::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 सं / O.I.O. No.	दिनांक / Date
	V2/74/BVR/2017	**11/CX-I Ahmd/JC/KP/2017**	**31.01.2017**

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

BHV-EXCUS-000-APP-091-2017-18

आदेश का दिनांक / Date of Order:	**11.01.2018**	जारी करने की तारीख / Date of issue:	**23.01.2018**

Passed by **Shri Suresh Nandanwar, Commissioner, Central Goods Service Tax (Audit), Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुरेश नंदनवार , आयुक्त , केंद्रीय वस्तु एवं सेवा कर (लेखा परीक्षा), अहमदाबाद को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Suresh Nandanwar, Commissioner ,Central Goods Service Tax (Audit), Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

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 Saurastra Cement Limited, Near Railway Station, P.O. Ranavav - 360 560

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 असावा 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

140

(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 सार्वजिनक 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की 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 सार्वजिनक 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/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

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

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं 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 छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न॰ 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा सेमायाविधि 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 रूपये या उससे कम है तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण 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.

ORDER-IN-APPEAL

M/s Saurashtra Cements Limited, Near Railway Station,ranavav.Dist.Porbandar-360560 (henceforth, "*appellant*") has filed the present appeal before the Commissioner (Appeals) Rajkot against the Order-in-Original No.11/CX-I Ahmd/JC/KP/2017 dated 31.01.2017 (henceforth, "*impugned order*") passed by the Joint Commissioner of Central Excise, Ahmedabad-I (henceforth, "*adjudicating authority*").

2. Further the Board Vide Order No. 05/2017-Service Tax issued vide F.No. 137/13/2017-ST dated 16.11.2017 by the Under Secretary (Service Tax), CBEC, New Delhi has transferred the said Appeal Petition to the Commissioner, Central Tax Audit, Ahmedabad for passing Order-in-Appeal.

3. Briefly stated, the facts of the case are that a show cause notice, based on departmental audit, was issued to the appellant on 18.09.2014 for recovery of Cenvat credit of Rs.12,51,450/- taken by the appellant during the period 2009-10 to 2013-14 of service tax paid on "Dredging Service". The Cenvat credit was sought to be denied on the ground that the CENVAT Credit has been taken and utilized in respect of Input Service viz. Dredging Service which does not qualify as Input Service, defined under Rule 2(l) of Cenvat Credit Rules,2004 as the dredging service has not been used either directly or indirectly in production of cement or for providing of any output service. The adjudicating authority, under the impugned order, disallowed the Cenvat credit of Rs.12,51,740/- and ordered to be recovered along with interest. Penalty of Rs.6,25,725/-was also imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

4. The appellant has filed the appeal mainly on the ground that the impugned input service has direct/indirect nexus with procurement of inputs and inward transportation of inputs or capital goods which is in relation with manufacture of final products (which are dutiable) and outward transportation up to the place of removal and that this is also not excluded under the definition of input service under CCR (Refer Rule 2(l) of CCR. They have also contended that the dredging service to maintain the normal functio of jetty is essential and it is in relatio

procurement of inputs and clearance of finished goods up to the place of removal .The appellant has cited number of decisions which were relied upon in their present appeal. The appellant has also contested the charge of suppression of facts and imposition of penalty.

5. A personal hearing was held on 26.12.2017, wherein Shri Saurabh Dixit Advocate represented the appellant and reiterated the grounds of appeal and also filed additional submissions. In the additional submissions they have submitted that the dredging services are quite similar to making proper approach road to the factory location so that the incoming material can be easily transported for the purpose of manufacturing operations and hence the Cenvat credit thereon cannot be denied to them. They have also cited few case laws in support of their contention.

6. I have carefully gone through the appeal papers. Considering that appeal against impugned order passed on 31.01.2017 has been filed on 30.03.2017, I find that the appeal has been filed within the time limit of sixty days prescribed under Section 35 of the Central Excise Act, 1944.

7. The issue involved is of admissibility of Cenvat credit of Service tax paid on "Dredging Service" which was availed by the appellant at their jetty during the period 2009-2010 to 2013-14. Before I proceed to examine the merits in the appeal, I refer to the legal provisions relevant in the case. First of all I examine the definition of input service prevalent during the period under consideration. As per Rule2 (l) of Cenvat Credit Rules, 2004:

"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 for repairs of a factory or premises, advertisement, or sales promotion, market research, storage upto the place of removal, procurement of inputs, activity relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking ,credit rating,

share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."

8. I find that the appellant is engaged in manufacturing activity of cement and Cement Clinker falling under Chapter 25 of First schedule of Central Excise Tariff Act 1985 and availing Cenvat Credit and utilizing the same for payment of Central Excise duty on clearance above final products. The appellant is taking Cenvat credit of services of Dredging service. As per Section 65(36a) of Finance Act,1994, the *"Dredging Service" includes removal of material including silt, sediments, rocks, sand, refuse, debris, plant or animal matter in any excavating, cleaning, deepening, widening, lengthening, either permanently or temporarily, of any river, port, harbor, backwater or estuary."*

9. From the above definition, I find that the definition of Dredging service is inclusive one and it describes the service. Normally, the Dredging service is availed by the ports providing various port services to their clients. This is required for the ships/vessels arriving at the port for loading /unloading of cargo. Further I find that "Input Service" is defined at Rule 2(l) of the Cenvat Credit Rules, 2004, as amended reproduced hereinbefore. The definition is explicit to the effect that those services which are used *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 are the input services.* The inclusive part of the definition also prescribes various services which are in relation to various activities cited therein.

10. At the outset, therefore I proceed to examine whether the service of dredging can be interpreted to be used *directly or indirectly, in or in relation to the manufacture of final products.* Undisputedly the appellant manufacture cement. In support of their contention the appellant emphasis that the service of dredging is used by them so that the ships can properly anchor at the jetty for the purpose of landing of coal which is a major raw material (fuel) for them.

11. At Para 4 of the grounds of appeal it is also contended that the impugned service has direct/indirect nexus with procurement of inputs and inward transportation of inputs or capital goods and outward transportation upto the place of removal.

135

12. At Para 8 it is further emphasized that the jetty is also used for exportation of their final product, and therefore it appears that in this context they are claiming the service to be used for outward transportation up to the place of removal. However in a catena of cases it has been held that in case of exports the place of removal is port and not on board the ship. It would be fictional to say that the service of dredging is used for such outward transportation of final products.

13. The appellant's contention is too farfetched to say the least. Coal being their input/fuel, the duty paid thereon is entitled to Cenvat credit. The tax paid on the service of transportation availed for transportation of coal from overseas to port and from port to the factory/power plant, is also available as Cenvat credit. However to say that the service of dredging, used even on their own jetty, so that the ships importing/exporting coal/cement can maneuver properly, by no stretch imagination can be termed as the activity used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal. If such a proposition is accepted I wander what could not be termed as "Input Service"?

14. My assertion as above is also supported by the following case laws:

(i) WELSPUN MAXSTEEL LTD Versus COMMISSIONER OF CENTRAL EXCISE 2014 (7) TMI 28 - CESTAT MUMBAI wherein it was held that:-

"Dredging is undertaken in the navigation channel which leads to the jetty of the appellant. The channel is not the private property of the appellant but belongs to the Maharashtra Maritime Board and the channel is also used not only by the appellant but also by several others and therefore, it cannot be said that the benefit of dredging of the channel accrues only to the appellant and not to others and such dredging is entirely in relation to the manufacturing activity undertaken by the appellant. Various case laws stated by the appellant do not help the appellant's case for the reason that the facts involved therein were different and distinguishable. In an identical matter relating to dredging services in respect of Sanghi Industries Ltd., Vs. CCE, Rajkot - [2008 (8) TMI 277 - CESTAT AHMEDABAD], a co-ordinate bench at Ahmedabad took the view that the issue is contentious and accordingly, pre-deposit of about Rs.10 lakhs

against the demand of Rs.55 lakhs was ordered. Therefore, it cannot be said that the issue is settled in favour of the appellant and against the Revenue. However, there is a merit in the contention of the appellant that they had disclosed the fact of availing Cenvat Credit on dredging services as early as in October 2006 and therefore, invoking of extended period of time is not justified - stay granted partly."

(ii) In the case of Sanghi Industries Ltd referred above, it was held that:-

" Credit of service tax on dredging service at appellant's own port denied on the ground that dredging in port not relatable to manufacture and clearance of final product of clinker-Issue contentious-Pre-deposit of Rs. 10 Lakhs as offered by appellant, directed-Pre-deposit of penalty and balance amount of Service tax waived-Section 35F of Central Excise Act,1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994 . Stay partly granted."

15. At Para 18, 19, 20 & 26 of the grounds they have contended that the Joint Commissioner has not dealt with the following case laws cited by them. I propose to deal with them as under:

(i) Shree Cement Limited vs. CCE Jaipur- 2013 (293) ELT 70 (Tri. Del).

I find that in the cited case the Cenvat credit on Sweet on Paste (SOP) used during the manufacturing was allowed, though it was not expedient to use SOP in the manufacturing of Cement. It was held that SOP has to be treated as input and it was eligible for Cenvat credit. In the case on hand I find that the issue is not whether the use of the service of dredging expedient or not but whether the said service can be an input service for them in the facts of the case. As discussed supra the impugned service, by no stretch of imagination can be said to be the activity used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal and therefore, it does not fall within the purview of the definition of "Input Service".

(ii) Rajratan Global Wires Ltd. versus Commissioner of C. Ex., Indore - 2012 (26) S.T.R. 117 (Tri. - Del.):

In the cited case the Hon'ble tribunal had held that though the windmill for generation of electricity was located at a distance from the factory it will be treated as captive plant and therefore Cenvat credit on services of installation, etc. related thereto would be entitled. However, as discussed supra in the case on hand, the issue is quiet at variance and therefore the cited decision is of no avail to the appellant.

(iii) ADITYA CEMENT versus UNION OF INDIA - 2008 (221) E.L.T. 362 (Raj.).

The cited decision pertains to the definition of Capital Goods as defined at Rule 57Q of the erstwhile Modvat Rules, wherein the Modvat credit was allowed on material used for laying railway track, and therefore the facts of the present case are nowhere near the cited decision.

16. The appellant has further relied upon the following case laws in their additional submissions during the course of hearing:-

(i) RSWM Ltd (Fabric Division) V/s. Commissioner of Central Excise, Jaipur –II—2015(37) STR1074 (Tri.-Del).

(ii) Deepak Fertilizers & Petrochemicals Corpn. Ltd V/s. C.C. Ex. Belapur—2013(32) STR 532 (Bom).

(iv) Parry Engg & Electronics P. Ltd. V/s. CCE & ST Ahmedabad-I,II & III— 2015(40)STR 243(Tri.LB).

17. In the case law cited at Sr. No. (i) above, it was held that

"Services used in relation to procurement of inputs' and 'activities relating to business" –Construction of railway siding for transportation of coal to be used in captive power plant in factory only, facts not disputed-Transportation of coal is necessary for generation of electricity in captive powerplant, hence connected with business of manufacturing of final product-Service to be treated as used in or in relation to procurement of input-Denial of credit not sustainable."

However in the present case, the services of dredging is undertaken in the navigation channel (water way) which leads to the port/jetty. and not related to procurement of input. The appellant can claim input svice of freight incurred for transportation /import of coal which is their input but any expenses

related to ship or its maintenance or its smooth maneuverability is outside the scope of input service. Further the period in dispute in the above case at Sr. No. (i) was June-2008 to March-2010 whereas in the instant case the appellant had availed Cenvat credit of dredging service in F.Y 2013-14 only. However, it is a fact that vide Notification No.3/2001-CE(NT) dated 1.3.2011 (effective from 1.4.2011), the definition of 'input service' provided under rule 2(l) of the Cenvat Rules was amended, which resulted in the deletion of the omnibus phrase "activities relating to business" from the inclusive part of the definition. Thus the period during which Cenvat was availed was as per the amended definition of "input service" w.e.f. 01.04.2011. Hence, I find that dredging service cannot be classified as input service in light of the discussions in the foregoing and more so after the definition was amended w.e.f. 01.04.2011.

In the case law cited at Sr. No. (ii) above, it was held that,

"Input service utilized in relation to installation of ammonia storage tanks situated outside factory of production. During manufacture, dutiable final products, storage and use of ammonia was intrinsic part: Input services were used by assessee whether directly or indirectly, in or in relation to manufacture of final products- Hence, these were input services on which appellant was entitled to take credit of service paid on them."

In the above cited case, the input service is related to the installation of tanks for storing of ammonia which is one of their inputs and is therefore related to manufacturing of final product. However in the present case, the services used are related to dredging in the navigation of channel (water way) and not related to manufacturing of final product. Hence the said citation is not relevant in the case of appellant.

In the case law at Sr. No. (iii) above, it was held that,

" Input Service –Erection, commissioning or Installation service and Management, Maintenance or Repair service-windmills for generation of electricity away from factory premises-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)STR-320(Tribunal), Cenvat Credit available for aforesaid services used in windmills away from factory-Subsequent amendment in definition not relevant."

In the cited case also the Hon'ble tribunal had held that though the windmill for generation of electricity was located at a distance from the factory it will

be treated as captive plant and therefore Cenvat credit on services of installation, etc. related thereto would be entitled. However as discussed supra in the case on hand the issue is quiet at variance and therefore the cited decision is of no avail to the appellant.

In the above case, Hon'ble Tribunal has relied on the decision of Hon'ble Bombay High Court in the case of M/s. Endurance Technology Pvt Ltd -2015-TIOL-1371-HC-MUM-ST wherein Hon'ble High Court has held as Under :-

> *"As per Rules2(B)(k)(l)(m),3 & 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 & 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.*
>
> *Despite the settled position in view of the High Court decisions, contention of the revenue that the judgment is being challenged before Supreme Court does not really help in deciding the appeals-Appeals (of revenue) dismissed"*

On the basis of above decision of Hon'ble High Court of Bombay, Hon'ble Tribunal had decided the matter in favour of then assessee.

From the above referred case, it is also observed that the department had made submission before Hon'ble High Court that in a similar matter in case of Commissioner of Central Excise, Nagpur Versus Ultratech Cement Ltd.2010-TIOL-745-HC-MUM-ST department has challenged the order of High Court of Bombay (Nagpur Bench) in case of M/s. Ultratech Cement Ltd. before Hon'ble Supreme Court which has been admitted by the Hon'ble Supreme Court. I find that the said appeal filed by the department is still pending with the Apex Court. Since the matter has not attained finality, the above case of Perry Engg. & Electronics P. Ltd. cannot be followed in this case.

18. From the above, I find that the dredging service cannot be considered to be an input service as the same is neither used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus

with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal.

19. As such, I find no justifiable reason to allow the credit in respect of the dredging service and I uphold the confirmation of denial of Cenvat credit and demand of interest thereon.

20. In view of preceding discussion, the Cenvat credit of Rs 12,51,450/- availed on Dredging Service, therefore, is liable to be denied. Therefore, on merits, I uphold the impugned order for recovery of the said amount, along with interest.

21. As far as invocation of extended period of demand is concerned, I find that despite there being clear provision in the Cenvat Rules the appellant had taken the Cenvat credit on ineligible service and the fact of wrong taking Cenvat credit on ineligible service was revealed only during the audit conducted by the department. Even though the service of dredging by no means could have been classified as input service , the appellant willfully availed the said ineligible credit which was ultimately utilized for payment of duty on their manufactured goods and thereby evading duty. This act of deliberate defiance of law has to be reprimanded. I, therefore find that extended period has been correctly invoked for demand of duty. The case laws cited by the noticee are not relevant in the instant case as the noticee had failed to fulfill their legal obligation by availing ineligible Cenvat credit.

22. The Hon'ble Supreme Court in the case of Commissioner of C. Ex., Aurangabad Versus Bajaj Auto Ltd - 2010 (260) E.L.T. 17 (S.C.) – has held:

> ***"12.*** *Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section."*

23. In this case also I find that the department has been able to bring on record that the noticee had wrongly availed the Cenvat credit and therefore the department alleged that by suppressing the fact of such wrong availment the appellant had evaded the payment of duty by utilizing the said credit for payment of duty. The noticee failed to offer any plausible explanation except to site some judgments, which as discussed supra I have found to be distinguishable in the facts of the present case. Therefore, I find that the extended period for demand of Central Excise duty not paid, is rightly invoked in this case.

24. I find that the provisions of Cenvat Credit Rules are unequivocal. The provisions are explicit to the effect that no Cenvat credit of tax paid on services which are not input services, can be availed . The appellant, who was well aware of the fact, ought to have not taken the credit. There cannot be any doubt on this, and therefore it is evident that they knowingly availed ineligible credit and also suppressed the facts of such wrong availment in sheer defiance of law by resorting to fraud.

25. They are well-established company and dealing with the Central Excise Law and the Rules framed there under, over the years, could not have claimed a bonafide belief that such credit was entailed to them. Therefore their intent to misuse the provisions of Central Excise Act & Rules and thereby evade payment of duty is established beyond doubt. Moreover in the present regime of liberalization, self-assessment, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such wrong doings only during audit or preventive/other checks. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in case of Lalit Enterprises vs. CST Chennai, it is held that extended period is evocable when department came to know of service charges received by appellant on verification of his accounts.

26. It is established principle of law that fraud and justice do not dwell together. An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence. It was so held in the case of K.I. International Ltd. Versus Commissioner of Custom, Chennai - 2012 (2) ECS (126) (Tri-Chen).

27. It has been held by Apex Court in case of Commissioner of Customs, Kandla vs. Essar Oil Ltd.-2004 (172) E.L.T. 433 (S.C.) that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Changalvaraya Naidu V. Jagannath [1994(1) SCC 1]).

28. In the case of Shilpa Printing Press *Versus* **Commissioner of Central Excise, Thane-ii – 2013(297) ELT 417 (Tri. Mumbai) it was held thus:**

> *"Demand - Limitation - Bona fide belief - Assessee consciously deciding to exclude product from liability to payment of duty - HELD: In such case, question of bona fide belief cannot arise - Bona fide belief can arise in case assessee had doubt about their dutiability and thereafter on its efforts to ascertain legal position, was armed with necessary material to contend that there was no dutiability in respect of such product - Section 11A of Central Excise Act, 1944."*

29. In view of the above findings and the judgments cited I have no hesitation in holding that the noticee resorted to fraud, by suppressing the value of the service provided and thereby evading tax and therefore I hold that this is a fit case where the proviso to Section 73(1) of the Finance Act, 1994 can be invoked for confirming the demand of tax, raised by the impugned show cause notices. For the same reasons invocation of penalty under Rule 15 of the Cenvat Rules read with section 11AC is rightly justified. My views are further fortified by the order in the case Samsung India Electronics Ltd. - 2014 (307) ELT 160 (tri. Del) –

30. In view of the above I also find that the decisions cited by the assessee in support of their contention that extended period cannot be invoked are distinguished.

31. Accordingly the charge of suppression & mala fide with intent to evade duty is convincingly established against the appellant and I am also unable to accept any claim of *bona fide*.

In the case of Commissioner of Central Excise, Raipur *Versus* **Raj Wines – 2012 (28) STR 46 (Tri. Delhi) it was held:**

"15. *In the matter of involving Section 80 of the Finance Act, 1994, we are not in agreement with the finding of the Commissioner (Appeals). A person giving his own interpretation of notification and then arguing that he was under the bona fide belief cannot get the protection of such Section 80."*

32. In view of forgoing, the appeal is rejected on the grounds of merits as well as on the issue of invocation of extended period.

33. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.

11.1.18

(सुरेश नंदनवार)
आयुक्त
केंद्रीय कर लेखा परीक्षा
अहमदाबाद

By R.P.A.D.

To,
M/s Saurashtra Cements Limited,
Near Railway Station, Ranavav,
Dist.Porbandar-360560

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Bhavnagar.
3. The Additional Commissioner, Central Tax (System), Bhavnagar.
4. The Asstt./Deputy Commissioner, Central Tax, Division-Junagadh.
5. Guard File.

ORDER-IN-APPEAL

M/s Saurashtra Cements Limited, Near Railway Station,ranavav.Dist.Porbandar-360560 (henceforth, "*appellant*") has filed the present appeal before the Commissioner (Appeals) Rajkot against the Order-in-Original No.11/CX-I Ahmd/JC/KP/2017 dated 31.01.2017 (henceforth, "*impugned order*") passed by the Joint Commissioner of Central Excise, Ahmedabad-I (henceforth, "*adjudicating authority*").

2. Further the Chief Commissioner vide .....

3. Briefly stated, the facts of the case are that a show cause notice, based on departmental audit, was issued to the appellant on 18.09.2014 for recovery of Cenvat credit of Rs.12,51,450/- taken by the appellant during the period 2009-10 to 2013-14 of service tax paid on "Dredging Service". The Cenvat credit was sought to be denied on the ground that the CENVAT Credit has been taken and utilized in respect of Input Service viz. Dredging Service which does not qualify as Input Service, defined under Rule 2(l) of Cenvat Credit Rules,2004 as the dredging service has not been used either directly or indirectly in production of cement or for providing of any output service. The adjudicating authority, under the impugned order, disallowed the Cenvat credit of Rs.12,51,740/- and ordered to be recovered along with interest. Penalty of Rs.6,25,725/-was also imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

4. The appellant has filed the appeal mainly on the ground that the impugned input service has direct/indirect nexus with procurement of inputs and inward transportation of inputs or capital goods which is in relation with manufacture of final products (which are dutiable) and outward transportation up to the place of removal and that this is also not excluded under the definition of input service under CCR (Refer Rule 2(l) of CCR. They have also contended that the dredging service to maintain the normal functioning of jetty is essential and it is in relation to procurement of inputs and clearance of finished goods up to the place of removal .The appellant has cited number of decisions which were relied upon in their present appeal. The appellant has also contested the charge of suppression of facts and imposition of penalty.

5. A personal hearing was held on 26.12.2017, wherein Shri Saurabh Dixit Advocate represented the appellant and reiterated the grounds of appeal and also filed additional submissions. In the additional submissions they have submitted that the dredging services are quite similar to making proper approach road to the factory location so that the incoming material can be easily transported for the purpose of manufacturing operations and hence the

125

ANNEXURE-I

List of relied upon documents to the Show Cause Notice bearing F.No.ST/15-32/C-IV/AP-XXIV/FAR-275/RP.06/15-16 dated 15.05.2017 issued by the Joint Commissioner Audit-II, Ahmedabad to M/s. Adani Enterprises Limited, Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad.

Sr. No.	List of relied upon documents	Remarks
1.	FAR No.275/14-15 dated 08.04.2015 and addendum dated 02.07.2015 to FAR 275/14-15 dated 08.04.2015	Available with the assessee
2.	Work Order No.1213504810 dated 09.06.2012 of M/s Tamil Nadu Newsprint & Papers Ltd., Kagithapuram (Tamilnadu).	Available with the assessee
3.	submission vide letter dated 22.06.2014 by the assessee	Available with the assessee
4.	Annexure-A along with copies of invoices issued.	Available with the assessee
5.	ST 3 returns filed by the assessee for the year 2012-13	Available with the assessee

Cenvat credit thereon cannot be denied to them. They have also cited few case laws in support of their contention.

6. I have carefully gone through the appeal papers. Considering that appeal against impugned order passed on 31.01.2017 has been filed on 30.03.2017, I find that the appeal has been filed within the time limit of sixty days prescribed under Section 35 of the Central Excise Act, 1944.

7. The issue involved is of admissibility of Cenvat credit of Service tax paid on "Dredging Service" which was availed by the appellant at their jetty during the period 2009-2010 to 2013-14. Before I proceed to examine the merits in the appeal, I refer to the legal provisions relevant in the case. First of all I examine the definition of input service prevalent during the period under consideration. As per Rule2 (l) of Cenvat Credit Rules, 2004:

> *"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 for repairs of a factory or premises, advertisement, or sales promotion, market research, storage upto the place of removal, procurement of inputs, activity relating to business, such as accounting, auditing ,financing, recruitment and quality control, coaching and training, computer networking ,credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."*

8. I find that the appellant is engaged in manufacturing activity of cement and Cement Clinker falling under Chapter 25 of First schedule of Central Excise Tariff Act 1985 and availing Cenvat Credit and utilizing the same for payment of Central Excise duty on clearance above final products. The appellant is taking Cenvat credit of services of Dredging service. As per Section 65(36a) of Finance Act,1994, the *"Dredging Service" includes removal of material including silt, sediments, rocks, sand, refuse, debris, plant or animal matter in any excavating, cleaning, deepening, widening, lengthening, either permanently or temporarily, of any river, port, harbor, backwater or estuary."*

9. From the above definition, I find that the definition of Dredging service is inclusive one and it describes the service. Normally, the Dredging service is availed by the ports providing various port services to their clients. This is required for the ships/vessels arriving

(c) service portion in execution of a works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory ***to a business entity registered as a body corporate, located in the taxable territory, both the service provider and the service recipient to the extent notified under sub-section (2) of section 68 of the Act, for each respectively.***

2.4 The extract of sub section (2) of Section 68 of the Finance Act reads as follows;

[68. Payment of service tax. – (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 12[66B] in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable service as may be notified] by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.] ***"Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.";***

2.5 The extent of service tax payable by such person and the remaining part of the service tax payable by the service provider as provided in the sub Section (2) of Section 68 of the Act ibid has been notified vide notification No. 30/2012 dated 20/06/2012 (made effective from 01.07.2012). The relevant extract of the said Notification is as under;

Notification No. 30/2012-Service Tax

New Delhi, the 20th June, 2012

GSR.....(E).-In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 15/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 213(E), dated the 17th March, 2012, and (ii) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 36/2004-Service Tax, dated the 31st December, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 849 (E), dated the 31st December, 2004, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

(II) *The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely:-*

at the port for loading /unloading of cargo. Further I find that "Input Service" is defined at Rule 2(l) of the Cenvat Credit Rules, 2004, as amended reproduced hereinbefore. The definition is explicit to the effect that those services which are used *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 are the input services.* The inclusive part of the definition also prescribes various services which are in relation to various activities cited therein.

10. At the outset, therefore I proceed to examine whether the service of dredging can be interpreted to be used *directly or indirectly, in or in relation to the manufacture of final products.* Undisputedly the appellant manufacture cement. In support of their contention the appellant emphasis that the service of dredging is used by them so that the ships can properly anchor at the jetty for the purpose of landing of coal which is a major raw material (fuel) for them.

11. At Para 4 of the grounds of appeal it is also contended that the impugned service has direct/indirect nexus with procurement of inputs and inward transportation of inputs or capital goods and outward transportation upto the place of removal.

12. At Para 8 it is further emphasized that the jetty is also used for exportation of their final product, and therefore it appears that in this context they are claiming the service to be used for outward transportation up to the place of removal. However in a catena of cases it has been held that in case of exports the place of removal is port and not on board the ship. It would be fictional to say that the service of dredging is used for such outward transportation of final products.

13. The appellant's contention is too farfetched to say the least. Coal being their input/fuel, the duty paid thereon is entitled to Cenvat credit. The tax paid on the service of transportation availed for transportation of coal from overseas to port and from port to the factory/power plant, is also available as Cenvat credit. However to say that the service of dredging, used even on their own jetty, so that the ships importing/exporting coal/cement can maneuver properly, by no stretch imagination can be termed as the activity used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal. If such a proposition is accepted I wander what could not be termed as "Input Service"?

14. My assertion as above is also supported by the following case laws:

OFFICE OF THE COMMISSIONER OF AUDIT-II
CENTRAL EXCISE & SERVICE TAX, AHMEDABAD
3RD FLOOR, G N F C TOWER, BODAKDEV, S.G.HIGHWAY,
AHMEDABAD-380054

SHOW CAUSE NOTICE

M/s. M & Co Advisors & Consultant Pvt. Ltd., 2nd Floor, B- Wing, Premium House, Near Gandhigram Railways Station, Navrangpura, Ahmedabad-380009 *[hereinafter referred to as the "assessee"]* are registered under the category of "Business Auxiliary services & Manpower Supply agency Service(with the Service Tax Department) and holding Service Tax Registration No.- AAFCM3793EST001 dated 15.02.2008.

2. During the course of audit of the records of the said assessee for the period 2009-10 to 2013-14 and as detailed at Para 2 of the FAR No. 281/2014-15 dated 22.04.2015, it was observed that:

2.1 The assessee is engaged in providing "Manpower supply agency Service" to various organizations, companies, etc. The said assessee hires the manpower from one M/s. Data line Computer Services (Proprietary firm holding Service Tax Reg.No. AAQPP3523MST001) herein after referred to as the said "service provider" and further supply them to various organizations, companies, etc. The said service provider charges Service Tax @12.36% (including Ed. Cess & SHEC) on the entire value of invoices raised to the said assessee and pays 100% service tax accordingly.

2.2 Whereas in respect of "Manpower supply agency Service", if the services are provided by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory, **to a business entity registered as a body corporate,** located in the taxable territory, **then** 25% of the service tax is payable by the person providing service and 75% of the service tax is to be paid by the person receiving the service. The relevant provisions are mentioned hereinafter.

2.3 Whereas, as per Rule 2(1)(d)(i)(F)(b) of Service Tax Rules, 1994,

> *Rule 2. Definitions – (1) In these rules, unless the context otherwise requires,-*
> *1 [(d) "person liable for paying service tax",-*
> *(i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means*
> ***(F) In relation to services provided or agreed to be provided by way of:-***
> *(a) renting of a motor vehicle designed to carry passengers, to any person who is not engaged in a similar business; or*
> ***(b) supply of manpower for any purpose; or 3 [security services];***

(i) WELSPUN MAXSTEEL LTD Versus COMMISSIONER OF CENTRAL EXCISE 2014 (7) TMI 28 - CESTAT MUMBAI wherein it was held that:-

"Dredging is undertaken in the navigation channel which leads to the jetty of the appellant. The channel is not the private property of the appellant but belongs to the Maharashtra Maritime Board and the channel is also used not only by the appellant but also by several others and therefore, it cannot be said that the benefit of dredging of the channel accrues only to the appellant and not to others and such dredging is entirely in relation to the manufacturing activity undertaken by the appellant. Various case laws stated by the appellant do not help the appellant's case for the reason that the facts involved therein were different and distinguishable. In an identical matter relating to dredging services in respect of Sanghi Industries Ltd., Vs. CCE, Rajkot - [2008 (8) TMI 277 - CESTAT AHMEDABAD], a co-ordinate bench at Ahmedabad took the view that the issue is contentious and accordingly, pre-deposit of about Rs.10 lakhs against the demand of Rs.55 lakhs was ordered. Therefore, it cannot be said that the issue is settled in favour of the appellant and against the Revenue. However, there is a merit in the contention of the appellant that they had disclosed the fact of availing Cenvat Credit on dredging services as early as in October 2006 and therefore, invoking of extended period of time is not justified - stay granted partly."

(ii) In the case of Sanghi Industries Ltd referred above, it was held that:-

" Credit of service tax on dredging service at appellant's own port denied on the ground that dredging in port not relatable to manufacture and clearance of final product of clinker-Issue contentious-Pre-deposit of Rs. 10 Lakhs as offered by appellant, directed-Pre-deposit of penalty and balance amount of Service tax waived-Section 35F of Central Excise Act,1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994 . Stay partly granted."

~~I observe that the appellants has availed the dredging service at the port area which is far away from their registered factory premises. As such I find that there is no nexus between the dredging service availed and the manufacturing process and clearance of the final goods of the appellant. Thus in absence of any co-relation between input service and final product , the cenvat credit on input service i.e. " Dredging service " is not admissible .Dredging service can be input service" for the output service of "port service". The assessee is a manufacturer and not providing output service like port service.~~

7. ~~The assessee has contended in para 13 of grounds of appeal that they have been availing credit of additional duty of Custom duty on coal. But in the present case, the Cenvat credit has been availed on the tax paid service of Dredging which is related to maneuverability of ship where as coal is an input/fuel for the manufacturing of final product by the appellant.~~

charges received by appellant on verification of his accounts. Therefore, in this case, all essential ingredients exist to invoke the extended period in terms of proviso to Section 11 A (4) of the Central Excise Act,1944.

10. In the instant case, the said assessee was well aware that the activity of trading under taken by them was exempted from service tax; even then they continued to take Cenvat credit on such input services commonly used in both dutiable products as well as trading activity i.e. exempted service and also failed to follow the provisions of Rule 6 of the Cenvat Credit Rules, with a clear intent to evade payment of Service Tax. They also did not in any manner disclose to the department about their trading activity. Thus, there is clear suppression of facts on part of the assessee and failure to reciprocate the trust put on them by the department. Thus, the necessary ingredients to invoke larger period in this case is clearly present.

11. Further, the said assessee has contravened the provisions of Rule 3 of CCR, 2004 in as much as they have availed Cenvat credit on common input services used in trading i.e. exempted service ; Rule 6 of CCR, 2004 in as much as they failed to maintain separate accounts and/or failed to pay the requisite amount on value of exempted service as required under said Rule 6; Rule 9(6) of CCR, 2004 in as much as they took Cenvat credit on input services used in exempted service and failed to reciprocate the burden of proof of admissibility of Cenvat credit thereon. All these acts of contravention on their part were with intent to evade payment of Service Tax.

12. Therefore an amount of Rs.46,45,023/- as calculated at Para 8 for the period 2011-12 to 2015-16 (Upto December-2015) is required to be recovered from the said assessee in terms of provisions of Section 11A(4) of Central Excise Act, 1944 *(hereinafter also referred to as 'CEA, 1944') read with* Rule 14 of CCR, 2004 by invoking larger period. They are also required to pay interest in terms of Section11AA of CEA, 1944 read with Rule 14 of CCR, 2004. They are also liable to penalty in terms of provisions of Section 11AC (1)(c) of CEA, 1944 read with Rule 15(2) of CCR, 2004.

13. Therefore, M/s. Navkar Transcore Pvt. Ltd. situated at Survey No.439/1+2, Matoda, opposite -Chacharwadi Vasna Bus Stop, Sarkhej Bavla Road, Sarkhej Ahmedabad-382210 are hereby called upon to show cause to the Additional Commissioner, Central Excise, Ahmedabad-II, having his office at Customs House, Navrangpura, Ahmedabad, as to why:

(i) An amount of Rs. 46,45,023/- (Rupees forty six lacs forty five thousand twenty three Only) being an amount payable on the value of exempted service (Trading) arrived at interms of Rule 6(3) (i) of CCR, 2004 should not be demanded & recovered from them under the provisions of Rule 14 of CCR 2004 read with Section 11A(4) of CEA, 1944;

(ii) Interest on the demand of above amount should not be charged & recovered from them in terms of Rule 14 of CCR, 2004 read with Section 11AA of CEA, 1944;

(iii) Penalty should not be imposed upon them under Rule 15(1) of Cenvat Credit Rules,2004 read with Section 11AC (1) (a) of the ~~Finance~~ C. Ex. Act, 1994;

15. At Para 18, 19, 20 & 26 of the grounds they have contended that the Joint Commissioner has not dealt with the following case laws cited by them. I propose to deal with them as under:

(i) Shree Cement Limited vs. CCE Jaipur- 2013 (293) ELT 70 (Tri. Del).

I find that in the cited case the Cenvat credit on Sweet on Paste (SOP) used during the manufacturing was allowed, though it was not expedient to use SOP in the manufacturing of Cement. It was held that SOP has to be treated as input and it was eligible for Cenvat credit. In the case on hand I find that the issue is not whether the use of the service of dredging expedient or not but whether the said service can be an input service for them in the facts of the case. As discussed supra the impugned service, by no stretch of imagination can be said to be the activity used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal and therefore it does not fall within the purview of the definition of "Input Service".

(ii) **Rajratan Global Wires Ltd. versus Commissioner of C. Ex., Indore - 2012 (26) S.T.R. 117 (Tri. - Del.):**

In the cited case the Hon'ble tribunal had held that ~~the will be~~ though the windmill for generation of electricity was located at a distance from the factory it will be treated as captive plant and therefore Cenvat credit on services of installation, etc. related thereto would be entitled. However as discussed supra in the case on hand the issue is quiet at variance and therefore the cited decision is of no avail to the appellant.

(iii) **ADITYA CEMENT versus UNION OF INDIA - 2008 (221) E.L.T. 362 (Raj.).**

The cited decision pertains to the definition of Capital Goods as defined at Rule 57Q of the erstwhile Modvat Rules, wherein the Modvat credit was allowed on material used for laying railway track, and therefore the facts of the present case are nowhere near the cited decision.

16. The appellant has further relied upon the following case laws in their additional submissions during the course of hearing:-

(i) RSWM Ltd (Fabric Division) V/s. Commissioner of Central Excise, Jaipur –II—2015(37) STR1074 (Tri.-Del).

(ii) Deepak Fertilizers & Petrochemicals Corpn. Ltd V/s. C.C. Ex. Belapur—2013(32) STR 532 (Bom).

(iv) Parry Engg & Electronics P. Ltd. V/s. CCE & ST Ahmedabad-I,II & III—2015(40) STR 243(Tri.LB).

8. Therefore, in terms of the Rule 6(3)(i) of the CENVAT Credit Rules 2004, the said assessee is required to pay an amount of @ 5%/6% (7% vide Nt.No.14/2015 dated 19.05.2015) on the difference between the sale price and the cost of the goods sold or on the 10 % of the cost of the goods sold, whichever is more. In the instant case the amount of 10 % of the cost of the goods sold is on higher side, hence, the assessee is required to pay an amount @5% / 6% (7% vide Nt.No.14/2015 dated 19.05.2015) on such value as described hereunder:-

(Amount in Rs.)

Year	Trading/High Seas Sales (Rs.)	10% of cost of goods sold (Rs.)	% amount payable of column 3	Amount Payable (Rs.)@ 5% / 6% / 7%
1	2	3	4	5
2011-12	103559885	10355989	5%	517799
2012-13	80655001	8065500	6%	483930
2013-14	159009895	15900990	6%	954059
2014-15	243760074	24376007	6%	1462560
2015-16 (April & May-15)	94980417	9498042	6%	569883
2015-16 (June to Dec.-15)	93827265	9382727	7%	656791
Total	775792537	77579254		4645023

9. Whereas, it further appears that the said assessee at no point of time disclosed the material facts to the department in any manner as well as they had not disclosed about their trading activity and that they were not maintaining separate records of input services used in dutiable goods as well as exempted services, which was not in accordance with the provisions as discussed above. The assessee has also not declared the same in their Monthly ER-1 returns. Moreover in the present regime of liberalization, self assessment and filing of ER – 1, 2 & 3 returns online, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such wrong availment of Cenvat credit only during audit or preventive/other checks. Therefore the Government in its wisdom has incorporated the provisions of Sub Rule 5 & 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of Cenvat credit on the manufacturer or output service provider taking such credit. Therefore, it appears that the assessee has deliberately suppressed the material facts from the Department by wrongly taking cenvat credit on common input services with an intention evade the duty. Hence, it appears that this is a fit case for invoking the extended period of limitation of five years under the provisions of Section 11A (4) of the Central Excise Act, 1944 to recover the whole of the Cenvat credit wrongly availed along with interest *under Section 11AA of Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004*. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275 in case of Lalit Enterprises v CST Chennai, it is held that extended period can be invoked when department comes to know of Service

17. In the case law cited at Sr. No. (i) above, it was held that

"Services used in relation to procurement of inputs' and "activities relating to business" –Construction of railway siding for transportation of coal to be used in captive power plant in factory only, facts not disputed-Transportation of coal is necessary for generation of electricity in captive power plant, hence connected with business of manufacturing of final product-Service to be treated as used in or in relation to procurement of input-Denial of credit not sustainable."

However in the present case, the services of dredging is undertaken in the navigation channel (water way) which leads to the port/ jetty. and not related to procurement of input. The appellant can claim input service of freight incurred for transportation /import of coal which is their input/fuel but any expenses related to ship or its maintenance or its smooth maneuverability is outside the scope of input service. Further the period in dispute in the above case at Sr. No. (i) was June-2008 to March-2010 whereas in the instant case the appellant had availed Cenvat credit of dredging service in F.Y 2013-14 only. However, it is a fact that vide Notification No.3/2001-CE(NT) dated 1.3.2011 (effective from 1.4.2011), the definition of 'input service' provided under rule 2(l) of the Cenvat Rules was amended, which resulted in the deletion of the omnibus phrase "activities relating to business" from the inclusive part of the definition. Thus the period during which Cenvat was availed was as per the amended definition of "input service" w.e.f. 01.04.2011. Hence, I find that dredging service cannot be classified as input service in light of the discussions in the foregoing and more so after the definition was amended w.e.f. 01.04.2011.

In the case law cited at Sr. No. (ii) above, it was held that,

"Input service utilized in relation to installation of ammonia storage tanks situated outside factory of production. During manufacture, dutiable final products, storage and use of ammonia was intrinsic part: Input services were used by assessee whether directly or indirectly, in or in relation to manufacture of final products- Hence, these were input services on which appellant was entitled to take credit of service paid on them."

In the above cited case, the input service is related to the installation of tanks for storing of ammonia which is one of their input and is therefore related to manufacturing of final product. However in the present case, the services used are related to dredging in the navigation of channel (water way) and not related to manufacturing of final product. Hence the said citation is not relevant in the case of appellant.

In the case law at Sr. No. (iii) above, it was held that,

days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely :-

(i) details of CENVAT credit attributable to exempted goods and exempted services, month wise, for the whole financial year, determined provisionally as per condition (b),

(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),

(iii) amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,

(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(v) credit taken on account of excess payment, if any, determined as per condition (f);

(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no [output] service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

(i) where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent per annum from the due date till the date of payment.

6.2 Thus, as per Rule 6 ibid, the Cenvat credit shall not be allowed on such quantity of input services used for provision of exempted service except under the circumstances mentioned in sub rule 2. Under the provisions of Rule 6(3) of the Cenvat Credit Rules 2004 the manufacturer of goods, opting not to maintain separate accounts, shall follow any one of the following options as applicable to him, namely:-

(i) Pay an amount equal to 6% of value of the exempted goods and exempted service; or

(ii) Pay an amount determined under sub rule (3A); or

(iii) Maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub rule (2), take Cenvat Credit only on inputs under sub clause(ii) & (iv) of the said clause (a) and pay an amount as determined under sub rule (3A) in respect of input services. The provisions of sub clauses (i) & (ii) of clause (c) of Sub Rule (3A) shall not apply for such payment.

7. Whereas it is observed that the said assessee had received income for trading activity (High Seas Sales) during the period from 2011-12 to 2015-16 (upto December-15) totally amounting to Rs. 77,57,92,537/-, as per Annexure-A to this notice. As discussed above, the trading activity carried out by the assessee is exempted from payment of service tax. Further, the said assessee has not maintained separate records of input services used for dutiable goods as well as exempted service and also not intimated to the range office about availing of ineligible Cenvat credit.

" Input Service –Erection, commissioning or Installation service and Management, Maintenance or Repair service-windmills for generation of electricity away from factory premises-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)STR-320(Tribunal), Cenvat Credit available for aforesaid services used in windmills away from factory-Subsequent amendment in definition not relevant."

In the cited case also the Hon'ble tribunal had held that though the windmill for generation of electricity was located at a distance from the factory it will be treated as captive plant and therefore Cenvat credit on services of installation, etc. related thereto would be entitled. However as discussed supra in the case on hand the issue is quiet at variance and therefore the cited decision is of no avail to the appellant.

In the above case, Hon'ble Tribunal has relied on the decision of Hon'ble Bombay High Court in the case of M/s. Endurance Technology Pvt Ltd -2015-TIOL-1371-HC-MUM-ST wherein Hon'ble High Court has held as Under :-

"As per Rules2(B)(k)(l)(m),3 & 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 & 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.*

Despite the settled position in view of the High Court decisions, contention of the revenue that the judgment is being challenged before Supreme Court does not really help in deciding the appeals-Appeals (of revenue) dismissed"

On the basis of above decision of Hon'ble High Court of Bombay, Hon'ble Tribunal had decided the matter in favour of then assessee.

From the above referred case, it is also observed that the department had made submission before Hon'ble High Court that in a similar matter in case of Commissioner of Central Excise, Nagpur Versus Ultratech Cement Ltd.2010-TIOL-745-HC-MUM-ST department has challenged the order of High Court of Bombay (Nagpur Bench) in case of M/s. Ultratech Cement Ltd. before Hon'ble Supreme Court which has been admitted by the Hon'ble Supreme Court. I find that the said appeal filed by the department is still pending with the Apex Court. Since the matter has not attained finality, the above case of Perry Engg. & Electronics P. Ltd. cannot be followed in this case.

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of [output] and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of [output] services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services = (M/N) multiplied by P, where [M] denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, 1[N] denotes total value of [output] and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and 1[P] denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition (c) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen

9. From the above, I find that the dredging service cannot be considered to be an input service as the same is neither used directly or indirectly, in or in relation to the manufacture of final products or having direct/indirect nexus with procurement of inputs and inward transportation of inputs and outward transportation up to the place of removal.

10. As such, I find no justifiable reason to allow the credit in respect of the dredging service and I uphold the confirmation of denial of Cenvat credit and demand of interest thereon.

11. In view of preceding discussion, the Cenvat credit of Rs 12,51,450/- availed on Dredging Service, therefore, is liable to be denied. Therefore, on merits, I uphold the impugned order for recovery of the said amount, along with interest.

12. As far as invocation of extended period of demand is concerned, I find that ~~the fact that the noticee had~~ despite there being clear provision in the Cenvat Rules the appellant had taken the Cenvat credit on ineligible service and the fact of wrong taking Cenvat credit on ineligible service was revealed only during the audit conducted by the department. Even though the service of dredging by no means could have been classified as input service , the appellant willfully availed the said ineligible credit which was ultimately utilized for payment of duty on their manufactured goods and thereby evading duty. This act of deliberate defiance of law has to be reprimanded. I, therefore find that extended period has been correctly invoked for demand of duty. The case laws cited by the noticee are not relevant in the instant case as the noticee had failed to fulfill their legal obligation by availing ineligible Cenvat credit.

13. The Hon'ble Supreme Court in the case of Commissioner of C. Ex., Aurangabad Versus Bajaj Auto Ltd - 2010 (260) E.L.T. 17 (S.C.) – has held:

> ***"12.*** *Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section."*

14. In this case also I find that the department has been able to bring on record that the noticee had wrongly availed the Cenvat credit and therefore the department alleged that by suppressing the fact of such wrong availment the appellant had evaded the payment of duty by utilizing the said credit for payment of duty. The noticee failed to offer any plausible explanation except to site some judgments, which as discussed supra I have found to be distinguishable in the facts of the present case. Therefore, I find that the extended period for demand of Central Excise duty not paid, is rightly invoked in this case.

15. I find that the provisions of Cenvat Credit Rules are unequivocal. The provisions are explicit to the effect that no Cenvat credit of tax paid on services which are not input services, can be availed . The appellant, who was well aware of the fact, ought to have not taken the credit. There cannot be any doubt on this, and therefore it is evident that they knowingly availed ineligible credit and also suppressed the facts of such wrong availment in sheer defiance of law by resorting to fraud.

(i) *The manufacturer of goods shall pay an amount equal to Six per cent of value of the exempted goods and the provider of output service shall pay an amount equal to six percent of value of the exempted services; or*

(ii) *the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedures specified in sub-rule (3A).*

Explanation I.- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

***Explanation** III.* - No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or *input* services.]

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

(i) *name, address and registration No. of the manufacturer of goods or provider of output service;*
(ii) *date from which the option under this clause is exercised or proposed to be exercised;*
(iii) *description of dutiable goods or [output] services;*
(iv) *description of exempted goods or exempted services;*
(v) *CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;*

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -

(i) *the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;*

(ii) *the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)= (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of [output] services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;*

16. They are well-established company and dealing with the Central Excise Law and the Rules framed there under, over the years, could not have claimed a bonafide belief that such credit was entailed to them. Therefore their intent to misuse the provisions of Central Excise Act & Rules and thereby evade payment of duty is established beyond doubt. Moreover in the present regime of liberalization, self-assessment, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such wrong doings only during audit or preventive/other checks. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in case of Lalit Enterprises vs. CST Chennai, it is held that extended period is evocable when department came to know of service charges received by appellant on verification of his accounts.

17. It is established principle of law that fraud and justice do not dwell together. An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence. It was so held in the case of K.I. International Ltd. Versus Commissioner of Custom, Chennai - 2012 (2) ECS (126) (Tri-Chen).

18. It has been held by Apex Court in case of Commissioner of Customs, Kandla vs. Essar Oil Ltd.-2004 (172) E.L.T. 433 (S.C.) that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Changalvaraya Naidu V. Jagannath [1994(1) SCC 1]).

19. In the case of Shilpa Printing Press *Versus* **Commissioner of Central Excise, Thane-ii – 2013(297) ELT 417 (Tri. Mumbai) it was held thus:**

> *"Demand - Limitation - Bona fide belief - Assessee consciously deciding to exclude product from liability to payment of duty - HELD: In such case, question of bona fide belief cannot arise - Bona fide belief can arise in case assessee had doubt about their dutiability and thereafter on its efforts to ascertain legal position, was armed with necessary material to contend that there was no dutiability in respect of such product - Section 11A of Central Excise Act, 1944."*

20. In view of the above findings and the judgments cited I have no hesitation in holding that the **noticee** resorted to fraud, by suppressing the value of the service provided and thereby evading tax and therefore I hold that this is a fit case where the proviso to Section 73(1) of the Finance Act, 1994 can be invoked for confirming the demand of tax, raised by the impugned show cause notices. For the same reasons invocation of penalty under Rule 15 of the Cenvat Rules read with section 11AC is rightly justified. My views are further fortified by the order in the case Samsung India Electronics Ltd. - 2014 (307) ELT 160 (tri. Del) –

4. Section 66D was inserted by the Finance Act, 2012 w.e.f. 01.07.2012 whereby negative list of services were introduced and 'trading of goods' is included at sr. No.(e) of the said list.

5. The definition of exempted service provided in Rule 2(e) of the Cenvat Credit Rules, 2004 is also revised. The definition of exempted service as per Rule 2(e) of CCR w.e.f. 01.07.2012 is as under;

(1) ----; or
(2) service on which no service tax is leviable under section 66 B of the Finance Act, 1994".

5.1 Section 66B of the Finance Act provides as under:

SECTION [66B. Charge of service tax on and after Finance Act, 2012. *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]*

5.2 Therefore, services on *which no service tax was leviable under Section* 66 (prior to 01.07.2012) and *under section 66 B* (w.e.f. 01.07.2102) *of the Finance Act, 1994* including the services specified in the negative list under Section 66D *of the Finance Act, 1994* are considered as exempted service.

6. Further, it is observed that, as trading activity is an exempted service, the assessee was required to maintain separate records in respect of the said common input services used in trading activity as well as in the manufacture and clearance of dutiable goods, but the assessee has failed to do so. The assessee has also not followed the procedure as prescribed under Rule 6(3A) of Cenvat Credit Rules, 2004.

6.1 The relevant provisions of Rule 6 of the Cenvat Credit Rules, 2004 read as under;-

Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.- (1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule(2).

.....

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

21. In view of the above I also find that the decisions cited by the assessee in support of their contention that extended period cannot be invoked are distinguished.

22. Accordingly the charge of suppression & mala fide with intent to evade duty is convincingly established against the appellant and I am also unable to accept any claim of *bona fide*.

In the case of Commissioner of Central Excise, Raipur *Versus* **Raj Wines – 2012 (28) STR 46 (Tri. Delhi) it was held:**

*"**15.** In the matter of involving Section 80 of the Finance Act, 1994, we are not in agreement with the finding of the Commissioner (Appeals). A person giving his own interpretation of notification and then arguing that he was under the bona fide belief cannot get the protection of such Section 80."*

23. In view of forgoing, the appeal is rejected on the grounds of merits as well as on the issue of invocation of extended period.

24. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.

10.1.18

(सुरेश नंदनवार)
आयुक्त
केंद्रीय कर लेखा परीक्षा
अहमदाबाद

Date: .01.2018

By R.P.A.D.
To,
M/s Saurashtra Cements Limited,
Near Railway Station, Ranavav,
Dist.Porbandar-360560

Copy to:
1.The Chief Commissioner of Central Tax, Ahmedabad Zone.
2.The Commissioner of Central Tax, Bhavnagar.
3.The Additional Commissioner, Central Tax (System), Bhavnagar.
4.The Asstt./Deputy Commissioner, Central Tax, Division-Junagadh,
5. Guard File.

1-7 ₹ DFA pl.

सत्यमेव जयते

OFFICE OF THE COMMISSIONER OF AUDIT-II
CENTRAL EXCISE & SERVICE TAX, AHMEDABAD
G.N.F.C. TOWER, S.G. HIGHWAY, AHMEDABAD-380054

SHOW CAUSE NOTICE

M/s. Navkar Transcore Pvt. Ltd, situated at Survey No.439/1+2, Matoda, opposite Chacharwadi Vasna Bus Stop, Sarkhej bavla Road, Sarkhej Ahmedabad-382210, (hereinafter referred to as 'said assessee'), are engaged in the manufacturing of excisable goods namely Electrical Lamination falling under Chapter Heading 85049010 of the Central Excise Tariff Act, 1985 and holding Central Excise Registration No. AACCA8089QXM002. They are availing Cenvat Credit under Cenvat Credit Rules, 2004*(hereinafter also referred to as 'CCR, 2004')*.

2. During the course of audit of the records of the said assessee and as detailed at Para 6 of the FAR No. 328/2014-15 dated 27.04.2015, it was observed that the said assessee is also engaged in High Seas Sales of the raw material i.e. CRGO Coil. Therefore it appears that the said assessee is engaged in Trading Activity which is an exempted service, as discussed hereinafter. The total value of traded goods during the F.Y. from 2011-12 to 2015-16 (upto December-15) is Rs. 77,57,92,537/- as reflected in their balance sheets/ledgers for the relevant period. It is also noticed that the assessee had taken Cenvat Credit on common Input Services such as Telecommunication, CA, Consultancy Services, etc. and had not maintained separate records for the common input services used in manufacture and clearance of dutiable goods and those used in exempted service as above.

3. Prior to 01.07.2012, Rule 2(e) of CENVAT credit Rules'2004 provides as under:-

> *"exempted service" means taxable services which are exempt from the whole of the Service tax leviable thereon, and includes services on which no Service tax is leviable under Section 66 of the Finance Act;*

3.1 Under Section 66 of the Finance Act, 1994 Service Tax is leviable at prescribed rate on the value of "taxable services" referred to in the sub-clauses of clause (105) of Section 65 and collected in such manner as may be prescribed.

3.2 Activity of 'trading of goods' is not mentioned in the sub-clauses of clause (105) of Section 65 of the Finance Act'1994, hence no Service tax is leviable on it under Section 66 of the Finance Act'1994. Thus, 'trading of goods' falls within the purview of *"exempted service"* as defined under Rule 2(e) of CENVAT credit Rules'2004.