



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/106/BVR/2016 & V2/17/EA2/BVR/2016	BHV-EXCUS-000-JC-012 to 013-2016-17	27.05.2016
ख	अपील आदेश संख्या (Order-In-Appeal No.):		

BHV-EXCUS-000-APP-018 TO 019-2017-18

आदेश का दिनांक / Date of Order:	24.07.2017	जारी करने की तारीख / Date of issue:	28.07.2017
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**कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellants & Respondent :-**
1. DCW Ltd., Opposite Railway Station, Dhangadhra-363310, .
2. The Commissioner, Central Excise & Service Tax, Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं विल्ट अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, विल्ट अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/ In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायादिधि पर या बाद में पारित किए गए हैं।/ Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s. Dhrangadhra Chemical Works Limited, Opposite Railway Station, Dhrangadhra 363310 (*hereinafter referred to as "the appellant assessee"*) and Commissioner, Central Excise & Service Tax, Bhavnagar against (*hereinafter referred to as the "appellant department"*) both have filed separate appeals against the Order-in-Original No: BHV-EXCUS-000-JC- 012 TO 013-2016-17 dated 27.052016 (*hereinafter referred to as the "the impugned order"*) passed by the Joint **Commissioner**, Central Excise & Service Tax, Bhavnagar (*hereinafter referred to as the "the adjudicating authority"*)

2. Brief facts of the case are that the appellant-assessee are engaged in manufacture of excisable goods viz. Soda Ash. During the course of Audit, CERA, Ahmedabad observed that the Cenvat Credit on Structural material viz. MS Bars, Plates, Angles, etc. falling under Chapter 72 & 73 availed by the appellant assessee was not admissible to them. Therefore, the appellant was issued two show cause notices proposing recovery of wrongly availed Cenvat Credit for the period from September, 2003 to August 2004. In the first round of adjudication the Adjudicating Authority vide Orders In Original No.s 18/ADC/BVR/2011-12 dated 30.12.2011 and 19/ADC/BVR/2011-12 dated 30.12.2011 confirmed the demand. The appellant assessee preferred the appeal before Commissioner (Appeals), who vide Order in Appeal No. 115-116/ 2012(BVR)/ SKS/ COMMR(A)/Ahd dated 30.11.2012 remanded back the matter to the adjudicating authority. Being aggrieved with the said Order in Appeal, the appellant assessee preferred the appeal before CESTAT, Ahmedabad. Hon'ble CESTAT, Ahmedabad vide Order NO. A/10589-10590/ WZB/ AHD/ 2013 and M/12046 & 12047/AZB/AHD/2013 dated 04.04.2013 remanded the matter back to the adjudicating authority. The adjudicating authority following the CESTAT's order, decided the matter afresh vide impugned order partially allowing Cenvat Credit involved in the two show cause notices and partially confirming the demand under Rule 12 of the erstwhile Cenvat Credit Rule, 2002 (*hereinafter referred to as "the Rules"*) read with Section 11A of the Central Excise Act, 1944 (*hereinafter referred to as "the Act"*) along with interest under Section 11AB of the Act and also imposed penalty under Section 11AC of the Act.

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Appeal by appellant assessee

3.1 Being aggrieved with the impugned order the appellant-assessee preferred appeal on the following grounds:

- (i) The impugned order is not in consonance with the directions issued by the Hon'ble CESTAT in as much as the adjudicating authority has confirmed demand of Rs. 15,54,189/- and Rs.28,660/- along with the interest and imposed equal amounts of penalty as the CESTAT had remanded the matter with specific directions to consider the Chartered Engineer Certificate and duty paying documents; that the Hon'ble CESTAT has further directed the lower adjudicating authority to decide the matter within the frame work of the show cause notice issued to the appellant. The sole purpose of the remand was verification of the documents and an appreciation of the certificate issued by the Chartered Engineer thereby certifying that the inputs procured by the appellant were utilized for the erection of the Solway Tower.
- (ii) Adjudicating authority has travelled beyond his jurisdiction in rejecting the documents produced by them while confirming some portion of the demand only on the basis that the inputs were not mentioned in appellant letter dated 23.05.2016 produced by the appellant as well as Annexure B; that adjudication authority has categorically recorded that the Chartered Engineer certificate and invoices produced by them were sufficient documents to pass eligibility criteria of "user Test" and "Requirement Test" and thus they fulfilled conditions laid down by the Hon'ble CESTAT in its order. The adjudicating authority, while allowing them a portion of Cenvat Credit considering the Chartered Engineer Certificate and duty paying documents as sufficient, should have allowed Cenvat credit on the other inputs utilized for manufacture of Solway Tower. The cenvat credit is denied on the ground that inputs were neither mentioned in Annexure B nor in letter dated 23.05.2016. It was submitted that their letter dated 23.05.2016 only pertained to the queries raised in the departmental letter and documents submitted as demanded by the revenue during the course of adjudication; that duty paying documents pertaining to Show cause notice No. V.28/15-27/ demand /HQ/2004 dated 27.09.2004 were only demanded from them. As regards the list of inputs used in the manufacture of Solway Tower sought from them, they referred the chartered engineers certificate which was already on record. The letter dated 23.05.2016 does not pertain to the entire adjudication undertaken in the facts of the present case; that Annexure B submitted by the appellant is a list of all the inputs that were disputed by the revenue in Show Cause Notice NO. V.28/15-

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17/demand/HQ/2004 dated 27.09.2004 and were used by them in manufacture of solway tower. Further, the items of steel are mentioned as inputs in Annexure B also. The rejection of credit on steel items by the adjudication authority is already mentioned in the Annexure B as steel items and hence decision is ill-founded. However, had revenue demanded further documents during the adjudication the same would have been produced by them.

- (iii) The chartered engineer certificate has already certified use of all the inputs in the manufacture of the Solway Tower and they produced invoices i.e. duty paying documents . Revenue has also not disputed the duty paid nature of the inputs. The certificate mentions all the inputs which were disputed by the revenue. As per the Hon'ble CESTAT's order dated 04.04.2013, the certificate was required to be taken into consideration wholly and entirely. The adjudicating authority while discussing the (i)user test and (ii) requirement test, failed to consider the certificate which certifies that these items are required and tower cannot be erected without utilizing these accessories and auxiliaries used for erection of tower and hence user as well as requirement test is already passed by them.
- (iv) It is arbitrary on the part of the adjudicating authority to allow the part of credit and denying balance cenvat credit by rejecting the same set of documents. If the certificate and invoices produced by them were good enough for allowing Credit of Rs.2,88,031/- and Rs. 18,53,528/- the same certificate would hold goods for the other inputs also as those are also mentioned in it.
- (v) No demand on few invoices can be confirmed by invoking extended period as there was no malafide intention on the part of the appellant with an intention to evade payment of duty. The adjudicating authority has already dropped a portion of the demand on the basis of Chartered Engineer's Certificate mentioning all the inputs. Allowing some part of the credit shows that the appellant was under bonafide impression that the input credit was admissible to them. There is no suppression of facts on the part of the appellant because procurement of the inputs in question has been shown in the Cenvat Register of the appellant and the credit of duty paid on these inputs was duly shown in the Cenvat Register and the transactions have been recorded in the monthly returns therefore invocation of the period of limitation is not maintainable in the facts of the present case. They maintained the cenvat register, entered transaction, removed the final products under invoice and reported all these transactions in the return and hence no suppression on their part . They relied upon decisions

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reported in the cases of M/s. India Tin Industries [1994(70) ELT 731 (Trib)], M/s. Bony Rubber Co Pvt Ltd [1996(84)ELT 58] and D.J. Vora, Batliboi & Co Ltd reported in [1999(30) RLT 223].

- (vi) It is further contended that nothing is found illegal by the Range and divisional officer in charge of the appellant's factory and assessments for the disputed period was finalized without any objection. Mere different view of CERA Audit could not suggest that appellant did not disclose the facts about these transactions to the department. All these transactions were reflected in cenvat register as well as returns filed by the appellant. They relied upon the decisions in the cases of M/s. Padmini Products reported at 1989(43) ELT 195(SC), M/s. Chemphar Drugs & Liniments reported in 1989(40) ELT 276 (SC), M/s. Continental Foundation Jt Venture V/s CCE, reported in 2007(216)ELT177(SC).
- (vii) Penalty under Section 11AC is not justified as much as partial demand is dropped showing no malafide intention was there the appellant has not acted dishonestly or contumaciously. Penalty is a quasi criminal matter and therefore, it could be imposed when assessee was found guilty of dishonesty and no such ground or reason is disclosed in the order for justifying imposition of penalty. They referred Hon'ble Supreme Court in the case of M/s. Hindustan Steel Limited reported in 1978ELT (J159).
- (viii) Interest under Section 11AB of the Act is not sustainable as there is no ingredients contemplated under the provisions.

Appeal by department

3.2 The department also preferred appeal on the following grounds:-

- (i) Cenvat Credit is eligible in respect of goods which are either qualify as "capital goods" or used for manufacture of "capital goods". The eligibility of cenvat credit of duty paid on goods is determined keeping in view that they are 'capital goods' within the meaning of Rule 2(b) of CCR, 2002 or used as "input" for the manufacture of "capital goods" in view of explanation to Rule 2 (g) of CCR, 2002.
- (ii) There is not even a whisper of such facts as to how the Solway Tower is covered by the definition of capital goods so as to eligible the duty paid on goods used for fabrication of Solway Tower for the purpose of cenvat. The

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finding of the adjudicating authority at Para 2.4 arrived at the conclusion that Solway Tower falls under the category of capital goods a being new technology which is an incorrect findings as much as adjudicating authority failed to consider the aforesaid vital aspects.

- (ii) The adjudicating authority erred in interpretation of the decision of hon'ble supreme court incase of CCE, Jaipur Vs Rajasthan Spinning & Weaving Mills Ltd reported in 2010 (255) ELT 481 (SC). The essence of case in the said mater was that goods on which cenvat credit have been taken should be either capital goods and/ or component, spares and accessories thereof or should have been used in fabrication of such capital goods. The user test criteria as laid down by the Hon'ble Supreme court would be relevant if the goods have been put to use for fabrication of Capital Goods or its components, spares and accessories. The adjudicating authority did not demonstrate the aspect while passing impugned order and heavily relied upon the certificate issued by the Chartered Engineer, though basis adopted to issue such certificate was not provided by the appellant assessee.
- (iv) Annexure B referred by the Adjudicating Authority in impugned order is merely a technical requirement which simply states the Solway Tower is having height of 27 meters consisting of pipelines, instrumentation, control panel system etc., however, it does not show as to how the goods in question used to fabricate the Solway Tower is capital goods and or its components, spares and accessories. It is difficult by any stretch of imagination to compare chimney/ diesel generating set in the case of Rajasthan Spinning & Weaving Mills Ltd ((supra)) with Solway Tower as capital goods or its components, spares and accessories in the case on hand and hence the impugned order is non-speaking/ non-reasoned one.
- (v) The adjudicating authority failed to consider the basic issue involved/ raised by CERA as to whether Cenvat Credit on Structural Steel items used for fabrication of Solway Tower is admissible or otherwise. It is undisputed that cenvat credit was taken on goods which were used in the fabrication of Solway Tower which is huge structure consisting of pipes, instrumentation, control and panel system etc. Such towers are usually a structure which are mostly found fastened to earth on which various machineries are installed, hence, Solway Tower cannot be considered as

goods even being immovable goods and are non-marketable/ non excisable. On this backdrop, CERA sought to deny Cenvat Credit of goods used in the fabrication of Solway tower placing reliance on case law of Max G B Ltd (2003(159)ELT 203 (Tri-Del) considering that the goods on which cenvat credit have been availed are used in erection of machinery, therefore, cannot be considered as component or accessories of machinery.

- (vi) The adjudicating authority remained silent on the analogy adopted by the appellant assessee that decision of M/s. Vandana Global is no longer good law in light of Hon'ble Supreme court judgment in the case of M/s. Rajasthan Spinning and Weaving Mills Ltd. Hon'ble High court in the case of M/s. Bharti Airtel Ltd [2014(35) STR 865 (Bom)] relying on decision of Apex Court in case of M/s. Saraswati Sugar Mills [2011(270) ELT 465] held that Tower Parts Pre-fabricated structure are neither capital goods nor inputs and hence cenvat credit of duty paid thereon was not admissible. The issue involved in this case is akin to the case of M/s.Bharti Airtel Ltd ((supra)).

The appellant department by filing this appeal sought to get the impugned order set aside in favour of the revenue.

Cross Objection filed by the Appellant Assessee

3.3 The appellant assessee filed cross objection dated 20.10.2016 to the appeal filed by the department wherein they *inter-alia* submitted as under:-

- (i) During the course of adjudication, after attending the personal hearing on 13.04.2016, the appellant assessee was directed to produce duty paying documents pertaining to SCN V.28/15-27/demand/ HQ/2004 dated 27.09.2004 and was also to provide a list of materials used in the fabrication of Solway Tower. They vide letter dated 23.05.2016 have submitted invoices pertaining to the duty demand of Rs. 18,42,220/- vide show cause notice dated 27.09.2004; they give details of inputs which were used for the manufacture of solway tower; they referred chartered engineers certificate and stated that their letter dated 23.05.2016 was only to aid adjudication as per direction given by the Hon'ble CESTAT.

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- (ii) They contended that Solway Tower is essential for manufacturing of soda ash, which is the main product manufactured by them; that Solway Tower is the part and parcel of new technique to produce soda ash. They explained the manufacturing process as under:-

Soda Ash manufacturing process was established by solway brother about 200 years ago. They have established carbonisation towers finally precipitating of soda ash bicarbonation on these towers called as Solway Towers. Solway towers are used in soda ash manufacturing process for carbonation of ammonical brine where ammonical brine comes from Ammonia absorption and Co2 is mixed with Lime Kiln is compressed at a high pressure and put to carbonation towers i.e. so called Solway Towers with the result of carbonation on precipitate of soda bicarbonate takes place which is filtered in RVF and calcinated in the steam tube dryer to get dryer product called soda ash. Thus Solway Tower falls under the category of capital goods as being new technology for production of Soda Ash and essential for manufacturing for soda Ash. Therefore cenvat credit on the inputs utilized for fabrication of the Solway Tower.

- (iii) Department's contention that the case of M/s. Vandna Global Ltd was rendered after the judgment of M/s. Rajasthan Spinning and Weaving Mills Ltd does not provide any assistance as the principle laid down by the Hon'ble Apex Court is binding on all courts within territory of India. They referred the decision in the case of M/s. India Cement Ltd Vs CCE Salem reported in [2015(325)ELT 109(MAB)] wherein it was observed that when the judgment of M/s. Vandna Global Ltd was rendered, the judgment of M/s. Rajasthan Spinning and Weaving Mills Ltd ((supra)) was not brought to the notice of the Tribunal even though the same was available. Therefore, it will not be just and proper to consider that the judgment in case of M/s. Vandna Global Ltd will hold the filed as it was rendered after the case of M/s. Rajasthan Spinning and Weaving Mills Ltd.
- (iv) Hon'ble CESTAT in the case of M/s. APP Mills Ltd reported in 2011-TIOL-1378-CESTAT-BANG observed that decision in the case of M/s. Vandana Global Ltd is no longer valid after the Hon'ble Supreme Court's decision in the Rajasthan Spinning and Weaving Mills Ltd.
- (v) Adjudicating authority was under direction to consider the Chartered Engineers certificate and the said certificate was relevant to the present case as it was issued after auditing and certifying the inputs involved in the fabrication of Solway Tower on which cenvat credit was availed by them and it is unlawful to overlook such a specific document issued by a qualified professional company who is specified in the filed to inspect machinery. The said certificate is issued after physical verification and inspection as well as

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examination of all relevant records. There is no dispute that the inputs procured by them were utilized for manufacturing of Solway Tower/capital goods. The adjudicating authority has correctly relied upon the said certificate to analyze the use of inputs for fabrication of Solway Tower and eligibility of credit.

- (vi) The grounds on which the departmental appeal has been filed were already raised in the adjudication process and explanation tendered by them was considered by the adjudicating authority. The decision in the case of M/s Bharti Airtel [2014 (35) STR 865 (Bom)] will not be applicable in the facts of the present case. It is not explained by the department as to how and why the case of M/s. Bharti Airtel Ltd, (*supra*) will be applicable in the given facts of the present case as it was given in different set of facts.

5. Personal hearing in the matter was initially held on 16.03.2017, however, due to change in the Appellate Authority, fresh personal hearing was held on 22.06.2017. Shri Aditya S Tripathi, Advocate, appeared on behalf of the appellant who reiterated the grounds of appeal and also submitted that order has been passed exceeding direction of CESTAT and traveling beyond SCN exceeding jurisdiction in both account. The departmental appeal has raised points which were not in SCN.

FINDINGS:-

6. I have carefully gone through the facts of the case, impugned orders, grounds of appeals and submissions made by the appellant. The limited issue to be decided in the present appeal is whether the Cenvat credit of duty paid on MS Bars, Plates/Angels etc. availed by the appellant assessee used in manufacturing of Solway Tower is available to them or otherwise.

7. I find that the appellant assessee has availed Cenvat credit on the items falling under Chapter 72 & 73 of the First Schedule of the Central Excise Tariff Act, 1985 used for fabrication of "Solway Tower" in their factory premises. In de-novo proceedings, the adjudicating authority as per direction of the Hon'ble CESTAT, after considering the Chartered Engineer's certificate and applying principles of "User test" & "Requirement test" laid down by the Hon'ble Supreme Court in the case of M/s. Rajasthan Spinning & Weaving Mills Ltd reported in 2010 (255) ELT 481 (SC) allowed Cenvat Credit on inputs treating "Solway Tower" as Capital Goods. However, credit on some inputs was denied on the ground that the same were not mentioned in Annexure B and in the letter dated 23.05.2016 and

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hence these were not used for fabrication of Solway Tower. The appellant assessee made plea that when chartered engineer's certificate was considered sufficient for one Set of inputs, it can not be considered invalid for other set of inputs. I find that Annexure B referred to by the adjudicating authority is a part of letter F No. V.72(4)31/MP/D/2001 dated 25.11.2005 which is reproduced at Para 2.8 of the impugned order. I find that Annexure B is in the form of descriptive narration which reads as under:-

"Annexure B:- These Solway Tower is having 27 meters of height with a very heavy plant and machinery consisting of SS tubes, Titanium Tubes, Cast Iron and Stainless Steel Pipings, instrumentation and heavy control panel system like gas flow, liquor flow and outlet magma flow. Being A heavy structure with a strong foundation, the Plant is absolutely non-movable".

7.1 The above letter dated 25.11.2005 was obtained under letter F No. V/15-27/ Adj/Denovo/ 201314 dated 01.07.2016 by the adjudicating authority to appreciate the Annexure B improper context. Copy of this letter is reproduced below:-

OFFICE OF THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE
3rd Floor, 'Brahmanand Chambers' Opp M. P. Shah Arts College,
S. T. Stand Road, SURENDRANAGAR - 363001
Phone No. 01427-252270/67-68-69 Fax No. 01427521220904
E-mail: ceasnr.ad@sancham.

BY FAX
F. No.: V.72(4)-31/MP/D/2001 dated 25.11.2005

To,
The Joint Commissioner,
Customs & Central Excise
HQ, Bhavnagar

Madam,

Sub: SCN No. V.28/15-27(A)/Demand/HQ/04 dated 27.09.05
and V.28/15-34/Dem/HQ/05 dated 17.02.2005 issued in
respect of M/s. DCW Ltd.

Please refer to your letter F. No. V.28/15-35/Adj/2004 dated
18.10.2005 on the above subject.

In this connection, a detailed report given by M/s. DCW
received by this office through A. R. Dhrangadhra in respect of 'SODA
TOWER' installed at their premises is as under :

- (1) The Manufacturing process of the Solway Tower mentioned in Annexure 'A' (Copy enclosed).
- (2) The said tower is used for Soda Ash plant.
- (3) It has been installed in Soda Ash Plant i.e. after Ammonia Absorption Plant & prior to filtration plant.
- (4) Mode of installation - As per Annexure 'B' (Copy enclosed).
- (5) The drawing /diagram is shown in Annexure 'C' (Copy enclosed).

Yours faithfully,

Encl.: As above.

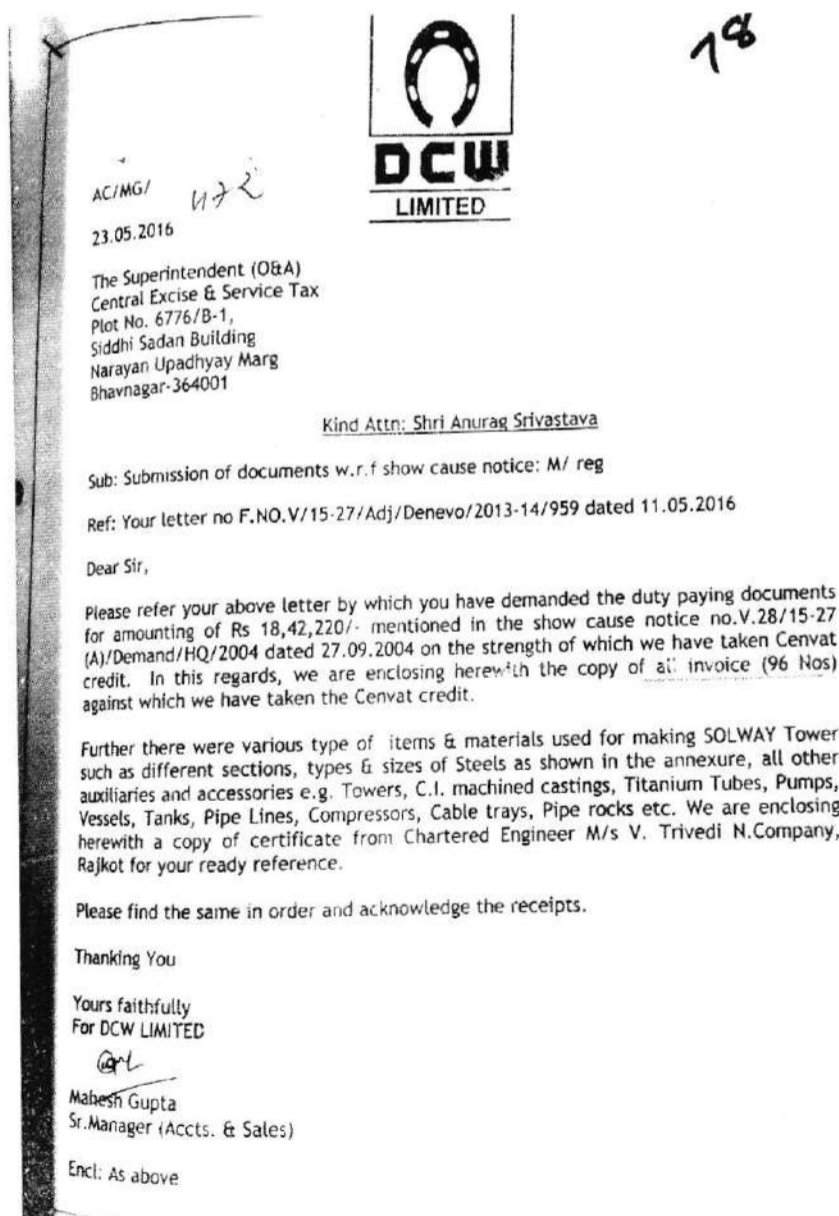
(D. R. GOHEL)
Assistant Commissioner
Central Excise Division
Surendranagar

अच. लेख. गांधी, अधिसूचक
A. R. Dhrangadhra, Supdt.

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7.2 I observe from Point 4 of the said letter that Annexure B is given with reference to "Mode of Installation". Thus, Annexure-B" has nothing to do with the inputs used in the fabrication of Solway Tower. I am, therefore, of view that the adjudicating authority has not appreciated Annexure B in right context and erred to hold that items are not reflected in Annexure B.

7.3 I also find that appellant assessee's letter dated 23.05.2016 is in reply to letter F No. V/15-17/Adj/Denovo/ 2013-14/959 dated 11.05.2016. The appellant assessee in the said letter submitted copies of 96 invoices pertaining to Show Cause Notice dated 27.09.2004 involving duty paying documents of Rs.18,42,220/-. I also find that the appellant assessee in Para 2 submitted that various type of itmes have been used for making Solway Tower and named the items using the prefix "Such as..". Copy of the letter is reproduced below for better appreciation of the facts.



7.4 I find that the appellant assessee in the said letter has not claimed that the list of items mentioned in their letter are exhaustive. They have also referred Chartered Engineer's certificate in this regard. Thus, I find strong force in appellant assessee's submission that (i) The letter was issued in relation to specific query raised to them by the department and (ii) They had mentioned the details of inputs, which were used for manufacture of Solway Tower as example and letter dated 23.05.2016 was not exhaustive at all.

7.5 Thus, I find that the adjudicating authority relying on Annexure B and appellant assessee's letter dated 23.05.2016 to deny the credit are not on correct footing and not justifiable at all especially when Chartered Engineer's certificate is accepted by him in respect of other items. The Hon'ble CESTAT has in earlier round of litigation categorically directed to consider the matter in light of the Chartered Engineer's certificate for the purpose of verification of facts and neither department nor assessee has gone in appeal against that order of CESTAT. I also find that the adjudicating authority has not recorded any findings contrary to the said certification and hence credit can not be denied on part of the items enumerated in the said Chartered Engineer's certificate.

8. The department has also challenged the impugned order on the ground that Solway Tower is not capital goods and hence cenvat credit on inputs used in manufacture of Solway Tower can not be allowed. The Show Cause Notice reveals that the proposal to deny the credit was made on the ground that the said steel items were used to make structure of New Solway Tower for Soda Ash. Thus, cenvat credit of items were disputed because they do not fall under definition of capital goods as per SCN. The Show Cause Notice nowhere speaks about ineligibility of 'New Solway Tower' as Capital Goods. In other words, Show Cause Notice has not been issued on the ground that the said Solway Tower is not capital goods. Therefore, I am of considered view that once Solway Tower has not been disputed as capital goods in the Show Cause Notice, then advancing this ground in appeal proceedings is beyond the scope of SCN. I also find that the adjudicating authority has narrated the process of making Solway Tower in Para 2.4 of the impugned order. Annexure B reveals that Solway Tower is a very heavy plant and machinery consisting of instrumentation and heavy control panel system like gas flow, liquor flow and outlet magma flow. Relevant portion of the impugned order is reproduced below:-

"2.4

.....Thus from the foregoing discussion it can be deduced that Solway

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Tower falls under the category of capital goods a being new technology for production of Soda Ash".

2.5....

2.6 *Thus based on the above it is to be decided whether the items mentioned in the subject Show Cause Notice are actually required and used in the fabrication of above capital goods i.e. Solway Tower in this case."*

The above facts establish that Solway Tower is not a tower but is a part of Plant and Machinery to manufacture Soda Ash. The department in its appeal has not place any evidence to contradict the assessee's submission and above findings of the adjudicating authority that the Solway Tower is part of Plant and Machinery to manufacture Soda Ash.

8.2 The Appellant department has also stated that the decision in the case of M/s. Rajasthan Spinning and Weaving Mills Ltd is not applicable in this case and that Hon'ble Bombay High Court's decision in this case of M/s. Bharti Airtel Ltd reported in 2014(35)STR 865(Bom) is applicable. I find that the above decision in the case of M/s. Bharti Airtel Ltd. is in relation to telecommunication tower to provide cell phone services and those items were held not to be treated capital goods as they were not components, spares and accessories of goods falling under any of chapters or headings of Central Excise Tariff specified in definition of Capital Goods and parts of towers were erected as supporting structure to the antenna. The decision is in relation to credit on Capital Goods relatable to output services, namely, cellular services. Para 31, 32 & 33 of the judgment form the relevant part for the purpose wherein it was held that the tower and tower parts are not part of an integrated system (para 31), not inputs to Capital Goods (para32) and not accessories to the Antenna. Thus, this decision appears not applicable at all in the present set of facts as Solway Towers are part of plant and machinery to manufacture Soda Ash. The department has not adduced any evidence to hold that Solway Tower is a mere support structure and can not be considered as part of plant and machinery to manufacture Soda Ash and is simply trying to derive similarity due to word Tower in it, which is neither judicial nor correct.

8.3 As regards applicability of decision in the case of M/s. Vandana Global vis-à-vis decision of Hon'ble Supreme Court in the case of M/s. Rajasthan Spinning & Weaving Mills Ltd, (*supra*), I find that the Hon'ble CESTAT in the case of M/s. A.P.P.Mills LTd reported in 2013 (291) ELT 585 (Tri-Bang), has *inter-alia*, held that views of the Larger Bench is no longer valid. Relevant portion of the said decision is reproduced as under:-

अधीन कांति
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"4.1.....

.....The facts of the present case are perfectly analogous to those of Rajasthan Spinning & Weaving Mills Ltd. (supra). It is not in dispute that MS angles, plates, etc., were used to fabricate structural support for machinery which was used for manufacturing excisable goods. It is, again, not in dispute that the machinery is squarely covered by clause (i) of Rule 2(a)(A) of the CCR, 2004. The immediate question is whether the structural support for the machinery could be treated as 'capital goods'. Indeed, it should be held to be an integral part of the machinery and hence to be covered by clause (i) *ibid*. If that be so, as held by the Hon'ble Supreme Court in the aforesaid case, the plates, angles, etc., used for fabricating structural support are liable to fall within the purview of clause (iii) of Rule 2(a)(A). In the result, it has to be held that the MS angles, plates and rounds used by the respondent for fabricating structural support for machinery would qualify to be 'capital goods' for CENVAT credit. Consequently, the impugned order can only be sustained.

4.2 The view of the Tribunal's Larger Bench in the case of Vandana Global Ltd. (supra), taken much before the Hon'ble Supreme Court decided the case of Rajasthan Spinning & Weaving Mills Ltd. (supra), was to the effect that the supporting structure for a machinery could not be considered to be part or accessories of the machinery and, therefore, the steel items used for constructing such supporting structure would not be 'capital goods' for the purpose of CENVAT credit. This view of the Larger Bench is no longer valid as it runs contrary to the subsequent ruling of the Apex Court."

8.4 In view of above decision, I have no option but to hold that the adjudicating authority has rightly held that cenvat credit on ERW Steel pipe, MS Tube etc. used in manufacture of Solway Tower, which is used to manufacture Soda Ash by the appellant assessee is required to be allowed in this case. The departmental appeal unfortunately does not succeed.

9. In view of the facts and circumstances, as detailed above, I allow the appeal filed by the appellant assessee and to that extent impugned order is modified and reject the appeal filed by the department.

१०. अपीलकर्ताओं द्वारा दर्ज की गई दोनों अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

10. Both appeals stand disposed off in above terms.

कुमार संतोष
अभिषेक
(कुमार संतोष)
आयुक्त (अपील्स)

BY R.P. A.D.

To

M/s. Dhrangadra Chemical Works Limited Opposite Railway Station, Dhrangadhra 363310	मेसर्स ध्रांगध्रा केमिकल्स वर्क्स लिमिटेड रलवे स्टेशन के सामने ध्रांगध्रा - ३६३३१०
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Copy to:-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad.
2. The Commissioner, GST & Central Excise, Bhavnagar.