To ascertain the method of adoption of assessable value at these two coastal units, the officials of the said units were summoned. Accordingly, statement dated 11.06.2009 of Shri Subhash Mohnot, working as Dy. General Manager in NMCU was recorded under Section 14 of the CEA, 1944 wherein he interalia stated that their unit was registered with Central Excise as a manufacturer; that they were undertaking packing of Cement from loose to retail packs; that they were receiving Ordinary Portland Cement (mostly of 53 grade) from their manufacturing plant i.e. Gujarat Cement works situated at Kovaya, Dist. Amreli; that the Cement was received through sea route, which was unloaded at JNPT port and carried to their plant (NMCU) at Navi Mumbai through Bowser; that they were taking credit of duty paid by the plant for clearance of loose cement to their unit. His further statement in question answer form is reproduced herein under:

Q.1 How and in which form you are clearing your final product?

Ans: We are clearing Cement in following ways:

Loose:

Loose cement received as such is cleared as per the requirement of customers. No packing whatsoever is done for loose cement and it is cleared in Bowser as such without any process or packing involved. In such cases, we are paying Central Excise duty on the Transaction value of the goods. Though we are not manufacturer of such goods for bulk despatches, we are paying Central Excise duty on the Transaction value as we are charging duty to our customers on Transaction value. On being asked I state that clearance to our own Ready Mix Concrete units (RMC) is also done in loose form. In that case, the amount of Credit of duty taken would be reversed.

Packed

Loose cement received by us is packed at our unit in 50 kgs. bag. Same is cleared on payment of Central Excise duty. In that case, the duty paid on the Transaction value at our end. In that case also there two methods of payment of duty. In case where the cement is to be sold in the retail market, the duty is paid on the MRP. When the Cement is sold to the institutional buyer or end user, than the duty is paid on the Transaction value.

Q.2 How is the price for Loose as well as packed cement is been decided?

Ans: The price of Cement (loose or packed) for the clearance to independent buyers is decided by our Marketing office. The marketing office of the Mumbai territory is headed by R. Suresh, Asstt. Vice President. Accordingly, the clearance from our unit is done. In case of clearance to our own RMC unit, the price is decided by us. As Cement in case of own RMC is cleared loose as such, the price at which we receive Cement from manufacturing plant i.e. Gujarat Cement Works, Kovaya, we clear to RMC at the same rate because there is no sale in case of clearance to our own RMC. However, in case of Cement cleared in loose condition to independent buyers, the price is fixed by the marketing office according to the prevailing market condition.

Q.3 From the invoices produced by you, your attention is drawn the invoices for clearances of loose cement. In case of independent buyers, the basic price of the cement is 3859.73 to 4221.07 per M. Ton. Whereas, the price of loose cement in case of clearance to your own unit (RMC), the basic

price of Cement is shown as 2861.80. Can you explain such a significant difference in pricing?

Ans: As stated earlier in my statement, in case of clearance to independent buyers, the price is being fixed by the Marketing office. Whereas, in case of clearance to our own RMC units, we are showing assessable value at 110% of Cost of production, since there is no sale to our own RMC. Hence, there is such a difference.

5.3 Shri Sanjaykumar V. Munoyat, working as Manager (Accounts) in M/s. Ultratech Cement Ltd., South Zone-A Marketing, Bangalore, representing MCU responded to the summons. Accordingly, his statement dated 11.06.2009 was recorded under Section 14 of the CEA, 1944 wherein he interalia stated that they were having Central Excise Registration; that theirs was a packing unit; that they were receiving Cement (both 43 and 53 grade) from their manufacturing plant i.e. Gujarat Cement Works, situated at Kovaya, Dist. Amreli; that the cement was received through sea route, which was unloaded at Mangalore port and carried to their plant; that they were taking credit of duty paid on Cement received by them. His further statement in question form is reproduced herein under:

Q.1 How and in which form you are clearing your final product?

Ans: Loose cement received by us is packed at our unit in 50 kgs. bag. Same is cleared on payment of Central Excise duty. The duty is paid on the Transaction value at our end. In that case also there two methods of payment of duty. In case where the cement is to be sold in the retail market, the duty is paid on the MRP. When the Cement is sold to the institutional buyer or end user, than the duty is paid on the Transaction value.

Q.2 How the assessable value for payment of Central Excise duty is arrived at in case of clearance of Cement to your own Ready Mix Cement (RMC) units?

Ans: In case of clearance to our own Ready Mix Cement units, we are arriving at assessable value by adding 10% to the Cost of production as there is no sale in case of clearance to our own RMC. The cost of production is calculated at our MCU.

Q.3 Please produce Cost sheet for both OPC and PPC.

Ans: I will produce the same within 15 days.

Q.4 Are you clearing Cement in loose condition?

Ans: No we are not clearing Cement in loose condition. All our clearances are in packed condition i.e. in 50 kgs. pack.

Q.5 Who is deciding the price for clearance of Cement?

Ans: The price is decided by the Marketing persons. The Marketing head for the South Zone-A is Shri S. V. Patil, Sr. Vice President, Zonal head, Marketing and Shri Sudhakar, Assistant Vice President, Zonal Head, Key Accounts.

5.4 A statement dated 14.06.2010 of Shri Shyam Phophalia, Sr. Manager (Accounts) of M/s. GCW was recorded under section 14 of the CEA, 1944 wherein he stated that :-

"My name, age and address as stated above are true and correct. I am working with Ultratech Cement ltd. since 2008. I am basically looking after the sales accounting. Our unit is engaged in manufacture of Cement viz. Ordinary

Portland Cement [43 and 53 grade] and Portland Pozzolano Cement. We are having manufacturing facility of Cement Clinker. We are having installed capacity of 5 Million Tons per annum. Our main inputs are Lime Stone, which we are getting from our own mines, Coal, which is being imported as well as procured indigenously.

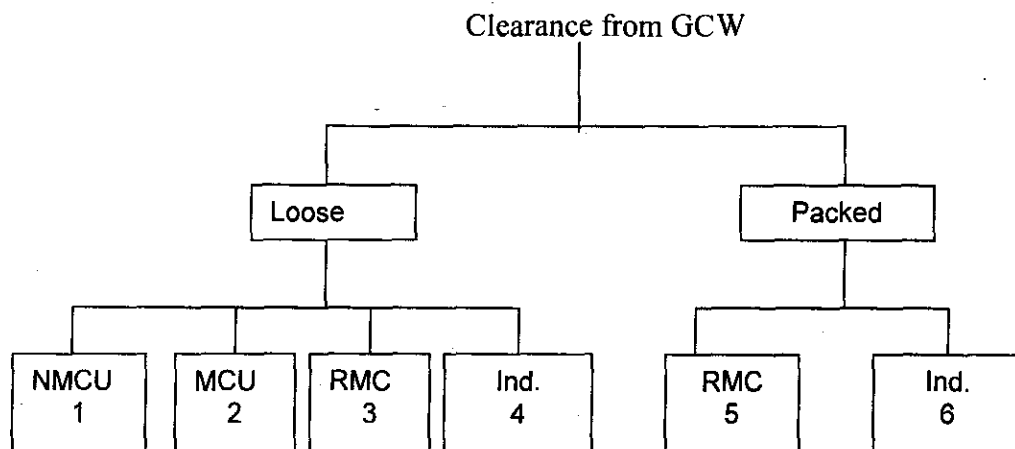
We (GCW) are clearing our final product in pack of 50 kgs. and also clearing loose. Loose Cement is cleared through oceanic route i.e. in the vessels to our own units at Navi Mumbai (known as Navi Mumbai Cement Unit) and Mangalore (known as Mangalore Cement Unit). On being asked as to how the Assessable Value is arrived for such clearances as there is no sale, I state that the assessable value is arrived on the basis of Cost of Production + 10% of Cost of Production in terms of Valuation of Excisable Goods Rules. Similarly, we (GCW) are also clearing Cement in loose and packed condition to our own Ready Mix Concrete plants situated at Ahmedabad, Vadodara and Surat. On being asked as to how the Assessable Value is arrived for such clearances as there is no sale, I state that in this case also the assessable value is arrived on the basis of Cost of Production +10% of Cost of production in terms of Valuation of Excisable Goods Rules.

On being asked regarding pattern of further clearance by Navi Mumbai Cement Unit and Mangalore Cement Unit, I state that there is no change in the pattern during the period from 01.06.2009 to 31.05.2010 as disclosed / described by officials of our company during the course of investigation before DGCEI authorities.

On being asked, we are submitting herewith details of all clearance of cement including clearances to NMCU, MCU, RMC, Self-Consumption as well as further Clearance effected by NMCU during the period from 01.06.2009 to 31.05.2010 in soft copy as per our letter dated 14.06.2010."

6. From the paras discussed above, it revealed that GCW were clearing Cement in loose condition to their own RMC, their own coastal units viz. NMCU, MCU and consuming internally in their own factory on payment of Central Excise duty. It also revealed that since the clearance of Cement to their own RMC and their own coastal units viz. NMCU and MCU was not sale, they were arriving at the assessable value in terms Section 4(1) (b) of the CEA, 1944 whereby the valuation of Excisable goods was governed by Valuation Rules, 2000. GCW were arriving at the assessable value in terms of Rule 8 of the Valuation Rules. Hence, they were paying Central Excise duty on the assessable value arrived at 110% of the Cost of Production of the final product. Further, as per Notification No. 4/2006-CE dated 01.3.2006, the Central Excise duty was ad valorem or specific duty, whichever is higher. Since, the assessable value arrived at 110% of the cost of production was lower than the specific rate of duty, M/s GCW were paying duty at a specific rate. In case of RMC, cement was also cleared in packed condition from GCW, NMCU and MCU. In such cases also, the adoption of assessable value was same as in case of loose cement i.e. 110% of the cost of production.

7. It also revealed that at NMCU, the Cement was received in loose condition from GCW through sea route. NMCU was taking credit of duty paid on such Cement by GCW. As discussed earlier, the duty by GCW for the clearance to NMCU was paid at 110% of cost of production in turn was clearing Cement as such i.e. in loose condition, i.e. without carrying out any process. NMCU was clearing the Cement in loose condition to their own RMC. In such case, the Cenvat credit taken by them was reversed. Effectively, the duty on such clearance was paid at 110% of the cost of production. For better comprehension, the methods of clearances of Cement by GCW is given here under:



8.1 Further, the Central Excise duty on Cement falling under Chapter Sub heading 2523 29 10 was chargeable in following manner in terms of Notification No. 4/2006-CE dated 01.03.2006, as amended from time to time:

Period	Description of goods	Rate of duty	Date from which effective	Notification No. by which principal Notification No. 4/2006 was amended.
2007-08	When the Retail sale price is less than Rs. 190/- per package	350/MT	01.03.2007	4/2007-CE dated 01.03.2007
2007-08	other than those cleared in a packaged form	400/MT	01.03.2007	
2007-08	Other than above	600/MT		Tariff rate
2008-09	when MRP is less than 190 (in packaged form)	350/MT	10.05.2008	Notification No. 27/2008-CE dated 10.05.2008
2008-09	for Retail sale price exceeding Rs. 190 per bag,	12% of the Retail sale price	10.05.2008	
2008-09	other than above - other than those cleared in a packaged form	14% or 400/MT, whichever is higher	01.03.2008	Notification No. 04/2008-CE dated 01.03.2008
2008-09	when MRP is less than 190 (in packaged form)	230/MT	07.12.2008	Notification No. 58/2008-CE dated 07.12.2008
2008-09	for Retail sale price exceeding Rs. 190 per bag,	8% of the Retail sale price	07.12.2008	
2008-09	other than above - other than those cleared in a packaged form (loose form)	10% or 290/MT, whichever is higher	07.12.2008	

2009-10	other than above - other than those cleared in a packaged form (loose form)	8% or 230/MT, whichever is higher	24.02.2009	Notification No. 4/2009-CE dated 24.02.2009
2010-11	Loose and packed cement	290/PMT or 10% whichever is higher	27.02.2010	Notification No. 10/2010-CE dated 27.02.2010

8.2 From the above table, it is seen that Central Excise duty on Cement w.e.f from 01.03.2008 was chargeable @ 14% ad valorem or ₹ 400/MT whichever is higher in case of cement cleared in loose condition. The duty rate for such clearance was revised to 10% ad Valorem or ₹ 290/MT whichever is higher w.e.f. 07.12.2008. The duty rate for such clearance was again revised to 8% ad valorem or ₹ 230/MT whichever is higher w.e.f 24.02.2009.

9. It has been seen from the data submitted by GCW that during the period from 01.03.2008 to 06.12.2008, the duty for the clearance to their own coastal units viz. NMCU MCU and for internal consumption was paid @ ₹ 400/M.T.

10. In terms of Section 3 of the CEA, 1944, Central Excise duty on the Excisable goods are chargeable at the rate specified in the First Schedule to the Central Excise Tariff Act, 1985. As seen above, the Central Excise duty on Cement was chargeable at a specific rate as well as ad valorem, whichever was higher. It has been also seen that since, the maximum retail sale price of packaged cement in case of M/s. GCW was not exceeding ₹ 190/- per bag, they were paying Central Excise according to clause (ii) of the Notification No. 4/2006-CE dated 01.03.2006 as amended from time to time.

11. Further, it has been seen from the discussions above that in case of clearances of Cement to their own units viz. RMC, NMCU, MCU and for internal consumption, since it was not sale, the assessment by M/s. GCW was done as per provisions of Section 4(1)(b) of the CEA, 1944, which prescribes that the valuation of Excisable goods would be done as per Valuation Rules, 2000. It also appeared during the investigation that M/s. GCW had adopted assessable value in terms of Rule 8 of the said Rules and consequently had arrived at assessable value by addition of 10% to the Cost of Production of their final product. Since, the ad valorem duty in terms of this method was less than the specific duty, they had paid duty at specific rate i.e. on per ton basis.

12.1 The Central Excise duty on Cement cleared in loose condition till 01.03.2008 was at specific rate. From 01.03.2008, the rate of duty was 14% ad valorem or ₹ 400/- per MT, whichever is higher. On scrutiny of the data submitted by M/s. GCW, it is seen that for the clearance affected by them till 28.02.2008 to their own units viz. NMCU, MCU, RMC and for internal consumption (i.e. when the rate of duty was specific), they had shown value of Cement per ton as ₹ 3588/- per Metric ton. From 01.03.2008 onwards, the value of Cement in case of clearance to their own units, was drastically reduced to ₹ 2800/- per ton. On being confronted with these facts, Shri Ashish Mehta, Dy. General Manager (Finance & Accounts) of M/s. GCW could not explain such reduction of value in such a short span. Later on, he, vide his letter dated 27.07.2009 gave the explanation to reduction in price. The relevant contents of the letter are re-produced herein under:

In this connection, we have to inform you that the excise duty in case of cement has been changed because of Exemption Notification No. 4/2006 dated 01/03/2006 from specific duty to specific cum advalorem duty, whichever is higher for the clearance in bulk (loose) from Gujarat to our Bulk Terminal from 01/03/2008.

Please note that earlier excise was not payable based on the valuation.

The estimated valuation was for transferring the material from one plant to another plant for our internal control purpose. No excise or sales tax is applicable on the transfer of material from Gujarat to Bulk Terminal as no sale is involved.

The transferring value is reduced from Rs.3527/- PMT to Rs. 2800/- PMT for the reason of our internal purpose and it has nothing to do for levying excise duty there on as no sale is involved. When we are removing material from Gujarat for taking the same to the Bulk Terminal, the excise duty is payable at Rs.400 PMT upto 29/02/2008. Thereafter from 01/03/2008 the excise duty is payable at Rs.400/- or 14%, whichever is higher.

14% has been calculated at 110% of the cost (as prescribed under Rule 8 of the Valuation Rules) or at Rs.400 PMT, whichever is higher.

In our case duty of Rs.400 PMT is higher and as such duty obligation is discharged at that rate.

12.2 It has been alleged in the SCNs that all along in the letter, Shri Mehta had stated that the transfer price shown in their invoice for clearance to their own units viz. RMC, NMCU and MCU was their internal matter and levying of Excise duty had nothing to do with the same, whereas after the Excise duty was chargeable at ad valorem, even in case of inter unit transfer, the value of the product was relevant. Hence, GCW cannot plead that the value of cement in case of transfer to their own unit was not relevant. M/s. Ashish Mehta was a Cost Accountant by qualification and was responsible for preparation of Cost of production sheet of their company. Hence, it appeared from the above discussion that M/s. GCW had intentionally reduced the value of Cement from ₹ 3588/- to ₹ 2800/- within a period of 5 days. More importantly the person in-charge of Costing was not able to explain any reason for such reduction. It thus appeared from the above facts that M/s. GCW, had reduced the value of Cement w.e.f. 01.03.2008 as the duty on Cement became chargeable at ad valorem rate. It is quite clear from the data that had M/s. GCW not reduced the value of the Cement cleared by them; they would have to pay duty @ 14% from 01.03.2008 and thus would have been liable to pay more duty. The comparative figures given below would comprehensively explain the facts:

Duty per ton if M/s. GCW would have continued the value which was prevailing before 01.03.2008 i.e. 14% of ₹ 3588/- = ₹ 502.32 per ton

12.3 Since, they had reduced the price substantially the duty calculated at ad valorem would be 14% of ₹ 2,800/- i.e. ₹ 392/- per ton. Further for the reason that the specific rate of duty was higher than the ad valorem, they paid duty at ₹ 400/- per ton, which is way below the duty as shown above, if M/s. GCW would have persisted with the prevailing rate i.e. ₹ 3,588/- per ton.

12.4 Notwithstanding above discussion, from the Cost Audit report of GCW, as certified by the Cost Accountant of the unit, it is seen that the Cost of production of Ordinary Portland Cement and Pozzolino Portland Cement for the year 2008-09 was ₹ 2072/- per MT and ₹ 2060/- per MT respectively. Hence, going by the Cost of

production, duly certified by the Statutory Cost Auditor, it is seen that quoting of ₹ 2,800/- per MT as cost of production was totally arbitrary and without any valid reasoning. Further, it is also seen that the assessable value per ton for the **loose cement** in case of clearance to their own RMC and for the captive consumption is taken as ₹ 2800/- w.e.f. 01.03.2008. It is also seen that assessable value per ton for the clearance of **packed cement** to their own RMC is also taken as ₹ 2800/-. From these facts, it appears that M/s. GCW had adopted some superfluous figures as a cost of production as the cost of loose cement and packed cement cannot be same. Hence, even for a moment the rule 8 of the Central Excise valuation Rules, 2000 is applied, without admitting, the cost of production adopted by GCW cannot be accepted.

13. It thus appeared from the discussions above that M/s. GCW had intentionally shown far lesser value for the clearance of cement from 01.03.2008 with a sole intent to evade payment of Central Excise duty. On being confronted during the recording of statement on 09.06.2009, Shri Ashish Mehta could not give any plausible explanation regarding such drastic reduction. Later vide his letter dated 27.07.2009 he contended that the reduction of value from ₹ 3527/- PMT to ₹ 2800/- PMT was for internal purpose and had nothing to do with levying of Central excise duty as no sale was involved. Since, there is no plausible explanation for such a huge reduction in price within such a short span of time, it appeared that there was clear intent on part of M/s. GCW to short pay Central Excise duty.

14. Further, it had been seen that while clearing their final product to their own units viz. NMCU, MCU, RMC and for internal consumption, w.e.f. from 01.03.2008, M/s. GCW was resorting to assessment under Section 4(1)(b) of the Central Excise Act, 1944 as there was no sale involved. Consequently, they were adopting assessable value by adding 10% to the Cost of Production in terms of Rule 8 of the Valuation Rules, 2000 and thus they had arrived at value of ₹ 2,800/- per ton as discussed above. Since, the ad valorem duty would be less than specific duty; they were paying duty @ ₹ 400/- per M.T.

15.1 In the SCNs, it has been alleged that resorting to Rule 8 of the Valuation Rules, 2000 by M/s. GCW is not correct for the reasons as explained hereunder:

15.2 M/s. GCW was clearing major part of their production to independent buyers and a small part of their production was cleared by them to their own RMC units. Whereas, Rule 8 of the Valuation Rules, 2000 would be applicable in case where a manufacturer was clearing its entire production to be consumed captively. Rule 8 is applicable in cases where there is no sale and where price of the product cleared to an independent buyer is not available.

15.3 It has been proposed in the SCNs that for the purpose of assessment of Central Excise duty, in case of clearances of Cement by M/s. GCW to their own RMC units Rule 4 of the Valuation Rules, 2000 is more appropriate. Since M/s. GCW are clearing their majority of production for sale to independent buyers, for paying Central Excise duty for the clearances to their own RMC (which is not sale), they could have adopted the price which they had charged for the sale to independent buyers.

16.1 It is alleged that in case of clearance to their own RMC units (which is not sale), M/s. GCW would be liable to pay Central Excise duty on the value of such goods sold by M/s. GCW for delivery at the nearest time to time of clearance to their own RMC units. It is seen from the data submitted by M/s. GCW that in a single day, they are making clearances to various customers. In such a case there would be multiple normal values in a single day. Hence, to arrive at reasonable price of sale by M/s. GCW to independent customers, "Normal Transaction Value" will have to be considered. As per Rule 2(b) of the Valuation Rules, 2000, the

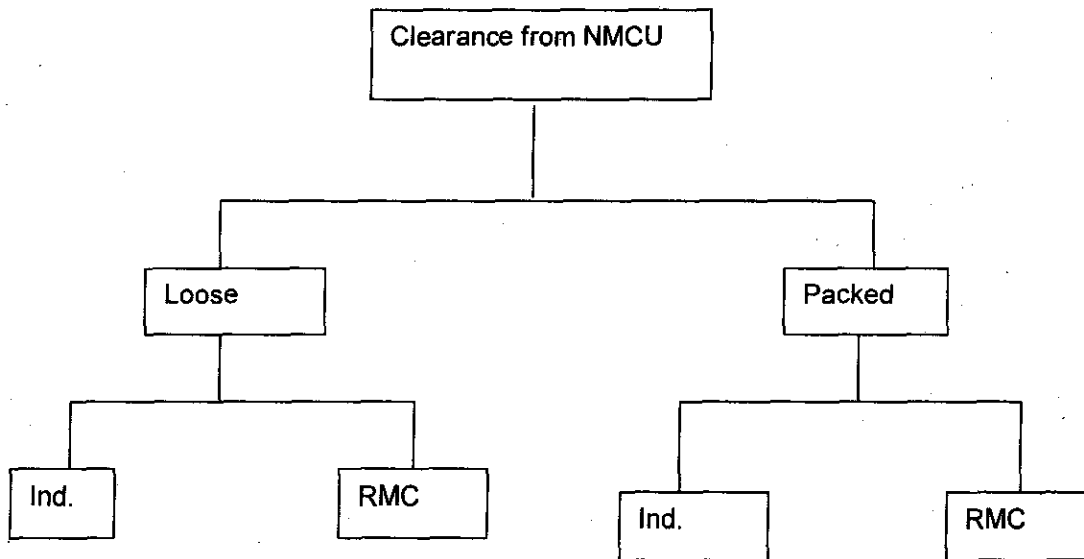
“Normal Transaction Value” means the transaction value at which the greatest aggregate quantity of goods are sold.

16.2 Hence, in terms of the above definition, “Normal Transaction Value” is arrived at by taking that per ton value of Cement at which the greatest aggregate quantity of Cement is cleared on that particular day i.e. on the day on which the assessment of Cement cleared to own RMC unit and cleared for internal consumption is to be considered. For example, if there is a clearance by M/s. GCW to their own RMC unit on 01.04.2008, then all the clearances on 01.04.2008 are scrutinized and the rate at which highest quantity of Cement is cleared on 01.04.2008, is taken as the Transaction value for that day i.e. 01.04.2008 and that would be the value at which the assessment of clearance of Cement by M/s. GCW to their own RMC would be done. To be more elaborate, say for example on 01.04.2008, there are following clearances of Cement by M/s. GCW to the independent buyers:

Basic Rate per ton at which Cement cleared	Quantity of clearance (in tons)
3500	30
3520	40
3500	20
3520	10
3500	10

16.3 In the above case, the quantity cleared at the rate of ₹ 3500/- per ton is higher than the quantity cleared at ₹ 3520/- per ton. Hence, for that particular day, the assessable value to be adopted would be ₹ 3500/- per ton. The differential duty for the clearance of cement from GCW to their own RMC and for captive consumption has been calculated in the SCNs in this manner.

17.1 As discussed earlier, NMCU was getting cement in loose condition from GCW on payment of Central Excise duty. Further, for such clearance, the value of goods was calculated at 110% of cost of production for purpose of calculating Central Excise duty and duty was discharged at specific rate as the same was higher. NMCU was taking credit of duty paid in the Cement received by them from GCW. The method of clearance from NMCU is shown in the diagram below:



17.2 As can be seen from above diagram, NMCU is clearing cement in loose condition i.e. as such received from M/s. GCW. Hence, it means that NMCU is not carrying out any process on the loose cement cleared by them. Effectively, for the

clearance of loose cement, they are acting as a depot for M/s. GCW. In case of packed cement, since they are carrying out packing of cement, NMCU is to be treated as manufacturer and has to discharge Central Excise duty accordingly. However, in case of clearance of loose cement, NMCU is not manufacturer and hence, in such case the duty has to be discharged by the manufacturer i.e. GCW. In case of sale of loose cement by NMCU, they are paying Central Excise duty on the transaction value. It would effectively mean that they are discharging duty on behalf of GCW (as in this case GCW has to discharge the duty). Hence, in case of clearance of loose cement from NMCU to independent buyers there is no loss as far as Central Excise duty is concerned. However, in case of clearance of loose cement to their own RMC, NMCU was reversing the Cenvat credit of the duty paid by GCW which effectively means that duty was paid on 110% of the cost of production of GCW. Hence, for the reasons enumerated in the above paras, there appeared to be undervaluation in case of clearance of loose cement by NMCU. Since, liability to discharge the duty in case of clearance of loose cement from NMCU is on GCW (as they are the manufacturer), the differential Central Excise duty for the clearance of loose cement to RMC from NMCU is demanded from GCW. Further, the value for the purpose of Central Excise duty in case of clearance of Cement to RMC from NMCU is taken as the value of Cement cleared in loose condition by NMCU on the date of clearance of Cement to RMC. As in case of valuation of clearance of cement from GCW to RMC, in case of NMCU also, the value is arrived for the clearance value of greatest aggregate quantity of loose cement cleared by NMCU on a particular date. The details of differential duty for clearances of loose cement from NMCU to RMC has been calculated in this manner.

18. From the above discussions it appeared that M/s. GCW has contravened following provisions of CEA, 1944 and Rules and Notifications issued there under:

- (i) Section 4(1)(b) of the CEA, 1944 in as much as they failed to correctly arrive at assessable value for the clearance of their final product to their own RMC units and used for internal consumption;
- (ii) Rule 8 of the Valuation Rules, 2000 in as much as they wrongly assessed the application of the said rule for the clearance of their final product to their own RMC units and used for internal consumption;
- (iii) Rule 4 of the Valuation Rules, 2000 in as much as they failed to assess the application of the said rule for the clearance of their final product to their own RMC units and used for internal consumption;
- (iv) Notification No. 4/2006-CE dated 01.03.2006, as amended from time to time, in as much as they failed to apply the correct rate of duty in terms of said Notification for the clearance of their final product to their own RMC units and used for internal consumption; and
- (v) Rule 11 of the CER, 2002 in as much as they failed to show correct value and rate of duty for the clearance of their final product to their own RMC units and used for internal consumption.

19. All the above omission and Commission on part of M/s. GCW alleged to have been committed with an intent to show lesser value of goods and in turn evade payment of Central Excise duty. They had intentionally and deliberately shown lesser value for the clearance of goods to their own RMC and used for internal consumption w.e.f. 01.03.2008 without any sufficient reason or explanation, with a sole motive to under value such clearance and thus evade payment of correct amount of Central Excise duty. It is also alleged that M/s. GCW knew or had reason to believe that their

acts of omission and commission would result in short payment of Central Excise duty. Since, it appeared that there was a deliberate and conscious attempt on part of M/s. GCW to under value their clearance of goods to their own RMC and used for internal consumption, the differential Central Excise duty as shown in respective SCNs appeared to be recoverable from them by invoking extended period of time in terms of proviso to Section 11A(1) of the CEA, 1944 along with interest in terms of Section 11AB of the CEA, 1944. It also appeared that these acts of omission and commission on the part of M/s. GCW have rendered them liable for penalty under Section 11AC of the CEA, 1944.

DEFENCE REPLY

20. M/s. GCW has filed separate but similar written submission in respect of all the four Show Cause Notices vide their submission dated 25.01.2010 in respect of SCN F.No. DGCEI/AZU/36-39/2009 dated 09.11.2009, submission dated 23.7.2010 in respect of SCN F.No. V/15-15/Dem/Adj/HQ/2010-11 dated 29.06.2010, submission dated 13.08.2010 in respect of SCN F.No. V/15-31/Dem/HQ/2010-11 dated 30.07.2010 and submission dated 13.10.2010 in respect of SCN F.No. V/15-41/Dem/HQ/2010-11.

21.1 It is inter-alia submitted that they have cleared cement in packaged form to various consumers like institutional/industrial consumers like builders/contractors, ready mix concrete units, manufacturers of cement based finished products, etc. In respect of the cement cleared in loose condition or packed condition on sale to the industrial consumers who had purchased the same from their factory, they have paid duty at the rate specified in Sl. No. 1C of Notification No. 4/2006-CE dated 1.3.2006. The SCNs has not disputed the rate of duty applied for such clearances.

21.2 They have also cleared cement from their factory in loose form to NMCU and to MCU on payment of duty. NMCU and MCU are their packing units where the cement received in loose/bulk condition is packed in bags of 50 kg capacity. They have also cleared cement in loose condition to their own RMC units.

21.3 In respect of the cement cleared from their factory in loose condition to NMCU, MCU and RMC units also, they have paid duty at the rate stipulated in Sl. No. 1C of Notification No. 4/2006-CE. Some times, they have cleared cement in packed condition to their own RMC unit and the rate of duty paid was in terms of Sl. No. 1C of Notification No. 4/2006.

22. During the period from 10.5.2008, the rate of duty specified in Sl. No. 1C of Notification No. 4/2006-CE was at 14% ad valorem or ₹ 400/- per MT whichever is higher. With effect from 7.12.2008 the rate of duty specified in Sl. No. 1C of Notification No. 4/2006 was at 10% adv. or ₹ 290/- per MT whichever is higher. With effect from 24.2.2009, the rate of duty specified in Sl. No. 1C of Notification No. 4/2006 was at 8% adv. or ₹ 230/- per MT whichever is higher.

23. It is submitted that during the period from 1.3.2008 onwards, in respect of cement cleared by them in loose condition to their own units namely NMCU, MCU and RMC where there is no sale involved, the rate of duty of ₹ 400/-, ₹ 290/- or ₹ 230/- per MT, as the case may be in terms of Sl. No. 1C of Notification No. 4/2006-CE was adopted, since the ad valorem rates of duty specified under Sl. No. 1C of Notification No. 4/2006-CE was lower than ₹ 400/-, ₹ 290/- or ₹ 230/- as the case may be. For this purpose, the assessable value of the cement cleared by them to their own units namely NMCU, MCU and RMC was determined in terms of Rule 8 of the Valuation Rules, 2000 based on 110% of the cost of production.

24.1 NMCU which received loose cement from their factory had utilised the same for packing and the packed cement was cleared on payment of appropriate duty. Therefore, NMCU took credit of duty paid by GCW unit. Some quantity of loose cement on which credit has been taken was also cleared by NMCU on payment of the amount equal to the credit taken in terms of Rule 3(5) of the Cenvat Credit Rules.

24.2 Some quantity of packed cement manufactured by NMCU by using the duty paid on cement received from GCW was cleared on stock transfer basis to their RMC unit.

25.1 The MCU had entirely used the loose cement received by it in packing into bags and cleared the same on payment of appropriate duty.

25.2 Their own RMC units which received loose cement had used the same in the manufacture of Ready Mix Concrece.

26. It is submitted that they have been filing the monthly returns in Form ER.1 declaring the duty paid by them from time to time on the clearances made.

27.1 It is submitted that under the aforesaid circumstances, the above mentioned show cause notices have been issued proposing to demand differential duty on the quantity of cement cleared in loose condition to their own units namely, NMCU to RMC and RMC on the ground that for determining the rate of duty in terms of Sl. No. 1C of Notification No. 4/2006-CE, the value in terms of Section 4 has to be arrived at in terms of Rule 4 of Valuation Rules, 2000, based on the price at which the loose cement was sold by Gujarat Cement Works to independent buyers.

27.2 The show cause notices proceeds on the basis that if the transaction value at which the greatest aggregate quantity of cement in loose condition was sold to independent buyer, is taken at the point of time nearest to that of the clearances of loose cement to NMCU, MCU and their own RMCs, then the ad valorem rates of duty specified in Sl. No. 1C from time to time, would be higher than the specific rates of duty stipulated under the said Sl. No. 1C of Notification No. 4/2006, from time to time. Accordingly, the show cause notices propose to determine the value under Section 4(ii)(b) read with Rule 4 of the Central Excise Valuation Rules, 2000 and adopt the ad valorem rates of duty stipulated in Sl. No. 1C of Notification No. 4/2006-CE for the purpose of computing the duty payable on loose the cement cleared to their own other units like NMCU, MCU and RMC units.

27.3 The SCNs also alleges that some quantity of loose cement received by NMCU from GCW was cleared by NMCU to their own RMC units by paying an amount equal to the credit taken instead of determining the assessable value based on the price at which such loose cement was sold by NMCU to independent buyers. The show cause notice proposes to demand differential duty on such loose cement cleared by NMCU to their own RMC units.

27.4 The SCNs further allege that they have contravened the provisions of Rule 8 and 4 of the Valuation Rules, 2000. The SCNs allege that they had wilfully mis-stated the value of the goods and effected the payment of Central Excise duty. The SCNs therefore, propose to invoke the proviso to impose penalty under Section 11 AC of the Central Excise Act.

28. It is submitted that the entire basis in the SCNs is incorrect in law as well as on facts. Further, the basis in the SCNs is also contrary to the Circular of Central Board of Excise and Customs (CBEC) which is binding on the department. The proceedings initiated against them are to be dropped for the above grounds alone.

29.1 They submitted that the clearances of cement to their own units like NMCU, MCU & their own RMC units were on stock transfer basis from factory and do not involve sale. Generally, NMCU, MCU & their own RMC units use the cement in the manufacture. Hence the rule 8 of the Valuation Rules 2000 alone will be applicable.

29.2 The SCNs does not dispute the legal position that the rate of duty specified in Sl. No. 1C of the Notification No. 4/2006-CE dated 1.3.2006 alone is applicable to the cement cleared by M/s. GCW to NMCU, MCU & their own RMC units.

29.3 The Notification No. 4/2006-CE dated 1.3.2006 was amended by Notification No. 4/2008-CE dated 1.3.2008 by which the rate of duty stipulated in respect of the goods mentioned against Sl. No. 1C was amended as 14% ad valorem or ₹ 400 per ton which ever is higher. For the period from 7.12.2008 to 23.2.2009 the rate of duty specified in respect of the Cement covered under Sl. No. 1C is 10% ad valorem or ₹ 290/- per MT whichever is higher. For the period on or after 24.2.2009 the said rate is 8% ad valorem or ₹ 230/- whichever is higher. For the period from 27.02.2010 to March 2010, the rate of duty specified in Sl. No. 1C of Notification No. 4/2006 was at 10% Ad-valorem or ₹ 290/- per MT, whichever is higher.

29.4 They submitted that for the purpose of determining the amount of duty at 14% ad valorem in order to compare with specific rate of ₹ 400/- per MT (or other rates for subsequent period), they have to determine the value of the goods cleared to their other factories based on Rule 8 of the Valuation Rules, 2000.

30.1 It is submitted that the Central Board of Excise & Customs vide Circular No. 643/34/2002-CX dated 1.7.2002 had specifically considered the situation of captive consumption of excisable goods and clarified that the assessable value of the goods captively consumed has to be determined under Rule 8 of the Valuation Rules, 2000.

30.2 In fact at Sl. No. 5 of the table given in the above circular setting out the clarifications for various situations, the CBEC considered the situation where the manufactured goods are being consumed within the same factory and also in the case where such manufactured goods are transferred to a sister unit or another factory of the same company / firm for further use.

30.3 It was clarified by CBEC that when the goods were transferred to a sister unit or another unit of the same company, the valuation will be done as per the proviso to Rule 9 of the Valuation Rules, 2000 which would attract Rule 8 of the Central Excise Valuation Rules, 2000.

30.4 They referred to the proviso to Rule 9 of the Valuation Rules, 2000 and submitted that In view of the same, the value determined by them in respect of the quantity of cement in question under Rule 8 is in accordance with the above circular of the CBEC.

30.5 They submitted that the Central Excise department is bound by the aforesaid circular of the CBEC for the determination of assessable value of the excisable goods manufactured and cleared to the other units of the same company. The assessable value of the goods is to be determined in terms of Rule 8 of Valuation Rules, 2000 on the basis of 110% of the cost of production. Therefore, they had to determine the value on the basis of 110% of the cost of production and then determine the amount of duty payable at the rate of 14% ad voleram. Such duty payable should be compared with ₹ 400 and whichever amount is higher is to be adopted for payment of duty on the cement captively consumed. By adopting the above method to

determine the rate of duty in respect of the cement cleared to NMCU, MCU and RMC, they had correctly determine the rate of duty as ₹ 400/-, ₹ 290/- and ₹ 230/- for the period in question. The proceedings initiated in the SCNs contrary to the above are therefore incorrect and unsustainable in law.

31.1 They submitted that the Circular dated 01.07.2002 of the CBEC is binding on the authorities under the Act. The contrary stand of the department to demand differential duty is unsustainable in law.

31.2 The Circular dated 1.7.2002 issued by CBEC had specifically considered the situation of clearance of excisable goods to the other unit of the same manufacturer and clarified that the assessable value, of the such goods has to be determined under proviso to Rule 9 of the Valuation Rules, 2000 according to which Rule 8 of Valuation Rules, 2000 would apply. The department is bound by this Circular issued by CBEC for determination of assessable value of the goods manufactured and cleared to their other units.

31.3 They submitted that it has been clearly laid down by the Hon'ble Supreme Court in number of judgements that the departmental officers are bound by the Circular issued by CBEC and the assessee can argue that the department cannot take a stand contrary to the Circular issued by the Board. Some of these judgements are as under:-

- a) CCE v. Cadbury India Ltd
2006 (200) ELT 353.
- b) CCE v. Jayant Dalal Ltd.
1996 (88) ELT 638 (SC)
- c) Paper Products v. CCE
1999 (112) ELT 765 (SC)

31.4 The proceedings initiated in the SCNs are based on the ground which are contrary to the aforesaid Circular dated 1.7.2002 of the CBEC. In view of the decisions of Hon'ble Supreme Court referred to supra, the department cannot take a stand contrary to the Circular of CBEC which are binding on the department. Hence the proceedings initiated in the aforesaid SCNs to demand differential duty are incorrect and unsustainable in law.

32.1 They submitted that the cost of production has been correctly arrived at by them. The show cause notice had also alleged that cost of production considered by them was incorrect since for the period prior to 1.3.2008 they had shown the value for transfer of cement to their own units as ₹ 3,588/- per ton but after 1.3.2008 they had reduced the same to ₹ 2,800/- per ton. This allegation in the SCNs is incorrect in law as well as on fact.

32.2 During the period prior to 1.3.2008, the rate of duty specified for cement falling under Sl. No.1C of Notification No. 4/2006 was at specific rate and the value declared in the stock transfer documents was not determined based on the method of valuation provided under Section 4 of the CEA, 1944. They have been declaring the estimated valuation for transferring the cement from their GCW to their own units like NMCU, MCU and their own RMC units. Even during that period if the cost of production method is adopted and the assessable value is determined on the basis of 110% of the cost of production it would be the same as they have declared for the purpose of determining the rate of duty under Sl. No. 1C of Notification No. 4/2006-CE for the period after 1.3.2008. In other words, if the value has to be determined

under Rule 8 of the Valuation Rules, the assessable value would be the same for the period prior to and after 1.3.2008.

32.3 The cost of production of the cement captively consumed has to be determined in terms of Cost Accounting standard (CAS-4) developed by the Institute of Cost & Works Accountants of India [ICWAI]. The CBEC vide Circular No. 692/8/2003-CX., dated 13.2.2003 clarified that cost of production of captively consumed goods will be done strictly in accordance with CAS-4. The Supreme Court in the case of *CCE v. Cadbury India Ltd* reported at 2006 (200) ELT 353 noted the aforesaid circular of the CBEC and held as under:

12. Subsequent to the filing of these appeals, the Institute of Cost and Works Accountants of India (ICWAI) has laid down the principles of determining cost of production for captive consumption and formulated the standards for costing: CAS-4. According to CAS-4 the definition of "cost of production" is as under :

Cost of Production : Cost of Production "4.1. shall consist of Material consumed, Direct wages and salaries, Direct expenses, Works overheads, Quality Control cost, Research and Development cost, Packing cost, Administrative Overheads relating to production."

13. The cost accounting principles laid down by ICWAI have been recognized by the Central Board of Excise and Customs vide Circular No. 692/8/2003-CX., dated 13-2-2003. The circular requires the department to determine the cost of production of captively consumed goods strictly in accordance with CAS-4.

*14. The Tribunal in the case of BMF Beltings Ltd. v. CCE : 2005 (184) E.L.T. 158 (Tri. - Bang.) for the period 1995 to 2000 has directed the department to apply CAS-4 for the determination of the cost of production of the captively consumed goods. In ITC v. CCE - 2005 (190) E.L.T. 119 the Tribunal held that the department has to calculate the cost of production in terms of CAS-4. Other decisions of the Tribunal, wherein it has directed that CAS-4 be applied for determination of the cost of production, are Teja Engineering v. CCE - 2006 (193) E.L.T. 100 (Tri- Chennai), Ashima Denims v. CCE - 2005 (191) E.L.T. 318 (Tri-Mumbai), and Arti Industries v. CCE - 2005 (186) E.L.T. 208 (Tri-Chennai). This is therefore a consistent view taken by the Tribunal. The department has not filed any appeal in these cases and accepted the legal position. Apart from this, in the light of several decisions of this Court, the Department is also bound by the said circular No. 692/8/2003-CX., dated 13-2-2003 issued by the CBEC. As such it cannot now take a contrary stand.
(Emphasis supplied)*

32.4 The estimated value declared in the stock transfer invoices during the period prior 1.3.2008 was not the value determined in terms of Rule 8 of the Valuation Rules. Therefore, there was no question of reduction of the assessable value determinable under Section 4 of the Central Excise Act in respect of the cement cleared on stock transfer basis to their own units like NMCU, MCU and RMC plants. Hence, the allegation in the SCNs that for the period after 1.3.2008 value has been wrongly determined under Rule 8 also is incorrect and unsustainable in law.

32.5 Further, they enclosed copy of the Cost of Production for the determination of cost of production of cement during the period in question. The 110% of the said cost of production was treated as the value for the purpose of computing 14%, 10% or 8% as the case may be to compare with the relevant specific