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::आयुक्त (अपील्स) 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

रजिस्टर्ड डाक ए. डी. द्वारा :-

| क | अपील / फाइल संख्या / Appeal / File No. | मूल आदेश नं / O.I.O. No. | दिनांक / Date |
|---|---|-----------------------------|------------------|
| | V2/94/BVR/2017 | 02/Demand/Supdt./16-17 | 08.02.2017 |
| | V2/95/BVR/2017 | 01/Demand/Supdt./16-17 | 08.02.2017 |
| | V2/105/BVR/2017 | 04/Demand/Supdt./16-17 | 28.02.2017 |

6822 जे 6823

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

BHV-EXCUS-000-APP-085-TO-87-2017-18

आदेश का दिनांक / 15.01.2018 जारी करने की तारीख / 17.01.2018
 Date of Order: Date of issue:

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग उपर आयुक्त/संयुक्त आयुक्त/ज्वायुक्त सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गान्धीधाम द्वारा उपरलिखित जारी मूल आदेश से सुक्ति /
 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 Appellant & Respondent :-

- 1.Madhu Silica P. Ltd. (DU-III), Plot No. 73/74 GIDC, Chitra,Bhavnagar
2. Madhu Silica P. Ltd. (DU-II), Plot No. 53,65 & 56/A-B, GIDC, Chitra,Bhavnagar
3. Madhu Silica P. Ltd. (DU-I), Plot No. 40, GIDC, Chitra,Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / अधिकरण 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 अपीलवीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत निर्धारित जगह की जा सकती है। /
 Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1994 / Under Section 86 of the Finance Act, 1994 an appeal lies to:

(i) विशेषकरण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलवीय 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 पैराग्राफ 1(a) में बतला गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलवीय न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठिंग, दक्षिणीय तल, बहामली भवन असावा अहमदाबाद, 380016 को की जानी चाहिए। /
 To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asawa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलवीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अन्तर्गत निर्धारित किए गये फॉर्म EA-3 की चार प्रतियाँ में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की रकम, प्रयाज की रकम और लगाया गया जुर्माना, चण 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 अग्रतन, संबंधित अपीलवीय 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 अग्रतन, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलवीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए अर्बेदन-पर 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) अपीलवीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (जहाँ से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की रकम, प्रयाज की रकम और लगाया गया जुर्माना, चण 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 अग्रतन, संबंधित अपीलवीय 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 अग्रतन, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलवीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए अर्बेदन-पर 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/-.

- (i) विल अपीलियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत दंड की गई अपील, सेवाका निव्वलाही, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न करे (उसमें से एक प्रति फंसावित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपआयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकार, 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 Form 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 सेवाकार अपीलीय प्राधिकरण (सेनबेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अपीलियम 1994 की धारा 35एफ के अंतर्गत, जो की विलीय अपीलियम, 1994 की धारा 83 के अंतर्गत सेवाकार को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्कसेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस क्रॉड रुपए में अंशिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकार के अंतर्गत 'मांग किए गए शुल्क' में निम्न शामिल है।
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनबेट जमा की ली गई गलत राशि
(iii) सेनबेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त कि इस धारा के प्राधान्य विलीय (सं. 2) अपीलियम 2014 के अंतर्गत से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचारणीय रकमन अर्जी एवं अपील को लागू नहीं होगी।
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 Central Credit taken;
(iii) amount payable under Rule 6 of the Central 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 प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अपीलियम, 1994 की धारा 35EE के प्रथम पारंतुक के अंतर्गत अवर रूचि, भारत सरकार, पुनरीक्षण आवेदन ईकाई, विल अंशालय, राजस्व विभाग, चौथी मंजिन, जीवन दीप भवन, समत 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 अंतर गृह के पारणन के दौरान या किसी अन्य कारखाने या फिर किसी एक अंतर गृह से दूसरे अंतर गृह पारणन के दौरान, या किसी अंतर गृह में या अंतरण में माल में प्रसंकरण के दौरान, किसी कारखाने या किसी अंतर 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 किया 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 इच्छी क्रेडिट इस अपीलियम एवं इसके विभिन्न प्राधान्यी के तहत मजबूती की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विल अपीलियम (सं. 2), 1994 की धारा 109 के द्वारा नियत की गई तरीक अथवा समावधि पर या बट 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) निव्वलाही, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के संघर्ष के 3 महीने 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 अपीलियम, 1994 की धारा 35-EE के तहत निर्धारित शुल्क की अदाकारी के साथ 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 OIG 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 अदाकारी 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, उपरोक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की निम्न चर्ची बचत से बचने के लिए क्वांटिटी 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 D.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) पदासशील न्यायालय शुल्क अपीलियम, 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 सेवाकार अपीलीय न्यायाधिकरण (कार्टे रिपि) निव्वलाही, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्भालित करने वाले नियमों की और 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 दायित करने से संबंधित प्रमाण, विस्तृत और नवीनतम प्राधान्यी के लिए, अपीलकर्ता 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 ::

Three units of M/s. Madhu Silica Pvt. Ltd., all located in GIDC, Chitra, Bhavnagar (*hereinafter referred to as "Appellants"*) filed three appeals, as detailed in Table below, against respectively Orders-in-Original (*hereinafter referred to as "the impugned orders"*) passed by Superintendent(Adjudication), Central Excise, City Division, Bhavnagar (*hereinafter referred to as "the lower adjudicating authority"*).

| Sr. No. | Appeal No. | Appellant | Impugned OIO & Date | Amount involved (Rs.) |
|---------|------------|--------------|--------------------------------------|-----------------------|
| 1. | 94/2017 | MSPL- DU-III | 02/Demand/Supdt/2016-17 – 08.02.2017 | 8,161/- |
| 2. | 95/2017 | MSPL- DU-II | 01/Demand/Supdt/2016-17 – 08.02.2017 | 16,897/- |
| 3. | 105/2017 | MSPL- DU-I | 04/Demand/Supdt/2016-17 – 28.02.2017 | 3,60,022/- |

2. The brief facts of the case are that the Appellants utilized credit of Education Cess and Secondary & Higher Secondary Education Cess (*hereinafter also referred to as "Cess"*) lying in balance as on 28.02.2015 in May and August, 2015 towards payment of basic excise duty in violation of the provisions of Rule 3(7)(b) of the Cenvat Credit Rules, 2004. Show Cause Notices were issued to Appellants demanding Central Excise duty under Rule 14 of the Cenvat Credit Rules, 2004 (*hereinafter referred to as "the Rules"*) read with Section 11A(4) of the Central Excise Act, 1944 (*hereinafter referred to as "the Act"*) and interest under Section 11AA of the Act and proposing penalty under Rule 15 of the Rules on the ground that they utilized balance of Cess wrongly towards payment of Central Excise duty. The lower adjudicating authority, vide the impugned orders, confirmed demand along with interest and also imposed penalty equal to wrongly utilized Cess under Rule 15(1) the Rules.

3. Being aggrieved with the impugned orders, the appellants filed the present appeals, *inter alia*, on the grounds that the impugned orders are against the government policy of credit of duty paid on the excisable goods by the manufacturer to avoid cascading effect; that the lower adjudicating authority has not considered CBEC Circular No. 334/5/2016-TRU dated 30.04.2015, which clarified that the balance of Cess as on 28.02.2015 could be utilized for payment of basic excise duty in specific situations and hence, balance of Cess merged with balance of Cenvat credit to pay basic excise duty is proper; that balance in their Cenvat credit account register remained much more than balance of Cess credit under dispute during the period under consideration and therefore, the question of recovery of interest does not arise; that the issue involved interpretation of law in light of CBEC Circular dated 30.04.2015, all manufacturers were in dilemma whether to utilize the balance of Cess credit lying as on

28.02.2015 and therefore, penalty on them is not imposable; that impugned order confirming demand, ordering interest and imposing penalty be set aside.

4. Personal hearing in the matter was attended by Shri R. R. Dave, Consultant wherein he, *inter alia*, reiterated the grounds of appeals. Personal hearing notices were also sent to the jurisdictional Commissionerate, however, no one appeared.

Findings:-

5. I have carefully gone through the impugned orders, appeal memoranda and written as well as oral submissions made by the Appellant. I find that the issues to be decided in the present appeals are (i) whether the impugned orders confirming demand of wrongly utilized balance of Cess lying unutilized as on 28.02.2015, for payment of basic Central excise duty, is correct or not, and (ii) whether imposing penalty under Rule 15 (1) of the Rules read with Section 11AC(1)(a) on the appellants is correct or not.

6. The impugned orders have held that the proviso to Rule 3(7)(b) of Cenvat Credit Rules, 2004 is clear wherein it has been specified that Education Cess and Secondary & Higher Secondary Education Cess can be utilized only for payment of Secondary & Higher Secondary Education Cess respectively; that any deviation would tantamount to violation of Central Excise Act and Rules thereunder. Since the fulcrum of the entire case rest upon Rule 3(7)(b) of Cenvat Credit Rules, 2004, as amended by Notification No. 13/2005-CE(NT) dated 01.03.2005 and Notification No. 27/2007-CE(NT) dated 12.05.2007, I would like to reproduce as it existed in 2015, which reads as under:-

"3(7)(b) : CENVAT credit in respect of -

(i)

(ii)

(iii) the education cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

(iiia) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(iv)

(v)

(vi) the education cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

(vii) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(vii)

shall be utilised towards payment of duty of excise or as the case may be, of service tax leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 or the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), or the education cess on excisable goods leviable under section 91 read with section 93 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007) or the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003), or the education cess on taxable services leviable under section 91 read with section 95 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007), or the additional duty of excise leviable under section 85 of the Finance Act, 2005 (18 of 2005) **respectively**, on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves, if such inputs are removed as such or after being partially processed or on any output service :

Provided that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services."

(Emphasis supplied)

6.1 I find that 1st and 2nd provisos to Rule 3(7)(b) of the Cenvat Credit Rules, 2004 as it existed in 2015 clearly provide that credit of Education Cess and credit of Secondary & Higher Secondary Education Cess on excisable goods or on taxable services can be utilized for payment of Education Cess and Secondary & Higher Secondary Education Cess only leviable on excisable goods or on taxable services. The two proviso to Rule 3(7)(b) of the Rules *ibid*, were not amended or rescinded by the Central Government and was in force in 2015. Therefore, the contention of the appellants that the balance of credit of Education Cess and credit of Secondary & Higher Secondary Education Cess, as on 28.02.2015, could have been utilized for payment of Central Excise duty is not correct. The contention of the appellants that once the levy of both Cess was withdrawn, the question of utilization and restrictions put thereupon had become redundant, is also not correct. It is well-settled principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner only and not in any other manner. The provisos of Rule 3(7)(b) of the Cenvat Credit Rules, 2004, are very clear and unambiguous and the words used there in are very categorical and there is no reason to read the said proviso in any other manner and/or to conclude that the appellants are entitled to utilize accumulated credit of Education Cess and Secondary & Higher Secondary Education Cess for payment of Central Excise duty after budgetary changes made in 2015. I, therefore, find that the contention of the appellants is devoid of merits.

6.2 The Central Government vide Notification No. 14/2015-CE and Notification No. 15/2015-2015-CE, both dated 01.03.2015 exempted all excisable goods from whole of the Education Cess and Secondary & Higher Secondary Education Cess leviable thereon and issued Notification No. 12/2015-CE (NT) dated 30.04.2015, which reads as under:-

2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, in sub-rule (7), in clause (b), after the second proviso, the following shall be substituted, namely :-

"Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act :

Provided also that the credit of balance fifty per cent. Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final product in the financial year 2014-15 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act :

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacturer of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act ."

(Emphasis supplied)

6.3 CBEC vide D.O. F.No. 334/5/2015-TRU dated 30.04.2015, clarified that :-

(1) Rule 3(7)(b) of the CCR, 2004 has been amended so as to allow utilisation of credit of Education Cess and Secondary & Higher Education Cess for payment of basic excise duty in the following situations :

a. Education Cess and Secondary & Higher Education Cess on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015;

b. Balance 50% Education Cess and Secondary & Higher Education Cess on capital goods **received in** the factory of manufacture of final product in the financial year 2014-15; and

c. Education Cess and Secondary & Higher Education Cess on input services **received by** the manufacturer of final product on or after the 1st day of March, 2015.

(Emphasis supplied)

6.3.1 In the above notification as well as CBEC clarification, nothing has been said about balance credit of Education Cess and Secondary and Higher Secondary Education Cess. In view of this, the appellants contention that accumulated Education Cess and Secondary and Higher Secondary Education Cess on inputs received in the factory even before 01.03.2015 can also be used for payment of basic Excise duty on clearances of excisable goods on or after 01.03.2015 is not correct at all.

6.4 The Hon'ble Apex Court has already settled legal position that the law must be interpreted the way it is stated and conditions must be followed in the case of DHARAMENDRA TEXTILE PROCESSORS reported as 2008 (231) ELT 3 (S.C.) as under

Interpretation of statutes - Principles therefor - Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous - A statute is an edict of the legislature - Language employed in statute is determinative factor of legislative intent.

6.5 The Hon'ble Bombay High Court has also decided that hardship can't brought to interpret the rules/law differently in the case of NICHOLAS PIRAMAL (INDIA) LTD. reported as 2009 (244) E.L.T. 321 (Bom.) as under :-

Interpretation of statutes - Hardship, relevance in construction of rule - Hardship cannot result in giving a go-by to language of the rule and making rule superfluous - Assessee to represent to rule making authority pointing out defects - Court in the guise of interpretation cannot take upon task legislative function - Difficulties in few cases cannot result in departing from normal rule of construction. - The rule must ordinarily be read in its literal sense unless it gives rise to an ambiguity or absurd results

Statutory provisions - Rules when not absurd or unjust - Not possible for Legislature to conceive every possible difficulty - Provision or rule can occasion hardship to a few, that cannot result in rule being considered as absurd or manifestly unjust. - Hardship or breaking down of the rule even if it happens in some cases by itself does not make the rule bad unless the rule itself cannot be made operative.

7. In view of the above, I find that the appellants could not have utilized accumulated credit of Education Cess and Secondary & Higher Secondary Education Cess, lying in balance as on 28.02.2015, towards payment of Central excise duty on excisable goods as per Rule 3(7)(b) of the Rules *ibid*. However, the appellants have debited Cenvat credit by amount of Genvat credit^{less} balance which was merged with Cenvat credit in May and August, 2015 in March, 2016 as per contention of the Department and hence, no Central Excise duty is further recoverable in any of three appeals.

8. As regards penalty under Rule 15(1) of the Rules for the wrong utilization of balance of credit of Cess as on 28.02.2015 towards payment of Basic excise duty, I find that the treatment to be given to these two Cess lying in balance as on 28.02.2015 was not clear to the assessee as well as to the Department. This bears testimony from the fact that Tariff Conference held on 28th & 29th October, 2015 organized by CBEC had to clarify the matter at Point B.21 as below :-

"B.21 - Hyderabad, Coimbatore, Vadodara, Vishakhapatnam, Delhi Zone - Cenvat Credit - Balance of Education Cess and Secondary & Higher Education Cess lying in the CENVAT Credit Account :

Issue :

Exemption from levy of Education Cess and Secondary & Higher Education Cess has been provided w.e.f. 1-3-2015 vide notification no. 14/2015-C.E. & 15/2015-C.E. both dated 1-3-2015, Sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004, specifies that CENVAT credit of specified duties shall be utilized for payment of those specified duties only. CENVAT Credit of Education Cess and Secondary & Higher Education Cess can be utilized only for payment of Education Cess and Secondary & Higher Education Cess, respectively. Consequent upon grant of exemption there is issue of utilization of the accumulated credit of the past. It is suggested that an amendment to sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004 may be made to allow the utilization of balance CENVAT Credit of Education Cess and Secondary & Higher Education Cess towards payment of either duty of excise or Service Tax.

Discussion & Decision :

The conference after discussion and briefing from the officers from the Board noted that it was Government's conscious policy decision to withdraw the Education Cess and Secondary & Higher Education Cess. It is a policy decision to not allow utilization of accumulated credit of education cess and secondary and higher education cess after these Cesses have been phased out. As these Cesses have been phased out and no new liability to pay such Cess arises, no vested right can be said to exist in relation to the accumulated credit of the past. The rule and notifications as they exist need to be followed and do not need any amendment."

[Emphasis supplied]

8.1 It is, therefore, evident that the manner as to how the balance of accumulated credit of Education Cess and Secondary & Higher Education Cess is to be utilized was not clear and it required clarification of the Board even on 29.10.2015 after Commissioner's Tariff Conference. In such a situation, no penalty is warranted to be imposed on the Appellants for confusion at their end in May, 2015 as has been held by the Hon'ble Punjab and Haryana High Court in the case of M/s. Jai Ganesh Processors reported as 2016 (343) E.L.T. 47 (P & H):

"8. In view of above, even though the Hon'ble Supreme Court held that the assessee would not get benefit of exemption if duty had not been paid on inputs, the assessee held a bona fide view about interpretation of the notification. Thus, it may not be a case of deliberate evasion of duty. While the Tribunal rightly rejected the claim of the assessee that exemption was applicable, the setting aside of penalty cannot be held to be illegal. Levy of penalty is not automatic merely because an exemption was wrongly availed, even when plea of the assessee is found to be erroneous. According to the assessee, even after the judgment of Dhiren Chemical Industries, it was

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under a bona fide wrong belief in the light of circulars in force which were finally withdrawn on 26-9-2002 that it could avail of exemption, though the same has been found to be unacceptable.

9. In the circumstances, view taken by the Tribunal that though interpretation of the assessee was erroneous, it did not lack bona fides and in such a situation, levy of penalty was not called for, is a possible view. The question raised cannot, thus, be held to be a substantial question of law."

[Emphasis supplied]

8.2 I also find that the appellants, as law abiding assesseees, have paid Central Excise duty by way of debit entries in Cenvat credit account in March, 2016 much before the issue of the impugned orders. Therefore, in view of facts discussed in Para 8 and 8.1, I hold that penalty under Rule 15(1) of the Rules is not imposable in this case.

8.3 The appellants have contended that they had maintained sufficient balance of Cenvat credit in their accounts and hence, no interest is payable under Rule 14 of the Rule and thus substantiated their claim by way of submission of Table as below from April, 2015 to March, 2017 :

MADHU SILICA PVT. LTD.
Manufacturers of Precipitated Silica

Regd. Office : Plot No. 147 G.I.D.C. Varad, Bhavnagar - 364 000 Gujarat State, India
Phone : Off. +91 - 278 - 2541755, 2541866, 2540800, 2939550, 2939560 • Fax : 91-278 - 2541288
silica@madhusilica.com • Website : www.madhusilica.com • CIN : U24299GJ1987PTC010073 • GST No. 24AAACM4381J1Z5

MADHU SILICA PVT. LTD. : Bhavnagar

Details of cenvat credit balance as on 28.02.2015 as per ER-1
(Amt. in Rs.)

| Sl. No. | DESCRIPTION | Close Balance |
|---------|----------------------|---------------|
| 1 | MSPL -DU-I (40 G/DC) | 1,12,80,190 |
| 2 | MSPL DU-II | 48,05,484 |
| 3 | MSPL DU-III | 1,42,684 |

DETAILS OF CLOSING BALANCE OF CENVAT CREDIT AS PER ER-1
(Amt. in Rs.)

| Month | MSPL -DU-I | MSPL -DU-II | MSPL -DU-III | TOTAL |
|--------|-------------|-------------|--------------|-------------|
| Apr-15 | 1,37,90,428 | 21,02,108 | 13,22,135 | 1,72,14,671 |
| May-15 | 1,39,53,163 | 22,384 | 5,21,141 | 1,44,96,708 |
| Jun-15 | 1,38,94,888 | 1,16,928 | 1,35,669 | 1,41,47,485 |
| Jul-15 | 1,36,04,731 | 2,10,073 | 84,607 | 1,38,99,411 |
| Aug-15 | 1,32,53,638 | 10,95,919 | 3,59,977 | 1,47,09,534 |
| Sep-15 | 1,33,45,760 | 11,08,193 | 5,14,864 | 1,49,68,817 |
| Oct-15 | 1,35,06,154 | 11,00,231 | 2,29,393 | 1,48,35,778 |
| Nov-15 | 1,41,31,145 | 14,08,110 | 5,68,526 | 1,61,07,781 |
| Dec-15 | 1,48,46,135 | 37,16,479 | 4,68,865 | 1,90,31,479 |
| Jan-16 | 1,57,80,067 | 5,07,806 | 6,49,411 | 1,69,37,284 |
| Feb-16 | 1,70,53,533 | 4,47,293 | 3,73,405 | 1,78,74,231 |
| Mar-16 | 1,91,32,194 | 9,71,443 | 4,29,369 | 2,05,33,006 |

For, Madhu Silica Pvt. Ltd.

D R. es
Director

DARSHAK R. SHAH

8.4 The Hon'ble CESTAT in the case of M/s. Toyota Kirloskar Motors P. Ltd. reported as 2017 (47) S.T.R. 106 (Tri. - Bang.) has held that interest is not payable, if disputed credit has not been utilized. Hence, I hold that interest is not payable by the appellants as they have not utilized Cenvat credit as is evident from their account and Rule 14(1)(ii) of the Rules, which reads as under :-

"Rule 14. Recovery of Cenvat Credit wrongly taken or erroneously refunded.—

(1) (i)

(ii) *Where the CENVAT credit has been taken **and** utilized wrongly or has been erroneously refund, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provision of Section 11A and 11AA of the Excise Act, or Sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting recoveries."*

9. In view of above facts, the impugned orders are set aside and appeals are allowed.

9.1 अपीलकर्ता द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

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

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

| | |
|---|--|
| (i) M/s. Madhu Silica Pvt. Ltd., DU-III, Plot No. 73/74, GIDC, Chitra, Bhavnagar – 364 060. | मेस्सेर्स मधु सिलिका प्राइवेट लिमिटेड, DU-IV, प्लॉट नो. 147, GIDC, Chitra, भावनगर - ३६४ ०६०. |
| (ii) M/s. Madhu Silica Pvt. Ltd., DU-II, Plot No. 53,55 & 56/A-B, GIDC, Chitra, , Bhavnagar – 364 060. | मेस्सेर्स मधु सिलिका प्राइवेट लिमिटेड, DU-II, प्लॉट नो. 53,55 & 56/A-B, भावनगर - ३६४ ०६०. |
| (iii) M/s. Madhu Silica Pvt. Ltd., DU-I, Plot No. 40, GIDC, Chitra, Bhavnagar – 364 060. | मेस्सेर्स मधु सिलिका प्राइवेट लिमिटेड, प्लॉट नो. 40, GIDC, Chitra, भावनगर - ३६४ ०६०. |