::आयुक्त (अपील) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/6 & 7/BVR/2017	**06/Demand/2016-17** **05/Demand/2016-17**	**25-11-2016**

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-045 to 046-2017-18

आदेश का दिनांक / Date of Order: **09.10.2017** जारी करने की तारीख / Date of issue: **11.10..2017**

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 :-

M/s. Mepro Pharmaceuticals Pvt. Ltd. (Unit-I & II),,
1003, GIDC, Opp. Ganesh Oil Mill,, Wadhwan City,, Surendranagar..

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 वित्त 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 अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- ३८००१६ को की जानी चाहिए /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 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) नियमावली, 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 माँग ,ब्याज की माँग 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 क्रमश: 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, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 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 करे (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग 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 क्रमश: 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 of 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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269

(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) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट 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 अर्ज़ी एवं अपील को लागू नहीं होंगे।/
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 मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, 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-35B 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 छूट (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 ड्यूटी क्रेडीट 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 समायावधि पर या बाद में पारित किए गए है।/
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 पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय 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-I 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 संबन्धित 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. Mepro Pharmaceauticals, (Unit-I) 1003, GIDC, Opp. Ganesh Oil Mill, Wadhwan City – 363 035, Surendranagar and **M/s. Mepro Pharmaceauticals,** (Unit-II), Q Road, Phase IV. GIDC, Wadhwan City, Surendranagar (hereinafter referred to as "**the appellants**") filed two appeals against the Orders-In-Original (hereinafter referred to as '**the impugned orders**') as detailed in the table below passed by the Assistant Commissioner, Central Excise Division, Surendranagar (hereinafter referred to as '**the lower adjudicating authority**'):-

Sr. No.	Appeal No.	Impugned Order-In-Original No.	Period involved
1	V2/7/BVR/2017 of Unit -II	05/Demand/2016-17 dated 25.11.2016	December-12 to October-2013
2	V2/6/BVR/2017 of Unit -I	06/Demand/2016-17 dated 21.11.2016	August, 2012 to January-2016

2. Briefly stated the facts of the case are that Audit revealed that the appellants had availed Cenvat credit of Service Tax in respect of services, rendered at Windmill situated at Survey No. 376, Village Navadra, Taluka, Kalyanpur, District, Jamanagar, at a the distance of 275 kms. away from the factory site.

2.1 It was alleged in both the Notices that the appellants had availed Cenvat Credit not in accordance with the provisions of Rule 4 of the Cenvat Credit Rules, 2004 (hereinafter referred to as **"the Rules"**) as they availed Cenvat Credit without receiving the input service in their manufacturing premises. It was also alleged that the Cenvat Credit was taken and utilized on the services availed at Wind Mills, which do not qualify as Input Services defined under Rule 2(l) of the Rules .

2.2 The above facts led to issuance of Show Cause Notices, which was decided by the impugned orders, where under the demand of Rs. 84,483/- and Rs. 99,546/- for irregular availment of the Cenvat Credit of Service Tax taken for installation of Wind Mills confirmed under Rule 14 of the Cenvat Credit Rules, 2004, read with proviso to Section 11A of the Central Excise Act, 1944 (hereinafter referred to as **"the Act"**), along with interest and penalty under the provisions of Rule 15(2) of the Cenvat Credit Rules, 2004, read with Section 11AC of the Central Excise Act, 1944.

3. Being aggrieved with the impugned orders, the appellants preferred inter alia on the following grounds :-

3.1 The appellants contended that electricity generated by windmill is captively used by the appellant; that the lower adjudicating authority has observed as under while passing impugned order/s:

> *"First of all it is necessary to verify as to whether the electricity generated at windmill has been transmitted/set off to the factory premises otherwise. Accordingly, JRS vide letter dated 12.08.2016 was requested to examine and verify the quantum of electricity generated at windmill and whether the same has been transmitted/ set off fully in the factory or otherwise. The JRS vide letter dated 07.10.2016 submitted that, they have verified the month wise sheets titled as certificate submitted by the assessee which are duly signed by the four officers of PGVCL and based on the said sheet summary of the electricity generated at windmill and supplied to the unit has been prepared. It is noticed that, no electricity has been sold by the notice to the PGVCL."*

3.2 It is clear from the above findings that electricity is generated at windmill is supplied to the unit of the appellants which is even confirmed by the four officer of PGVC; that it is also observed that electricity has not been sold by appellants to PGVCL; that thus, it is evident that the electricity generated at the windmill is captively consumed by the appellant.

3.2.1 The adjudicating authority at Para No. 18 of the impugned order No. 1 has observed that the electricity generated at Jamnagar has not been captively consumed for manufacture of taxable goods in the factory premises in Surendranagar; that the said finding is contrary to the findings given in para No. 16 of the order; that the said observation is incorrect; that the adjudicating authority at para No. 19 of the impugned order No. 1 has observed that there is no continuous supply of the said electricity generated at Windmill to the factory; that it is only an offset of the electricity in the bills generated at factory premises, hence, it would not fall in the capacity of captive power plant; that electricity is the necessity for the manufacture of the final products and for making it operative during the eligibility period granted by Gujarat Energy Development Agency and the appellants has entered into an agreement with the Gujarat Energy Development Agency (GETCO); that the appellants has opted to wheel the 100% electricity generated in the Wind mill/s to its manufacturing unit; that as per the clause 4.1 under the heading 'terms and conditions for transmission/wheeling of energy' it is clear that the appellants was desirous of wheeling the energy to its own manufacturing units for the purpose of captive consumption, in accordance with the provision of the Policy; that the electricity generated at the Windmill is captively consumed by them at its own manufacturing unit and therefore not sold;

3.2.2 The appellants relied upon para No. (4) of the judgement of Hon. Tribunal of Delhi in the case of **M/s RAJRATAN GLOBAL WIRES LTD. 2012 (26) S.T.R. 117 (Tri. - Del.)**

wherein the Hon'ble Tribunal has held that since the Wind mill is a captive power generating plant, the credit of expenses related to it should be allowed; that they cited the relevant para of the judgement as follows:

> *"4. There is no dispute about the fact that if the inputs are used or input services are availed in respect of a captive power plant situated within the factory or adjacent to the factory, Cenvat credit would be available.* ***But if the captive power plant happens to be wind power generator, it may not be always possible to locate the same in the close vicinity of the factory, as the wind power Generators have to be located at the places where the wind with sufficient speed is available throughout the year. In this case, though the factories of the appellant are located at Raipur and Pitampur, since they have chosen to use electricity generated by their captive wind power generators, the wind mills are situated in Dewas.*** *These wind mills have been established with the permission of the M.P. State Electricity Board and from the permission given by the M.P. State Electricity Board it is seen that the wind mills are mentioned as for captive use by the appellant. Since, the wind mill are located far away from the factories, the power cannot be transmitted directly and the appellant would necessarily have to enter into an agreement with the State Electricity Board for its transmission. In both these cases, it is seen that the appellants had entered into the agreements with the M.P. State Electricity Board for transmission of power under which the electricity generated by the wind mills is first transferred to the M.P. Electricity grid and, thereafter, the M.P. State Electricity Board supplies 98% of that power to the appellants after deducting 2% power as wheeling charges.* ***In view of this, I hold that the wind mills in this case have to be treated as captive power plant and hence the services of erection, installation, commissioning, repair and maintenance and insurance used in respect of the wind mills would be eligible for Cenvat credit.*** *Moreover one of the main factors for deciding the question as to whether Cenvat credit is available in respect of the service used by a manufacturer is as to whether the service received has nexus with the manufacture of the final product or with the business of manufacture and in this case, I find that there is clear nexus as the electricity generated by the wind mills has been used for running of the factories of the appellant and just because the electricity has not been directly supplied, but has been supplied through M.P. Electricity grid, it cannot be said that the wind mills are not captive power plant. I find that same view has been taken by the Tribunal in the case of Maharashtra Seamless Ltd. v. C.C.E., Raigad (supra) and Endurance Technologies Pvt. Ltd. v. C.C.E., Aurangabad (supra). In the first judgment, the Tribunal has also discussed the judgment of Tribunal in the case of Rajhans Metals Pvt. Ltd. v. C.C.E., Rajkot (supra), where a contrary view had been taken and has observed that view taken in that judgment is not correct. In view of judgment of Bombay High Court in the case of C.C.E. v. Ultratech Cement Ltd. (supra). In view of the above discussion, I hold that the services, in question, received by the appellants have to be treated as input services eligible for Cenvat credit. The impugned orders, therefore, are not correct. The same are set aside. The appeals are allowed."*

3.2.3 Relying upon the above judgment, they contended that said services are eligible for the input service credit, and in the present case also the same should be allowed to the appellant.

3.3 The appellants further contended that the services used for erection and commissioning of Wind mills are directly in relation to manufacture of final products and therefore the credit of the same should be allowed; that the electricity is used for running of machinery installed in the factory and entire production process of the appellants was machine oriented; that therefore, without electricity, the appellants would I not be able to manufacture its final product, as the entire production process would come to a standstill; that therefore, electricity is a necessity for carrying out the production process; that the state electricity boards promote generation of electricity from non-conventional resources; that the companies which generate electricity from

non-conventional resources, the electricity board transmits the same from the plant to their factory by giving credit of the same in the next month electricity bill; that the generation of electricity and transfer to the electricity board is a part of the promotion of use of non-conventional resources scheme of the state government; that the appellants has entered into an agreement dated 26.03.2013 with the Gujarat Energy Transmission Corporation Ltd. (in short, **"GETCO"**) for the operation of the whole activity of wheeling the power generated at the Wind farm to the manufacturing units of the appellants; that when a project of erection of windmill plant is proposed, then due consideration is required to be given to its location, the direction of the wind for maximum generation of electricity; that erection of the windmill is location specific; that the location near the Surendranagar factory of the appellants was not suitable for a Windmill and hence, the appellants have chosen another location at Jamnagar to erect windmill/s which was used to generate electricity; that all the energy which was generated in the Windmill at Jamnagar was wheeled to the factories of the appellants at Surendranagar; that the consumption in the factories is much higher than the generation of the electricity; that the entire electricity generated in the Windmill is consumed by the factory itself and there is no quantity left for the sale.

3.3.1 The appellants submitted that they used the service for the erection and installation of Wind mill/s to generate the electricity and the electricity was further used in production of final goods which was excisable and therefore, the Cenvat credit of the input services used for production of electricity is available to the appellant; that the Hon'ble Tribunal in its decision in case ZF STEERING GEAR (INDIA) LTD. 2015 (317) E.L.T. 580 (Tri. - Mumbai) has held that :-

> *"Cenvat credit - Input service - Annual Maintenance of wind mill, installed outside factory by assessee for use of electricity generated by it, on transfer through State Electricity Board - No dispute raised that electricity so generated was used by assessee in course of business of manufacturing - HELD : Assessee was entitled to take Cenvat credit on annual maintenance charges of wind mill Department plea that as electricity was given to State Electricity Board, and only equivalent electricity was taken from it, electricity generated by wind mill was not used for manufacturing of final product, rejected - Rule 3A of erstwhile Central Excise Rules, 1944."*
>
> [Emphasis supplied]

3.3.2 Relying on the above case law, the appellants contended that they have installed Wind mill/s away from their factory; that they have transferred the electricity generated by Wind mill/s to state electricity board and in turn state electricity has given free electricity to them; that it was held that Cenvat credit of input services used for generation of electricity was available to the appellant.

3.4 The appellants also contended that the lower adjudicating authority had observed that the transaction of transmission of power to the GEB and sale of power or off-setting of power by the GEB with the appellants are two independent transactions.; that the GEB (PBVCL) was only giving credit for the power received in the grid and it does not mean that there is a nexus between the service received at the Wind mill/s and the items manufactured in the factory of the appellant; that the agreement entered into between GETCO and the appellants were was for wheeling the power generated at the windmill in Jamnagar; that the electricity board transmited the same from the plant to their factory by giving credit of the same in the next month electricity bill; that the appellants would not have entered into the agreement had they not got the set-off for the energy generated; that the basic condition of the agreement is that when the appellants transferred the electricity generated at Wind Mill/s to GEB, Jamnagar, in turn GEB, Surendranagar will transfer the same amount of electricity to the appellants at its factory; that the entire transaction is single; that this transaction completes in one chain only; that therefore, it is one transaction only; that the finding of the adjudicating authority that there are two independent transactions is incorrect.

3.5 The appellants further submitted that the lower adjudicating authority has not described any facts based on which it was observed that the services received by the appellants do not qualify to be input services and therefore the reliance placed on the judgment of Gujarat Heavy Chemicals Ltd. 2011 (22) STR 610 (Guj) by the adjudicating authority is not correct; that electricity generated by Wind Mill/s is captively consumed in the factory to produce the final products which are excisable; that it is evident from the certificates signed by the PGVCL, Gujarat that total quantity (except, wheeling loss) of the electricity transmitted by appellants to GEB was eceived in turn free of charge; that therefore the judgement of Gujarat Heavy Chemicals Ltd. (supra) on which the adjudicating authority had relied is not applicable to the appellants; that the appellants have availed the Cenvat credit on the security service provided at their residential quarters maintained for workers by the manufacturer; that naturally the said services would not be allowed as input services, since they were used for the residential quarters; that while the facts of the present cases are totally different; that in the present case, appellants had received erection and commissioning services for the generation of electricity which was directly utilized for production of final goods and therefore, the facts of the case relied upon by the lower adjudicating authority are not applicable to the present case.

3.6 The appellants further contended that unlike inputs credit of input services is eligible even if the same are used outside the factory premises; that the adjudicating authority observed that the input services i.e. erection and commissioning of Wind mill/s, are not used within the factory premise, as well as not used directly or indirectly

in the manufacture of final products; that it is nowhere stated in the definition of input service that the services should be used inside the factory premises; that as per Rule 4(7) of the Cenvat Credit Rules, 2004 credit of input service will be available on receipt of invoice by the appellant; that the credit will be eligible only on receipt of input service within the factory, unlike inputs, wherein it has been clearly stated in Rule 4(1) that the credit on input will be eligible only on receipt of input within the factory of the manufacturer or premises of provider of output service; that in the case of Deepak Fertilizers & Petrochemicals Corpn. Ltd. 2013 (32) S.T.R. 532 (Bom.), the Hon'ble High Court has held that there is no requirement under the Cenvat Credit Rules, 2004 that the input services should be received in the factory of the appellant. In view of the above even if the input service is received outside the factory, the credit is eligible to the appellants; that thus, the contention in the impugned orders that since the service is received outside the factory of the appellants, credit is not eligible is not correct.

3.7 The appellants further contended that there is direct nexus between the services availed at Wind mill farm and electricity used in the factory for the production of the final goods. The Hon'nle High Court in the case of **EnduranceTechnology Pvt Ltd. reported in 2015-TIOL-1371-HC-MUM-ST has held that:**

> ***"Held: As per Rules 2(B)(k),(l) (m), 3 and 4 of CENVAT Credit Rules, 2004, it is clear that the management, maintenance and repair of windmills installed by the respondents is input service as defined by clause "l" of Rule 2. Rule 3 and 4 provide that any input or capital goods received in the factory or any input service received by manufacture of final product would be susceptible to CENVAT credit. Rule does not say that input service received by a manufacturer must be received at the factory premises."***

3.7.1 Relying upon the above judgment, the appellants contended that there is no requirement of receipt of input services within the factory premises only; that the ratio of above judgment in the present case, there was no requirement to receive the erection and commissioning services within the factory; that the appellants also relied upon the case of Parry Engg. & Electronics P. Ltd. 2015 (40) S.T.R. 243 (Tri. - LB) by the Larger bench, wherein it has been inter alia rendered as under :-

> *"7. We find that the Hon'ble Bombay High Court in the case of Endurance Technologies Pvt. Ltd. (supra) held that **Cenvat credit is eligible on maintenance or repair services of Windmills, located away from the factory. It is well settled that the decision of Hon'ble High Court is binding on the Tribunal.** It was pointed out at the time of hearing that the definition of "input service" credit was subsequently amended in 2011. We find that the present appeals are involving for the period 2006-2007. In any event, this issue is not before the Larger Bench. Hence, the view taken by the Tribunal in the case of Endurance Technologies Pvt. Ltd. (supra) is correct."*
>
> *8. In view of the above discussion, the decision of the Tribunal in the case of Endurance Technology Pvt. Ltd. (supra), as upheld by the Hon'ble Bombay High Court as stated above, has enunciated the correct position of law. Accordingly, the reference is answered in favour of the assessee and against the Revenue. Registry is directed to place the files before the regular Bench for passing appropriate order."*

3.8 The appellants contended that the reliance placed on judgment of the Hon'ble Supreme Court in Maruti Suzuki Ltd. 2009 (240) ELT 641 (SC) by the adjudicating authority is incorrect; that it was held that electricity has to be consumed captively in the manufacture of excisable goods so as to be eligible for Cenvat credit on the inputs in the manufacture of such electricity; that in the case of Maruti Suzuki *supra* had transferred the electricity generated to its joint ventures thus could not consumed the total electricity generated by it in the factory; that the Hon'ble Apex Court held that only that credit of input used in generation of electricity which is not captively consumed will not be available; that it was held that Assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption), they are not entitled to Cenvat credit to the extent of the excess electricity cleared at the contractual rates in favor of joint ventures, vendors etc., which is sold at a price; that the facts of the above case and the present cases are not same; that in the present cases, the appellants has not sold or transferred the electricity to others; that the appellants has captively consumed the entire electricity generated by it and therefore the Cenvat Credit should not be denied to them.

3.9 The appellants also relied upon on the judgement of GUJARAT STATE PETRONET LTD 2013 (32) S.T.R. 510 (Tri. - Ahmd.) wherein it has been inter alia, held that :

> *"5.3 As regards the service rendered by the EPC contractors the ground canvassed is that what has emerged is an immovable property which is neither a service nor goods.* ***In this case, it has to be noted that EPC contractors have not paid service tax on 'pipeline system' but on the services provided for constructing the system. Definition of 'input service' clearly covers this and it cannot be said that this service is not provided to output service.*** *Moreover the decision of Hon'ble Andhra Pradesh High Court in the case of Sai Sahmita Storages (P) Ltd. [2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.)] also supports the case of appellants. In this case it was held that inputs used for construction of warehouse is admissible as credit."*

3.9.1 Relying upon the above judgement the Hon'ble Tribunal has disallowed the credit of the duty paid on pipeline considering it neither as 'input' nor as 'capital goods' under Cenvat Credit Rules, 2004; that however, the Tribunal has allowed to take credit of the Service Tax paid on construction of the pipe lines system; that the above judgement has been affirmed by Gujarat high court in 2014 (34) STR 321; that in the present cases, the appellants the said services are also covered in the definition of the input services, irrespective of the fact that Windmill falls within the definition of capital goods; that therefore, the credit of service of erection and commissioning is available to the appellant.

3.10 The appellants also relied on the judgement of Idea Cellular Ltd. 2016 (3) TMI 1117 – CESTAT-MUMBAI in which it held that :

"Cenvat credit - construction service, erection, commissioning and installation service, works Contract service, consultancy engineer's service, business auxiliary services and business support services - services used for ***erection of BTS Towers*** *- Held that:- services of construction and works contract are excluded from the definition of input service, therefore the Cenvat Credit on the said two services are disallowed. As regard other services there is a dispute between the Ld. Commissioner and the appellant that some of the services like design service, technical testing and analysis service are in fact business auxiliary service and business support service, which needs verification by the adjudicating authority.* ***However, irrespective of difference of service whether it is design service, technical testing and analysis service or business auxiliary service and business support service, the same for not falling under the exclusion category, therefore the credit cannot be denied on these services. Similarly, the services like erection, commissioning and installation and consultancy engineer's service are also not excluded in the amended definition of input service****. Therefore in my considered view, except the construction service and works contract service the credit on other services are admissible."*

3.10.1 Relying upon the above judgement that credit of the Service Tax paid on installation and erection services of goods i.e. BTS Towers which are not allowed as capital goods as per the High Court order in the case of Bharti Airtel Ltd. Vs. Commissioner of C. Ex., Pune-III 2014 (35) S.T.R. 865 (Bom.), is allowed; that it will evident that credit of the Service Tax paid cannot be denied on the ground that such services are used in relation to goods which are not capital goods; that applying the ratio of the above judgement, the appellants are eligible to take the credit of the erection and commissioning services.

3.11 The appellants also submitted that, the definition of the Capital goods as per rule 2(a) of the Cenvat credit rules, 2004 as amended w.e.f. 01.07.2012 is as follows:

A. "The following goods, namely –
(i) falling under chapter 82, chapter 84, chapter 85, chapter 90, [heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804] of the First Schedule of the Central Excise Tariff Act;
(ii) Pollution control equipment;
(iii) Components, spares and accessories of the goods specified in clauses (i) and (ii);
(iv) Moulds and dies, jigs and fixtures;
(v) Refractories and refractory materials;
(vi) Tubes and pipes and fittings thereof;
(vii) [Storage tank and]
(viii) Motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis, [but including dumpers and tippers],]

used-

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

[(1A) Outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory; or]

(2) For providing output service,

B. Motor Vehicles designed for transportation of goods including their chassis registered in the name of service provider, when used for-
(i) Providing an output service of renting of such motor vehicle; or
(ii) Transportation of inputs and capital goods used for providing an output service; or

(iii) Providing an output service of courier agency;]

C. Motor Vehicles designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of –

(i) transportation of passengers; or
(ii) renting of such motor vehicle; or
(iii) imparting motor driving skills;

D. Components, spares & accessories of motor vehicles which are capital goods for the assessee;"

3.11.1 Relying upon the above clause (1A) supra of the above definition, the appellants contended that any machinery used outside the factory for the production of the electricity which is to be captively consumed within the factory for production of the final product is a capital goods; that the period of dispute in the present case is June 2013 i.e. after the amendment therefore, the Wind mill/s installed by the appellants also fell under the definition of capital goods; that definition has nowhere described the area limit within which is should be installed; that it has just been mentioned that outside the factory premises and therefore, Wind Mill/s installed at Jamnagar has to be considered as capital goods.

3.11.2 The appellants further submitted that nowhere in the show cause notices it has been alleged that the credit of impugned services is not allowed, as the credit of the Windmill as Cenvat credit is not allowed; that said observation made in the impugned order/s is beyond the scope of show cause notice; that following are the cases where It has been held that the adjudicating authority cannot pass order beyond the scope of show cause notice:

- Magna Laboratories Gujarat (P) Ltd. -	2016 (339) E.L.T. A56 (S.C.)
- ASHOKA BUILDCON LTD.	2016 (41) S.T.R. 452 (Tri. - Mumbai)
- DHL Logistics Pvt. Ltd. -	2015 (39) S.T.R. J172 (S.C.)
- I.S.E. SECURITIES & SERVICES LTD	2013 (32) S.T.R. 442 (Tri. - Mumbai)
- DHAMPUR SUGAR MILLS LTD.	2010 (260) E.L.T. 271 (Tri. - Del.)
- JAYASWAL TRAVELS	2008 (12) S.T.R. 379 (Tri. - Del.)

3.11.3 As regards, the issue that If the intermediate product is exempted/non – excisable, the credit of the input services that are used for the manufacture of such intermediate product will be eligible, the appellants contended that the lower adjudicating authority has observed that services used in erection and commissioning have resulted in production of electricity, which is not excisable and therefore, Cenvat credit on the said input services is not available. The chain of Cenvat credit of the said input is broken once the emergence of non-excisable product in terms of Rule 6 of CCR, 2004. In the instant case, even the electricity has been generated at windmill farm which is far away and there is no continuous supply of the said electricity generated at

windmill to the factory. Therefore, electricity being a non-excisable goods, the input services used for such electricity cannot be further pass on or utilized at the factory premise.

3.11.4 The appellants countered the above findings of the lower adjudicating authority contending that transmission of electricity by the appellants to GEB and receipt by the appellants in turn from GEB, is one transaction; that if inputs or input services are used for the manufacturing of intermediate product and intermediate product is used in the production of final product which is excisable, Cenvat credit of input or input services would be available to the manufacture as held by the Supreme Court in the case of Solaris Chemtech Ltd. as reported in 2007 (214) E.L.T. 481 (S.C.).

3.11.5 The Hon'ble Supreme Court in the case of Solaris Chemtech Ltd. *(supra)* has held that the credit of inputs or input services used in manufacture of non-excisable intermediate product will be eligible if the intermediate product is used for the manufacture of dutiable final product. The Hon'ble Supreme Court has also dealt with the inputs used in the manufacture of electricity which was further used in the manufacture of final products cleared on payment of duty. The appellants thus submitted that the ratio of the judgment is squarely applicable to the present case. They also relied upon relevant extract is as follows:

> *"8. In our view, there is no merit in this civil appeal filed by the Department. At the outset, we may clarify that electricity is not an excisable item. Further, in this batch of civil appeals we are concerned with the electricity which is generated inside the plant by heating of LSHS and which is captively consumed and used to manufacture cement/caustic soda. Rule 57A, quoted above, has an Explanation clause which stated as to what inputs are included in MODVAT credit. Explanation clause (c) refers to "input used as fuel". This clause was introduced by Notification No. 4/94. At that time the Government made it clear that inputs used as fuel were entitled to MODVAT credit. That fuel either utilized directly or for generating electricity, as an intermediary product, is integrally connected with several operations which results in the emergence of the final product, namely, cement/caustic soda. It is important to note that without utilization of LSHS, it is not possible to manufacture cement/caustic soda. The electrolysis process is dependent on continuous flow of electricity. If there is disruption in the supply of electricity from the Electricity Board then the entire plant of the assessees would fail and the manufacture of cement/caustic soda would not take place. Therefore, LSHS would come within the ambit of the expression "used in or in relation to the manufacture of the final product". Further, in the case of Collector of Central, Excise v. Rajasthan State Chemical Works - 1991 (55) E.L.T. 444 (S.C.), it has been held that any operation in the course of manufacture, if integrally connected with the operation which results in the emergence of manufactured goods, would come within the term "manufacture". This is because of the words used in Rule 57A, namely, "goods used in or in relation to the manufacture of the final products". Electricity is one form of heat. It gets generated in several ways. LSHS is a fuel used in the generation of electricity. Since, electricity is self-generated and since it comes into existence as an intermediary product, its utilization for production of final product is crucial. Hence, MODVAT credit on LSHS used in production of electricity cannot be denied. Lastly, we may point out that in order to appreciate the arguments advanced on behalf of the Department one needs to interpret the expression "in or in relation to the manufacture of final products". The expression "in the manufacture of goods" indicates the use of the input in the manufacture of the final product. The said expression normally covers the entire process of converting raw-materials into finished*

*goods such as caustic soda, cement etc. However, the matter does not end with the said expression. The expression also covers inputs "used in relation to the manufacture of final products". It is interesting to note that the said expression, namely, "in relation to" also finds place in the extended definition of the word "manufacture" in Section 2(f) of the Central Excises and Salt Act, 1944 (for short, 'the said Act'). It is for this reason that this Court has repeatedly held that the expression "in relation to" must be given a wide connotation. The Explanation to Rule 57A shows an inclusive definition of the word "inputs". Therefore, that is a dichotomy between inputs used in the manufacture of the final product and inputs used in relation to the manufacture of final products. The Department gave a narrow meaning to the word "used" in Rule 57A. The Department would have been right in saying that the input must be raw-material consumed in the manufacture of final product, however, in the present case, as stated above, the expression "used" in Rule 57A uses the words "in relation to the manufacture of final products". The words "in relation to" which find place in Section 2(f) of the said Act has been interpreted by this Court to cover processes generating intermediate products and it is in this context that it has been repeatedly held by this Court that if manufacture of final product cannot take place without the process in question then that process is an integral part of the activity of manufacture of the final product. Therefore, the words "in relation to the manufacture" have been used to widen and expand the scope, meaning and content of the expression "inputs" so as to attract goods which do not enter into finished goods. In the case of M/s. J.K. Cotton Spinning and Weaving Mills, Co. Ltd. v. The Sales Tax Officer, Kanpur and another - AIR 1965 S.C. 1310, this Court has held that Rule 57A refers to inputs which are not only goods used in the manufacture of final products but also goods used in relation to the manufacture of final products. Where raw-material is used in the manufacture of final product it is an input used in the manufacture of final product. However, the doubt may arise only in regard to use of some articles not in the mainstream of manufacturing process but something which is used for rendering final product marketable or something used otherwise in assisting the process of manufacture. This doubt is set at rest by use of the words "used in relation to manufacture". In the present case, the LSHS is used to generate electricity which is captively consumed. Without continuous supply of such electricity generated in the plant it is not possible to manufacture cement, caustic soda etc. Without such supply the process of electrolysis was not possible. Therefore, keeping in mind the expression "used in relation to the manufacture" in Rule 57A we are of the view that the assessees were entitled to MODVAT credit on LSHS. In our opinion, the present case falls in clause (c), therefore, the assessees were entitled to MODVAT credit under Explanatory clause (c) even before 16-3-95. **Inputs used for generation of electricity will qualify for MODVAT credit only if they are used in or in relation to the manufacture of the final product, such as cement, caustic soda etc. Therefore, it is not correct to state that inputs used as fuel for generation of electricity captively consumed will not be covered as inputs under Rule 57A.**"*

3.11.6 The lower adjudicating authority has observed that it is related to Inputs – Low Sulphur Heavy Stock (LSHS) and furnace oil used to generate electricity which is captively consumed for manufacture of final product such as caustic soda, cement etc., whereas in the present case it relates to Input Services used at Wind mill farm and electricity has been generated there and not in the plant therefore, it cannot be said as generated and used captively in the plant itself. The appellants submitted that it would be clear from their submissions above that electricity generated at Wind mill/s is captively consumed by them.

257

3.11.7 The appellants further submitted that he issue is no longer *res integra* and cited the following case laws :-

Sr. No.	Citation	Gist of the judgement
1	2015-TIOL-1371 – HC - MUM-ST	As per Rules 2(B)(k),(l) (m), 3 and 4 of CENVAT Credit Rules, 2004, it is clear that the management, maintenance and repair of windmills installed by the respondents is input service as defined by clause "l" of Rule 2. Rule 3 and 4 provide that any input or capital goods received in the factory or any input service received by manufacture of final product would be susceptible to CENVAT credit. Rule does not say that input service received by a manufacturer must be received at the factory premises.
2	2016 (42) S.T.R. 776 (Tri. - Chennai)	**Cenvat credit of Service Tax allowed for operation and maintenance services of windmills**, including rental and security services, term loan processing charges for purchase of windmill and machinery, insurance policy for workers, service charges paid for cranes and outward transportation of goods, as all such activities essential in running windmill operation, an important source of energy generation.
3	2015 (40) S.T.R. 774 (Tri. - Chennai)	Cenvat credit - Maintenance of windmill - **Service provided towards maintenance thereof entitles the appellant to Cenvat credit of Service Tax paid in that regard.**
4	2016 (332) E.L.T. 142 (Tri. – Chennai)	Cenvat - Input - Maintenance of windmill of generating power - **A windmill owner generating power at source of wind may not have factory at same place, therefore, they exchange power generated by them with Electricity Board at point of generation for getting equivalent power at their place of manufacture - Appellant entitled for credit - Rule 3 of Cenvat Credit Rules, 2004.**
5	2015 (317) E.L.T. 580 (Tri. - Mumbai)	Assessee was entitled to take Cenvat credit on annual maintenance charges of wind mill Department plea that as electricity was given to State Electricity Board, and only equivalent electricity was taken from it, electricity generated by wind mill was not used for manufacturing of final product, rejected - Rule 3A of erstwhile Central Excise Rules, 1944
6	2015 (40) S.T.R. 243 (Tri. - LB)	Electricity generated surrendered to the grid and equivalent quantum is withdrawn in the factory from the grid - In view of Bombay High Court upholding decision of Tribunal in 2012 (27) S.T.R. 320 (Tribunal), Cenvat credit available for aforesaid services used in windmills away from factory.

3.12 The appellants further contended that penalty under Rule 15(2) of Cenvat credit rules, 2004, read with Section 11AC of Central Excise Act, 1944 should not be imposed upon them for the reason that penalty under Rule 15(2) of Cenvat Credit Rules, 2004, read with Section 11AC of the Central Excise Act, 1944 can be levied only when the demand arises on account of fraud, suppression etc.; that the appellants were under a bonafide belief that they are eligible for credit of the impugned services; that from the above it is clear that there was no intention of fraud or suppression of facts with an intention to evade payment of duty; that therefore, penalty should not be imposed; that the Hon'ble Supreme Court in number of cases has held that the manufacturer should possess mala fide intention of non-payment of duty, where the proviso to section 11AC are to be invoked. The appellants relied upon the following case laws in support of their contention :-

(i) Cosmic Dye Chemical	1995 (75) ELT 721 (SC).
(ii) In CCE Vs. Chemphar Drug and Liniments	1989(40) ELT 276 (SC),
(iii) In Pushpam Pharmaceuticals company	1995 (78) ELT 401 (SC)
(iv) Tamil Nadu Housing Board	1994 (74) ELT 9 (SC)
(v) Continental Foundation Jt. Venture,	2007 (216) ELT 177 (SC)
(vi) Pahwa Chemicals Private Limited	2005 (189) E.L.T. 257 (S.C.)
(vii) Al-Falah (Exports),	2006 (198) ELT 343 (Tri. LB).

3.12.1 The appellants contended that the proviso to Section 73 of the Finance Act is in *pari materia* to Section 11A of the Central Excise Act, 1944 in light of the decision of the Hon'ble Tribunal in Mahakoshal Beverages Pvt. Ltd. v. Commissioner of Central Excise, Belgaum [2007 (6) STR 148], wherein it has inter alia been held that,

""The proviso to Section 73 of the Act was promulgated by Finance Act 2004 but adding proviso to Section 73 of the Central Excise Act, which is parimateria to Section 11A of Central Excise Act."

3.12.2 The appellants contended that it is evident from the above judgement that the penalty under Section 11AC cannot be imposed if the demand is for normal period; that show cause notice/s are issued within the normal period of limitation; that applying the ratio of the above judgement, it is submitted that penalty cannot be imposed under Section 11AC and penalty r should be set aside.

3.12.3 The appellants further contended that the issue pertains to Interpretation of the statute and it is well settled that when an issue relates to interpretation of statute, penalty should not be levied; that in the case of Uniflex Cables Ltd 2011 (271) ELT 161 (SC), the Hon'ble Supreme Court has held when an issue relates to interpretation of statute, penalty should not be imposed on the assessee; that the

appellants further relied on the following decisions :-

- Sonar Wires Pvt. Ltd. Vs. CCE 1996 (87) ELT 439 (T)
- Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T)
- Man Industries Corporation 1996 (88) ELT 178 (T)
- Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT 429
- Aquamall Water Solutions Ltd. 2003 (153) ELT 428

4. Personal hearing in the matter attended by 04.10.2017. S/Shri Karan Awtani, Chartered Accountant and Nilesh Chauhan, Excise In-charge of the appellants appeared and reiterated the submissions made in the grounds of appeals. They further stated that the issue involved has already been decided by the Hon'ble High Court of Bombay in the case of Endurance Technology Pvt. Ltd. reported in 2017 (52) S.T.R. 361 (Bom.), as well as by the Larger Bench of CESTAT in the case of Parry Engg. & Electronics P. Ltd. reported in 2015(40) S.T.R. 243 (Tri-LB). They also submitted that Hon'ble Supreme Courts judgment in the case of Maruti Suzuki Ltd. reported in 2009 (240) ELT 641 relied upon by the adjudicating authority is for the prior period and since then the law has changed and the said judgment has considered only inputs and not input services. They further submitted that the case of Gujarat Heavy Chemicals Ltd. *supra*, relied upon by the lower adjudicating authority is also not applicable as the facts are different in that case.

4.1 Personal hearing notice was also sent to the jurisdictional Assistant Commissioner however none appeared from the Department.

Findings :-

5. I have carefully gone through the facts of the case on record, the impugned orders, the grounds of appeals raised by the appellants in Appeal memorandum, as well submissions as made during course of personal hearing.

5.1 The issue to be decided in both the appeals is whether the impugned orders denying Cenvat credit of Service Tax paid on the services utilized for installation of Windmill at Jamnagar, 275 kms. away from the factory premises, is proper or otherwise.

6. I find that the adjudicating authority has denied Cenvat credit of Service Tax paid on services utilized for installation of Windmill, *inter-alia*, on the grounds :-

(i) that the electricity generated at the Wind mills was being supplied to GEB and in lieu of the electricity so generated the GEB was providing set-off to the appellants in their factory at Surendranagar and therefore it had no direct or indirect relation to manufacture of the final product at Surendranagar, as required under Rule 2(l) of the Cenvat Credit Rules, 2004;

(ii) the transaction of transferring of power to the GEB and sale of power of offsettting of power by the GEB with the appellants, are two independent transactions and therefore both are unrelated act to each other and therefore services availed at Jamnagar and credit of the service tax paid for service is not admissible at the manufactguring units situated at Surenderanagar, as there is no direct or indierect relation between such availment of service at Jamangar and the manufacture of final product at Surendranagar;

(iii) input services have been used towards erection and maintenance of Windmill which produce electricity, which is not excisable and is intangible and, therefore, the services have resulted into production of electricity being non-excisable goods, the availment and utilization of the said input service, is not admissible electricity being non-exisable as chain of Cenvat credit of the said input services is broken once non excisable goods emerged as per Rule 6 of the CCR, 2004; and

(iv) the appellant is not eligible for Cenvat Credit of input which resulted in transmission loss and therefore proportionate credit which is attributable to the electricity, not used / supplied in the factory premises would not be available and therefore credit of Rs. 9,550/- out of total Cenvat Credit of Rs. 99,546/- in respect of the Unit-II would not be available to the appellant.

7. I find that the appellants have availed Cenvat credit on Service Tax paid on installation and erectioning services utilized at the Windmill situated at distant place from the registered premises of the appellants. The contention of the Department is that the services being utilized at a distant place, hence Cenvat credit was not available to the appellants whereas, the appellants have pleaded that the definition of 'input service' covers such services. I would like to examine, definition of input service as defined under Rule 2(l) of the CCR, 2004 during the relevant period which is produced below for ready reference:-

(l) "input service" means any service,-

(i) used by a provider of output service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

7.1 It is a undisputed fact that the generation of electricity is taking place at Windmill at a place away from the factory and the electricity so generated, is wheeled to the electricity authorities, who in turn, supplied electricity at the manufacturing unit of the appellants, as per agreed formulae, and that electricity was utilized at the factory for manufacture of the final products of the appellant. I find that the matter is no more *res integra* in view of the decisions of the Hon'ble Bombay High Court in the case of Endurance Technology Pvt. Ltd reported at 2017 (52) S.T.R. 361 (Bom) and the Larger Bench of CESTAT in the case of Parry Engg. & Electronics P Ltd reported at 2015 (40) S.T.R. 243 (Tri.-LB). I also find that there is no restriction under Cenvat Credit Rules, 2004 that the services should be utilized within the factory premises only.

7.2 I find that the lower adjudicating authority has relied upon the decision in the case of Maruti Suzuki Ltd. Vs CCE, Delhi-III as reported at 2009 (240) E.L.T. 641 (S.C.). On study of this judgments, I find that the dispute in the Maruti case was relating to Cenvat credit on inputs used in generating electricity, whereas in the case on hand, dispute is relating to Cenvat credit on input services. Further, the part of electricity so generated was sold/wheeled out to joint ventures and vendors by the Maruti, whereas, in the instant case the wheeled energy is adjusted by PGVCL/GEB by giving set off in periodical bills of the appellants only. Also, the period covered in the above Maruti case is from January, 2003 to March, 2004, whereas in the present case, the period covered is from 2012 to 2016 and the definition of input service was amended in 2008, 2011 and 2012. Therefore, the facts of the case on hand and that of the Maruti Suzuki Ltd. *supra* are different and hence, the case-law relied upon by the lower adjudicating authority, is not correct at all.

7.3 The lower adjudicating authority has also relied upon the decision in the case of CCE Vs Gujarat Heavy Chemicals Ltd as reported at 2011 (22) S.T.R. 610 (Guj.). I find that in the case of Gujarat Heavy Chemicals Ltd, the Hon'ble High Court of Gujarat disallowed Cenvat credit on security services provided at residential quarters of their workers, which had no connection with the manufacture of their final products, whereas, in the case on hand until and unless the windmill is installed / maintained, the appellants cannot produce electricity and the electricity so generated from the said windmill has been used to manufacture the final products of the appellants. Since, electricity received by the appellants have been used in manufacture of the final products of the appellants there is direct nexus. Therefore, this case law relied upon by the lower adjudicating authority also is not correct and applicable in the instant case at all.

7.4 Regarding the issue of the disallowance of proportionate Cenvat Credit of Rs. 9,550/- on account of transmission loss etc as held at para 26 of the impugned order dated 21.11.2016, I find that denial of Cenvat Credit of Service Tax proportionately to the transmission loss occurred during wheeling of electricity has a basis. Cenvat Credit can be taken on inputs/input service only to the extent actually used / utlised in the manufacture of the final products. Therefore, I find that denial of proportionate credit equal to the transmission loss /wheeling of electricity is correct, legal and proper. However, this can't be basis to impose penalty under Section 11AC and hence penalty imposed under Section 11AC, read with Rule 15 of Cenvat Credit Rules, 2004 is set aside.

8. In light of the above discussion and findings, I hold that the appellants are eligible to take Cenvat Credit of Service Tax on installation of Windmill even if situated at a distant place from the factory premises. However, it can be allowed only to the extent actually used/utilized in the manufacture of the final products. Hence, denial of Cenvat Credit of Rs. 9,550/- on account of transmission loss etc. is justified.

९. अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the appellants stand disposed off in above terms.

9/10/2017

(कुमार संतोष)
आयुक्त (राजकोट)

By R.P.A.D.

To,

M/s. Mepro Pharmaceauticals, (Unit-I) 1003, GIDC, Opp. Ganesh Oil Mill, Wadhwan City – 363 035, Surendranagar	**M/s. Mepro Pharmaceauticals,** (Unit-II), Q Road, Phase IV. GIDC, Wadhwan City, Surendranagar.

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad.
2) The Commissioner, GST & Central Excise, Bhavnagar.
3) The Assistant Commissioner, GST & Central Excise, Rural Division, Bhavnagar.
4) The Jurisdictional Range Superintendent, GST &Central Excise, Surendranagar.
5) F. No. V2/07/BVR/2017
6) Guard File.