::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
	V2/106/BVR/2017	15/CX-I Ahmd/JC/KP/2017	02.03.2017

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

BHV-EXCUS-000-APP-121-2017-18

आदेश का दिनांक / Date of Order:	22.01.2018	जारी करने की तारीख / Date of issue:	07.02.2018

Passed by **Shri Suresh Nandanwar, Commissioner, Central Goods and 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 and 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, Ranavav - 360 560 Dist : Porbandar

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

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहा 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 प्रतियां संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

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

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

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

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

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

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

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

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

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

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहा 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 अदा की गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो 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 सीमावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

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

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय 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 filed 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.

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ORDER-IN-APPEAL

The present appeal has been filed by Saurashtra Cement Limited, Nr. Railway Station, Ranavav, P.O. Ranavav, Dist. Porbandar, Gujarat – 360560,(hereinafter referred to as "Appellant") holding Central Excise Registration No. AAHFS5211JXM001,against OIO No.15/CX-IAhmd/JC/KP/2017 dated 02.03.2017(herein after referred to as "impugned order") passed by Joint Commissioner, Central Excise, Ahmedabad-I Commissionerate (hereinafter referred to as "Adjudicating Authority").

2. Briefly, the facts of the case are that during the test check of the records of the appellant for the period 2007-08 to 2011-12 by CERA Party-V,it was observed that appellant has purchased Capital Goods and availed Cenvat Credit of Rs. 11,40,158/-.The said Capital Goods were destroyed in the month of September 2009 and the unit has received insurance claim for the loss. Consequent upon destruction of Capital Goods, it was observed that the Appellant has not paid an amount equal to the Cenvat credit taken on the said Capital Goods after reducing by 2.5% for each quarter of a year or part thereof from the date of taking Cenvat Credit, as per the provisions of Rule 3(5A) of Cenvat Credit Rules 2004 (hereinafter referred to as "CCR").

3. Accordingly, a Show Cause Notice No.V/15-30/Dem/HQ/2014-15 dated 01.09.2014(hereinafter referred to as "SCN") was issued to the Appellant demanding an amount of Rs. 9,09,536/- under Rue 14 of CCR r/w Sub-Sec.4 of 11A(1) Central Excise Act 1944 (hereinafter referred to as "CEA") and Rule 15(2) of CCR r/w Sec. 11AC CEA and Rule 14 of CCR r/w Sec. 11-AA CEA.

4. The SCN was adjudicated by the Adjudicating Authority vide above referred impugned OIO after giving a Personal Hearing to the Appellant. The Adjudicating Authority has confirmed the above demand and order to recover the said amount as wrongly taken and utilized under Rule 14 of CCR r/w 11A(4) of CEA and confirmed interest under Rule 14 of CCR r/w Sec. 11AA of CEA and also imposed penalty of equal amount under rule 15(2) of CCR r/w Sec. 11AC of CEA. While confirming the above demand, the main contention of the Defense Reply of the Appellant that provisions of Rule 3(5A) of CCR invoked in SCN were not in force at the material time i.e. during September 2009 has been countered by Adjudicating Authority by citing that the relevant provision of Rule 3(5A) of CCR containing the requirement of paying an amount equal to Cenvat credit taken on said Capital Goods reduced by 2.5% for each quarter of the year or part thereof from the date of taking such credit was inserted in Rule 3(5) of CCR by way of amendment notification no. 39/2007-CE (NT) dated 13.11.2007 i.e. before the month in which the relevant Capital Goods in question were destroyed. Further, it is also observed by Adjudicating Authority that no evidence has been adduced by Appellant to prove that the said goods (remains of destroyed Capital Goods) have not been removed/cleared by them. It is also observed in the impugned order that Adjudicating Authority has held that the Appellant has also not produced their books of accounts showing relevant entries conveying the status of the destroyed goods or the accounting treatment given to such goods i.e. whether written off or otherwise.

5. Being aggrieved with the impugned order, Appellant has preferred the present appeal, on the following grounds:

a) The impugned order suffers from the vice of non-appreciation of facts and the ratio laid down by judicial fora on the subject.

b) The impugned order failed to appreciate that the provisions quoted in SCN i.e. Rule 3(5A) of CCR came into force only with effect from 17th March 2012 and that the proviso inserted in Rule 3 vide Notification No. 39/2007-CE(NT) dated 13.11.2007 was not discussed or mentioned in SCNand hence, has traversed beyond the scope of SCN. Appellant has relied upon the decision held by apex court in the case of Commissioner of Customs Mumbai Vs. Toyo Engineering India Ltd. reported in 2006(201) E.L.T. 513 (SC).

c) The impugned order has held that appellant has not adduced any evidence that the goods in question have not been cleared by them without realizing that there is no such allegation in the SCN and therefore, it cannot be expected that of the appellant to give defense reply on matters not referred or alleged in the SCN.

d) A notarized Affidavit regarding current status of goods that the same are presently stored in the premises of the Appellant has been adduced with the Grounds of Appeal. Further, the duty liability on the remnants/salvage is cleared only at the time of its removable which in this case has not occurred. And therefore, no demand is legally sustainable till the relevant goods are removed.

e) A copy of the Insurance claim settlement letter dated 14/09/2010 evidencing that the Insurance claim settlement is only for the price of the goods rendered unusable but excluding Cenvat portion and also that value of Salvage Rs. 50,408/- has been deducted from the settlement amount.

f) It is admitted position that true facts of the case is fully recorded in the Books of Account and that at the material point of time there was not provision to payment of amount equal to Cenvat credit taken in Capital Goods reduced by 2.5% per quarter and therefore, Appellant has acted in bonafide and there was no intention at all to suppress/misrepresent facts with intent to evade duty and accordingly, the extended period of limitation in terms of provision of Sec.11A CEA r/w Rule 14 of CCR cannot be invoked. On this ground alone the impugned order is liable to be set aside.The Adjudicating Authority has also erred in imposing penalty under Rule 15(2) of CCR r/w Sec. 11 AC of CEA when the ingredients for imposition of such a penalty are absent.

6. In view of the above submission, the Appellant requested to allow appeal and set aside the impugned order as it is not tenable on merits as well as limitation.

7. On the request to be heard in person, opportunity was granted on 26/12/2017, wherein Shri Saurabh Dixit, Advocate, appeared on behalf of the Appellant and submitted additional written submission along with copy of following case laws in their favour:

a) CCE Bangalore Vs. TATA Advance Materials Ltd. 2011 (271) E.L.T.62 (Kar.)

b) Crystal Cable Industries Ltd. Vs CCE 2016 (343) E.L.T. 1108 (Tri-Kolkata)

The Appellant has further submitted that with regards the issue of current status of destroyed goods, they had repeatedly requested revenue authorities to

physically verify such goods so lying within their premises but till date authorities have not responded. Further, the burden lies on Revenue Department to prove that the goods are actually taken out of the premises but instead the impugned order is resorting to lame excuses stating that it is unbelievable in personal capacity that the damaged goods are still lying in the premises. Further, the burden also lies on Department to prove that insurance payment is inclusive of Cenvat portion which Department has failed to do so inspite the appellant having volunteered for it. The Appellant has further claimed that as a matter of fact the insurance claim did not include the Cenvat component but even assuming that if it was so, then the decision given in CCE Bangalore Vs. TATA Advance Materials Ltd. 2011 (271) E.L.T.62 (Kar.) by Hon'ble High Court of Karnataka has clearly says that whether the Insurance Company has reimbursed the Central Excise duty component to the assessee or not is a commercial issue between the Insurance Company and the assessee and the revenue authorities cannot take any cognizance of the same since the Rules made under fiscal statute are not affected by such commercial developments. They have reiterated that since the remnants of destroyed goods are still lying in the factory premises and in the absence of any specific provision in the Cenvat Credit Rule, at least till the goods are removed from factory premises, the demand as confirmed in the impugned order must be quashed and set aside and the present appeal allowed.

8. I have carefully gone through the facts of the case and the submission put forth by the Appellant in their Grounds of Appeal as well as additional written submission during personal hearing. The issue under consideration is that

i) whether the provision (Rule 3(5A) of CCR invoked in SCN) requiring the Appellant to pay amount equal to Cenvat Credit taken on Capital Goods which were subsequently destroyed in fire during September 2009 reduced by 2.5% per quarter from the date of taking Cenvat credit on such goods existed at the relevant point of time?

ii) whether it is clearly established in the impugned order that remnant/salvage of destroyed goods are removed from the factory premises and therefore, appellant is liable to pay an amount equal to Cenvat Credit taken on Capital Goods reduced by 2.5% per quarter from the date of taking Cenvat credit on such goods; and

iii) whether it is clearly established that the loss assessed by Insurance Company includes Cenvat portion?

iv) whether the demand confirmed by the impugned order is time barred by limitation under Rule 14 of CCR 2004 r/w Sec. 11A of CEA 1944 by virtue of alleged suppression on the part of Appellant?

9. As regards the first issue, I find that the amendment brought in CCR vide Notification No. 39/2007-CE(NT) dated 13/11/2007, which has been relied upon by Adjudicating Authority that "if the Capital Goods, on which Cenvat credit has been taken, are removed after being used, the manufacturer shall pay an amount equal to Cenvat credit taken on said Capital Goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit" was actually inserted after Second Proviso to Rule 3(5) of CCR vide said Notification and not in Rule 3(5A) of CCR, as stated in

impugned order. Rule 3(5A) which has been cited in SCN was actually inserted in CCR vide amendment Notification No. 27/2005-Central Excise (NT) dated 16/05/2005 and the text of the said Notification is as under:

2. In the CENVAT Credit Rules, 2004, (hereinafter referred to as the said rules), in rule 3,-
(A) after sub-rule (5), the following sub-rule shall be inserted, namely:-
"(5A) If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.".

10. From the above it can be seen that the correct text of Rule 3(5A) of CCR was as above at the relevant time i.e. in September 2009, when the Capital Goods in question was destroyed. In the said Rule 3(5A) there is no reference of any requirement on the part of manufacturer to pay an amount equal to Cenvat credit taken on said Capital Goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit. Whereas, the text of Rule 3(5A) as is reproduced in the SCN was actually brought in CCR vide amendment Notification No. 18/2012-CE(NT) dated 17/03/2012 i.e. more than two years after the Capital Goods were destroyed in the instant case. Though Notification No. 06/2010-CE(NT) dated 27/02/2010 substituted second proviso to Rule 3(5) by making provision for payment of an amount equal to Cenvat credit taken on the Capital Goods reduced by the percentage points calculated by straight line method @ 2.5% for each quarter, but that amendment too was brought in after the Capital Goods were destroyed i.e. September 2009.

11. Therefore, I find that the text of Rule 3(5A) of CCR reproduced in SCN cannot have retrospective effect and similarly, the assertion in the impugned order at Para 13.1 that provision requiring the Appellant to pay an amount equal to Cenvat credit taken on Capital Goods reduced by 2.5 % for each quarter, existed in Rule 3(5A) of CCR during relevant time, is also misplaced. Demand in the present case is sustainable only if the conditions prescribed in Rule 3(5A) of CCR (as it existed during September 2009) i.e. "If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value" are met.

12. As regards issue no. (ii) I observe that the SCN neither alleges that the goods in question have been removed not it conveys in any manner about the status of such goods, as on date of issue of SCN. However, I observe that at Para 14.1 of the impugned order, it is stated that assessee has claimed that the said goods have yet not been cleared by them but did not adduce any proof in this connection. I find that in the absence of an allegation in SCN that goods have been removed the appellant cannot be expected to adduce any such evidence in his defense reply before the Adjudicating Authority. I also find that in the same para, it is concluded by Adjudicating Authority that existence of destroyed goods in the premises of the appellant is an unbelievable concept. At the same time at Para 17 of the impugned order, it is asserted that the Adjudicating Authority is not able to conclude that what is the fate of goods in question, i.e. whether the goods destroyed in fire are removed/renovated/scrapped. The apparent contradiction above when read in the context of the submission of Appellant that Department has not initiated any verification to ascertain the existence of destroyed goods, provides certain

degree of credence to the contention of Appellant that the impugned order is based on conjecture and surmise to this extent. In the given scenario, I am not inclined to agree with the contention of impugned order that it is unbelievable that the damaged goods are still lying in the premises and therefore, the confirmed demand for recovery of Rs. 9,09,536/- under Rue 14 of CCR r/w Sub-Sec.4 of 11A(1) CEA on deemed removal is not sustainable under law.

13. As regards the issue of whether insurance payment includes Cenvat portion, I find that the assessable value of each of the three destroyed Capital Goods in question as mentioned in the Annexure-A to SCN (total Rs. 72,32,913/-) and the amount of loss (total Rs. 72,32,913/-) assessed for the said three destroyed Capital Goods by New India Assurance Company Ltd. (who is the Insurer in the present case) is same whereas, the total Cenvat Credit taken on such goods was Rs. 11,40,158.70 is not mentioned even at depreciated rate in the letter of said Insurer cited as Exhibit-B in the Grounds of Appeal. Moreover, the SCN does not specifically impute whether the insurance claim received for the loss is inclusive of Cenvat Portion and therefore, Appellant is made liable for Demand. In view of the above, the inference drawn in impugned order that insurance amount claimed is inclusive of Cenvat, is not sustainable in law.

14. I also find that the impugned order also draws a surmise that Capital Goods destroyed in fire become worthless and useless and its subsequent existence in the factory premises or anywhere else makes no difference. This conclusion is in contradiction of the concerned Rule 3(5A) of CCR prevalent during September 2009 as even the Appellant has accepted in their defense reply dated 25th September 2015 filed before Adjudicating Authority that the salvage item/s from the destruction which has not yet been cleared, as and when cleared as waste or scrap, they would pay the applicable duty on the transaction value as per the applicable rule in force in 2009.

15 On the basis of above discussion and findings, I find that the demand of Rs. 9,09,536/- confirmed in the impugned order needs to be set aside. Accordingly, the present appeal is allowed on merits of the facts of the case.

16. The appeal filed by the Appellant is disposed of in above terms.

22.01.18

(Suresh Nandanwar)
Commissioner
Central Tax Audit,
Ahmedabad.

F.No.V2/106/BVR/2017 Date: 22.01.2018.

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.