

147



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

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रजिस्टर्ड टैक्स ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/71/BVR/2017	मूल आदेश सं / O.I.O. No. 15/Demand/2016-17	दिनांक / Date 25.01.2017
ख	अपील आदेश संख्या (Order-In-Appeal No.):		

BHV-EXCUS-000-APP-123-2017-18

आदेश का दिनांक / Date of Order:	31.01.2018	जारी करने की तारीख / Date of issue:	07.02.2018
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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 पठे बोर्डे ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुरेश नंदनवार, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर (लेखा परीक्षा), अहमदाबाद को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय 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 17.10.2017 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 Astron Paper & Board Mill, Survey No. 52/1-2,53/1-2, Village - Sukhpur, Ta - Halvad, Surendranagar.

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

- (A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.
- (ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिक, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 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

148

(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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied 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 प्रतियों 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) सौभाग्य शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) 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, बशर्त 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

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

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall be 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 की पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पैरालेग के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, ससद 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 ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी कार्य से बचने के लिए यथास्थिति अपील न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

ORDER-IN-APPEAL

M/s. Astron Paper & Board Mill, Survey no. 52/1-2,53/1-2, village - Sukhpur, Tal-Halvad, Distt. -Surendranagar, Gujarat (hereinafter referred to as the appellant) filed present appeal before the Commissioner (Appeals) C. Ex. & Cus. Rajkot, against OIO no. 15/Demand/2016-17 dated 25-01-2017 (hereinafter referred to as "the impugned order") passed by Assistant Commissioner, Central Excise, Division- Surendranagar (hereinafter referred to as "the respondent"). The appellant is registered with Department having Central Excise Registration No. AAJCA0517EEM001 and is engaged in manufacture of excisable goods viz. Multilayer Kraft Liner Paper falling under C.E.T.S.H. No. 48059100 of the Schedule to the Central Excise Tariff Act 1985 and is availing Cenvat Credit as per Cenvat Credit Rules 2004.

2. Subsequently, 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, the facts of the case are during the course of Audit the appellant has availed Cenvat Credit wrongly on the TMT Bars/ Channels/ Beam/ S.S. Plates /S.S. Pipes etc. used for the foundation/ support of the capital goods amounting to Rs. 26,43,260/- (as per annexure A & B of the SCN) during the financial year 2011-12 and 2012-13. The said goods did not fall under the definition of capital goods as defined under rule 2(a) of Cenvat Credit Rules 2004 as amended and also could not be termed as Inputs as per Rule 2(k) of Cenvat Credit Rules 2004 as amended. The goods were neither spare parts of the machinery nor accessories of Capital goods.

As per Notification 16/2009-CE (NT) dated 07-07-2009, the Cenvat credit is clearly restricted on the TMT Bars/ Channel/Beam, S.S. Pipes etc. used for foundation/ support of the capital goods and is specifically out of purview of the definition of inputs and capital goods. The appellant had availed the Cenvat Credit on the said goods. Further, the amendment in the definition of input as prescribed in Rule 2(k) of Cenvat Credit Rules 2004 also confirmed the fact that the said goods were definitely not eligible to be capital goods or Inputs. The appellant had availed the Cenvat credit wrongly amounting to Rs. 26,43,260/- on said goods during the period of 2011-12 and 2012-13 in contravention of the Cenvat Credit Rules 2004. This cenvat credit along with interest was required to be recovered under Rule 14 of Cenvat Credit Rules 2004 read with section 11A of the Central Excise Act, 1944 and section 11AA(erstwhile Section 11AB) of the said Act.

The appellant had suppressed and mis-declared the material facts and wrongly availed the Cenvat Credit which was not admissible as per the said provisions of Cenvat Credit Rules 2004. The appellant under the guise of Capital goods had availed the Cenvat Credit on the said goods which were specifically stated as ineligible and out of purview of the definition of inputs and capital goods, by mis-declaration & suppression of facts. Such acts/ omissions and commissions made/ committed by the appellant also rendered them liable for penal action under rule 15 of the Cenvat credit rules 2004 read with section 11AC of the Central Excise Act, 1944 for deliberately contravening the provisions of Cenvat credit Rules 2004 and also the extended period was



invoked for demand of duty in terms of Section 11A of Central Excise Act, 1944.

4. A Show cause notice was issued to the appellant on 18th January 2016. After issuance of show cause notice, the appellant had paid the said amount of Rs. 26,43,260/- through Cenvat credit on 1st June 2016 vide R.G.23 A-Part-II register- entry No. 220.

5. The adjudicating authority while deciding the show cause notice, has observed the following:-

(i) The appellant had submitted that they had availed the credit on the said goods as capital goods in the category of component, spares & accessories of the capital goods i.e. cooling tower and paper making machinery.

(ii) The appellant had not submitted the manufacturing process and flow chart for the erection and manufacture of capital goods i.e. cooling tower and paper making machinery. They also did not submit the time when the said items had been used in the said capital goods. The said goods were not component, spares & accessories of capital goods in terms of the definition of a capital goods as per Rule 2(a) (A) of Cenvat credit rules 2004. The appellant had availed the credit in question on the said goods as per the annexure A& B to the show cause notice.

(iii) The certificate dated 28-02-2015 issued by the Chartered Engineer of M/s Multi Mentor Engineers & Associates Pvt. Ltd, was issued as per the information provided by the appellant and on verbal explanation. The Cenvat credit was availed during the period from 29-04-2011 to 26-03-2013 whereas the certificate was issued on 28-02-2015, which is after around 4 years to 2 years of the receipt of the said goods. By this time, the materials i.e. TMT Bars/ Channels/ S.S.Plates /S.S.pipes / Beam etc were used and not identifiable in the year 2015. Even on examination of the purchase invoice of the said goods, there was no specific marks and numbers in the invoice. The annexure to his certificate do not specify which goods and invoices have been used for the specific capital goods as mentioned in the annexure. The photographs of some of the machineries, submitted with the certificate are full of machinery and from which aforesaid items could not be identified. Therefore, the adjudicating authority did not rely on the said certificate.

(iv) Looking to the nature of the items, the same were used for the laying/foundation/support of the capital goods and Cenvat credit on said goods are restricted in terms of the definition of the capital goods as well as inputs in terms of Cenvat credit rules 2004.

(v) The adjudicating authority found that the Cenvat Credit availed by the appellant on the above said goods as capital goods (components, parts and accessories) inadmissible in view of the specific restriction as per Rule 2(a)(A) and rule 2(k) of Cenvat credit rules 2004. The appellant availed the Cenvat credit in the guise of capital goods and had not informed the department at any stage about availment of such inadmissible credit with deliberate intention to pay the duty on the final product. They also have suppressed the material fact with malafide intention, whereas they knew that there was clear restriction under the above said provision to avail the Cenvat Credit on such goods.

6. The adjudicating authority has decided the Show Cause Notice as under:-

(i) Confirmed the demand of Cenvat Credit amounting to Rs. 26,43,260/- availed/utilized under rule 14 of the Cenvat Credit Rules 2004 read with Section 11A of Central Excise Act, 1944. Appropriated the payment/reversal of credit of Rs.26,43,260/- against the said demand and vacated the payment under protest.

(ii) Confirmed the demand of interest at appropriate rate on the aforesaid Cenvat Credit amount under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of Central Excise Act 1944.

(iii) Imposed the penalty of Rs. 26,43,260/- under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

7. Being aggrieved with the impugned order, appellant preferred the present appeal on 27th March 2017 on the following grounds:-

- (i) The adjudicating authority had wrongly disallowed the Cenvat credit on the ground that the items viz. TMT Bars/Channels/ Beams/ S.S. Plates/ S.S. Pipes etc. were neither capital goods nor inputs.
- (ii) The items viz S.S. Sheets, M.S. Beam, Coils, Plates, Bars, Channels were used in the paper manufacturing machines which are the capital goods installed in the factory of the appellant. The paper manufacturing machines could not function without these component parts.
- (iii) The materials in question were used for fabrication/repair of the capital goods installed in the factory.
- (iv) The adjudicating authority had not considered the certificate of Chartered Engineering M/s Multi Mentor Engineers & Associates Ltd, Rajkot. And reproduced only part of the certificate which is not permissible under Law. The adjudicating authority had doubted the certificate given by the Chartered Engineer that he had not explained how he co-related the large numbers of items purchased by the appellant.
- (v) The adjudicating authority had also erred in relying in the decision of Vandana Global Ltd-2010(253) ELT. 440(Tri.L.B.) when there was a decision of Hon'ble Supreme Court relied by the appellant in case of M/s Rajasthan Spinning & Weaving Mills Ltd-2010 (255) ELT 481 (S.C.).
- (vi) The appellant further submitted that it was not alleged in the notice that the subject goods were used in the foundation/ support of capital goods.
- (vii) The appellant further submitted that they used the materials in question for repair and maintenance of machinery which is the capital goods installed in their factory.
- (viii) The appellant submitted that the reasoning of the adjudicating authority is that the materials are goods falling under chapter 72 and hence cannot be any spare parts of capital goods of chapter 84 and 85. The adjudicating authority without even making any feeble



141
 attempt to understand the use of the materials in the factory of the appellant, disallowed the Cenvat credit only on the ground that the said materials are falling under chapter 72 and used for construction of building, structure, foundation etc embedded to earth.

- (ix) The appellant submitted that the show cause was hit by limitation of time under Section 11A of Central Excise Act, 1944. The allegation in the notice for invoking period of time was that the appellant had not declared the details of capital goods in monthly returns. The allegation that the appellant did not declare the availing of credit in monthly return is fallacious.
- (x) The appellant submitted that there is no suppression of facts or mala-fide intentions to avail incorrect credit. When they filed the return, the Range officer as well as audit officer could have verified the credit availed.
- (xi) The appellant submitted that they have reversed the credit under protest, once the audit had taken objection.

8. A copy of appeal was sent to the Respondent for giving comments, if any. However, no comments were received.

9. The Personal hearing in the matter was held on 04-01-2018 wherein Shri B.V. Joshi -consultant appeared on behalf of the appellant and reiterated the written submission dated 04-01-2018.

10. **Discussion and Findings:-**

I have gone through the Appeal Memorandum, in particular the grounds of appeal, the submissions made by the Appellant from time to time and the materials on record.

(i) I find that during Audit of the unit, it came to light that the appellant had availed Cenvat Credit on the TMT Bars/ Channels/ Beam/ S.S. Plates /S.S. Pipes/ S.S. sheets etc. amounting to Rs. 26,43,260/-, in the financial year 2011-12 and 2012-13. Further, I find that during visit, audit noticed that the said goods were used for the foundation/ support of the capital goods. On the basis of the objection of Audit, a show cause notice was issued to the appellant. The appellant claimed that the said items were used in the paper manufacturing machines i.e. for fabrication/repair of the capital goods installed in the factory and that the paper manufacturing machines cannot function without these component parts. But to justify their claim, the appellant had not submitted any corroborative evidence and/or the manufacturing process and flow chart for the erection and manufacture of capital goods.

(ii) The appellant further submitted that it was not alleged in the notice that the subject goods were used in the foundation/ support of capital goods. I find that the submission of the claimant is wrong because during visit to the factory, audit noticed that the said goods were used for the foundation/ support of the capital goods. The show cause which was issued on the basis of objection of Audit, which is annexed as relied upon document in the Show

cause notice, where under it was alleged that the subject goods were used in the foundation/ support of capital goods.

(iii) At the time of adjudication, the appellant had submitted that they had availed the credit on the said goods as capital goods in the category of component, spares & accessories of the capital goods i.e. cooling tower and paper making machinery and the paper manufacturing machines cannot function without these component parts. I find that in initial para of present appeal, the appellant claimed that the said items were used in the paper manufacturing machines i.e. for fabrication/repair of the capital goods installed in the factory and then in another para, the appellant submitted that they used the materials in question for repair and maintenance of machinery which is the capital goods installed in their factory.

Looking at the description, quantity, period of purchase and nature of the items from the annexure "A" & "B" to the show cause notice, I find that the said goods were used for the foundation/support of the capital goods and these were not component, spares & accessories of capital goods in terms of the definition of a capital goods as per Rule 2(a) (A) of Cenvat credit rules 2004. The Cenvat credit on said goods are restricted in terms of the definition of the capital goods as well as inputs in terms of Cenvat credit rules 2004.

Further, to justify their claim, the appellant has not submitted the manufacturing process and flow chart for the erection / manufacture / repair-maintenance of capital goods. From the photographs submitted with the certificate of Chartered Engineering M/s Multi Mentor Engineers & Associates Ltd, Rajkot, it is clearly visible that there is shade, foundation, support platform made of said goods.

(iv) I find that the adjudicating authority has not considered the certificate of Chartered Engineering M/s Multi Mentor Engineers & Associates Ltd, Rajkot. The adjudicating authority had rightly doubted the certificate given by the Chartered Engineer because the engineer had not explained in the certificate as to how he had co-related the large numbers of items purchased by the appellant and that to after such a long period. Further, the Chartered Engineer declared in the above certificate that"

"We have not considered bought out plant machineries under this certificate. The plant & machineries under certification are self-fabricated plant & machineries, supporting structure etc. used for manufacturing of packaging paper - craft paper & paper Board etc. as described vide Annexure".

I further find an incomplete sentence in page no. 2 of the said certificate -

"The subject machinery/equipment/items are self fabricated and had been fabricated by use of various capital goods/ items purchased, materials /items described vide."

I further find that in the said certificate "under heading observation & Basis of Certificate", it was certified by the said engineer that-



1307
 "The site visit was made along with the representative of the owner/unit - shri Bipinbhai Patel. The machineries /items/ equipments under certification were identified by him and details collected. The position and other details were intimated to us and are considered in deriving this certificate. The correctness of the report rests on this same. We have been provided with following documents (attached herewith) - copy of self declaration letter and copy of list of capital goods/ items used (CA Certified) ."

I find that as per the said certificate, the machineries /items/ equipments under certification were identified by the representative of the owner/unit - shri Bipinbhai Patel and details were collected by the certificate issuing engineer. I further find that the copy of self-declaration letter and copy of list of capital goods/ items used (CA Certified) are not attached/submitted with the said certificate.

I find that the said certificate dated 28-02-2015 was issued as per the information provided by the appellant. The Cenvat credit was availed during the period from 29-04-2011 to 26-03-2013 whereas the certificate was issued on 28-02-2015 and that too as per identification by the representative of the owner/unit - Shri Bipinbhai Patel for a period April 2011 to March 2014.

I find that the title of the annexure to above mentioned certificate is" Capital goods/items used in various machineries/parts/supporting accessories etc. (April 2011 to March 2014) ".It does not specify which goods and invoices have been used for the specific capital goods as mentioned in the annexure. Further, no bifurcation / invoice wise details of cenvat amount ,is provided. There is no correlation shown between parts/components and items used (on which cenvat is availed).The adjudicating authority found that there was no specific marks and numbers mentioned in the purchase invoice of the said goods. The photographs of some of the machineries ,submitted with the said certificate are full of machinery . However, from the photographs, it is clear that there is shade, foundation, support platform made of channels ,S.S. Sheets, M.S. Beam, Coils, Plates, Bars.

I find that there is no valid and independent assesement of the Chartered Engineer. He has not inspected plant independently. Further, there are no independent findings of the Chartered Engineer. I find that the adjudicating authority has rightly rejected the said certificate.

(v) The appellant submitted that the reasoning of the adjudicating authority was that the materials were goods falling under chapter 72 and hence could not be any spare parts of capital goods of chapter 84 and 85 and the adjudicating authority without even making any feeble attempt to understand the use of the materials in the factory of the appellant, disallowed the Cenvat credit only on the ground that the said materials are falling under chapter 72 and used for construction of building, structure, foundation etc. embedded to earth.

I find that classification dispute i.e. the goods falling under chapter 72 or under any other chapter is neither raised in the show cause notice nor discussed in the order in original. The appellant has wrongly dragged the issue of goods falling under chapter 72, in the present appeal to divert the issue.

(vi) The appellant availed the Cenvat credit in the guise of capital goods and had not informed the department at any stage about availment of such inadmissible credit deliberately and had also suppressed the material fact with malafide intention, whereas they knew that there was clear restriction under the above said provision to avail the Cenvat Credit on such goods.

(vii) The appellant relies on various decisions in support of his arguments.

It is settled law that the case law is applicable when the facts are identical to the case on hand. Accordingly only those case laws will be applicable in this case where the facts are identical to the present case as well as the applicable provisions of the law are same. The decisions given by hon'ble Cestat/Court in the context of earlier rules dealing with modvat / classification dispute/ not identical facts and circumstances, cannot be applied to the present case. The present case has to be decided strictly under the provisions of CCR- 2004. The following case laws relied upon by the appellant, are not applicable to the case under decision for the reasons cited.

- (a) M/s Rajasthan Spinning & Weaving Mills Ltd-2010(255)ELT 481 (S.C.) - Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (b) M/ Jawahar Mills Ltd-1999(108) ELT 47(Tri)- Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (c) M/s Sterlite Industries India Ltd-2006(203) ELT-283 (Tri- Chennai)- Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (d) M/s Kothari Sugars & Chemicals Ltd-2001(137) ELT 345 (Tri- Chennai) - Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (e) U.P. State Sugar Corporation-2001(135)ELT 952 (Tri-Delhi)- Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (f) M/s India Glycols Ltd-2006 (196) ELT 221 (Tri- Del)- Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (g) K.K. Nag Ltd-2003(158) ELT 161(Tri- Mumbai) - Relates to Rule 57Q erstwhile Modvat Credit Rules.
- (h) M/s City Lubricants (P) Ltd-2011(266)ELT 131 (Tri-Bang.)- chapter 72 classification dispute
- (i) M/s Kothari Sugars & Chemicals Ltd- 2001-chapter 72- classification dispute.
- (j) M/s Andhra Sugars Ltd- 2014(305) E.L.T. 150(Tri- Bang)-used in repair of damaged machine.
- (k) M/s Jocil Ltd-2006(195) ELT 318(Tri- Bang.)- Relates to Rule 57Q erstwhile Modvat Credit Rules./used for corroded parts of capital goods
- (l) M/s Chemplast Sanmar Ltd-2007(207) E.L.T. 92 (Tri-Chennai)- Not identical case
- (m) M/s N.R. Agrawal Industries Ltd-2007 (215) ELT 462 (Tri-Ahmd)-
- (n) M/s Madras Cement Ltd -2006 (195) ELT 316 (Tri-Bang) Not identical case
- (o) M/s Parabolic Drugs Ltd -2016(342) ELT 140(Tri- Del) - Not identical - no evidence of use
- (p) M/s Rashtriya Ispat Nigam Ltd- 2011(267) ELT 311(A.P.)- Not identical case
- (q) M/s Pahva Chemicals Pvt Ltd- 2005(189) ELT257 (SC) - Section 11 A(1)- Not identical case

- 137
- (r) M/s Deccan Sugars Ltd- 2005(187) E.L.T. 351 (Tri- Bang) – Not identical case
 - (s) M/s Associated Cement companies Ltd – Relates to Rule 57Q erstwhile Modvat Credit Rules.
 - (t) M/s Hemeta Rolling Pvt Ltd- Not identical case.
 - (u) M/s Super poly fabrics Ltd-2008(10)STR 545(S.C.)

(viii) I find that the decision of Hon'ble Supreme Court relied upon by the appellant in case of M/s Rajasthan Spinning & Weaving Mills Ltd-2010 (255) ELT 481 (S.C.) is in context of earlier rules dealing with modvat therefore, it cannot be applied to the present case, which has to be decided strictly under the provisions of CCR- 2004.

(ix) I find that the adjudicating authority has rightly relied upon the decision of Vandana Global Ltd-2010(253) ELT. 440(Tri.L.B.) . The facts and circumstances are identical to the present case. The said case has been followed in various judgments and has become settled legal position.

(x) In order No. A/85946/17/SMB dated 14-02-2017 in appeal no. E/1353/11-MUM filed by M/s Bhima Sarkari Sakhar Karkhana Ltd, Hon'ble Cestat (West Zonal Bench) has discussed the case of Vandana Global Ltd-2010(253) ELT. 440(Tri.L.B.) in following terms :-

"Para 6 (b) -Goods like cement and steel items used for laying " foundation " and for building " supporting structures" cannot be treated either as inputs for capital goods or as inputs in relation to the final products and therefore , no credit of duty paid on the same can be allowed under the cenvat credit rules for the impugned period".

"Para 7- As for the penalty , in the similar situation, where inadmissible credit was detected in audit scrutiny CCE- Ghaziabad Vs. Rathi Steel & Power Ltd-2015(321) ELT 200(All.),the Hon'ble High Court held as under-

"32 We further find that under Rules, 2004 a burden is cast upon the manufacturer to ensure that Cenvat credit is correctly claimed by them and proper records are maintained in that regard.

33. The assessee, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents , which in our opinion is false and an attempt to deliberately contravene the provisions of the Act, 1944 and the rules made thereunder with an intent to evade duty.

34 In our opinion, the facts of the present case clearly suggest willful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A(1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

(xi) Also in the case of M/s Hissar Pipes Pvt Ltd. Vishnu Goyal, Director Vs. Commissioner of Central Excise, Rohtak - 2017-TIOL-3258-CESTAT-CHD, similar view was taken. It was held thus;

"Assessee are manufacturer of M.Pipes/G I Pipes and availed cenvat credit on angles, plates, MS angles, MS joists/shapes/sections and channels treating them as their inputs - On basis of intelligence, it is found that assessee had taken Cenvat credit on angles, plates, MS angles, MS joists/shapes/sections and channels treating them as their inputs - At the time of visit of officers, director of the company had clearly admitted that they had wrongly taken the credit on these items and therefore, reversed the same - said statement dt. 31.07.2007 has not been retracted at any stage - Chartered Engineer's certificate has been obtained two years after the credit was taken and reliance on same for co-relation of goods and invoices and quantification as to manufacture of capital goods is impossible - When items claimed as capital goods were already installed at time of statement, director made no reference to said items in his statement and admitted the correct position - Case law produced by revenue is directly applicable to this case as in case of Bajaj Hindustan Limited, Tribunal held that structural steel items used at time of commissioning of new plant for production of capital goods are not eligible for credit as inputs and that ER-1 returns did not declare their use in manufacture of capital goods - Since credit was irregularly taken and there is no production of capital goods under Notfn 67/95 and no declaration was made by assessee in ER-1, penalty has been correctly imposed on assessee:"

(xii) In the era of self-assessment, filing of 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 cast upon the assessee the responsibility of correct availment and utilization of credit under Rule 9 of the Cenvat credit Rules, 2004. I find that the adjudicating authority rightly found that the Cenvat Credit availed by the appellant on the above said goods as capital goods (components, parts and accessories) inadmissible and confirmed the demand of Cenvat Credit amounting to Rs. 26,43,260/- availed/utilized under rule 14 of the Cenvat Credit Rules 2004 read with Section 11A of Central Excise Act, 1944, of interest at appropriate rate under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of Central Excise Act 1944 and rightly imposed the penalty of Rs. 26,43,260/- under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

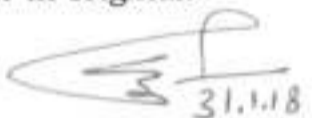
I find that the appellant had suppressed and mis-declared the material facts and wrongly availed the Cenvat Credit which was in-admissible as per the provisions of Cenvat Credit Rules 2004 to them. The appellant under the guise of Capital goods had availed the Cenvat Credit on the said goods which were specifically stated as ineligible and out of purview of the definition of input and capital goods, by mis-declaration. Such acts/ omissions and commission committed by the appellant rightly rendered them liable for penal action under

135
rule 15 of the Cenvat credit rules 2004 read with section 11AC of the Central Excise Act, 1944 for deliberately contravening the provisions of Cenvat credit Rules 2004 and also the extended period was rightly applicable for demand of duty in terms of Section 11A(4).

7. In view of the foregoing discussion and findings, I do not find any reason to interfere with impugned order of the Ld. Adjudicating Authority and pass the following order.

ORDER.

I reject the appeal filed by the appellant and upheld the order in original.


31.1.18
(Suresh Nandanwar)
Commissioner

F.No. V2/71/BVR/2017

Date : 31.01.2018

By R.P.A.D

To,

M/s. Astron Paper & Board Mill,
Survey No. 52/1-2,53/1-2,
Village-Sukhpur, Tal-Halvad,
Distt. Surendranagar, Gujarat

Copy to :

1. The Chief Commissioner of Central Tax, GST, Ahmedabad Zone.
2. The Principal Commissioner of Central GST, BHAVNAGAR
3. The Additional/Joint Commissioner, Central GST, BHAVNAGAR
4. The Assistant/Deputy Commissioner, Central GST, Division-
Surendranagar

5. Guard File.

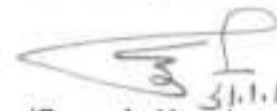
119

of Capital goods had availed the Cenvat Credit on the said goods which were specifically stated as ineligible and out of purview of the definition of input and capital goods, by mis-declaration. Such acts/ omissions and commission committed by the appellant rightly rendered them liable for penal action under rule 15 of the Cenvat credit rules 2004 read with section 11AC of the Central Excise Act, 1944 for deliberately contravening the provisions of Cenvat credit Rules 2004 and also the extended period was rightly applicable for demand of duty in terms of Section 11A(4).

7. In view of the foregoing discussion and findings, I do not find any reason to interfere with impugned order of the Ld. Adjudicating Authority and pass the following order.

ORDER.

I reject the appeal filed by the appellant and upheld the order in original.


31.1.13
(Suresh Nandanwar)
Commissioner

120

inputs - At the time of visit of officers, director of the company had clearly admitted that they had wrongly taken the credit on these items and therefore, reversed the same - said statement dt. 31.07.2007 has not been retracted at any stage - Chartered Engineer's certificate has been obtained two years after the credit was taken and reliance on same for co-relation of goods and invoices and quantification as to manufacture of capital goods is impossible - When items claimed as capital goods were already installed at time of statement, director made no reference to said items in his statement and admitted the correct position - Case law produced by revenue is directly applicable to this case as in case of Bajaj Hindustan Limited, Tribunal held that structural steel items used at time of commissioning of new plant for production of capital goods are not eligible for credit as inputs and that ER-1 returns did not declare their use in manufacture of capital goods - Since credit was irregularly taken and there is no production of capital goods under Notfn 67/95 and no declaration was made by assessee in ER-1, penalty has been correctly imposed on assessee."

(xii) In the era of self-assessment, filing of 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 cast upon the assessee the responsibility of correct availment and utilization of credit under Rule 9 of the Cenvat credit Rules, 2004. I find that the adjudicating authority rightly found that the Cenvat Credit availed by the appellant on the above said goods as capital goods (components, parts and accessories) inadmissible and confirmed the demand of Cenvat Credit amounting to Rs. 26,43,260/- availed/utilized under rule 14 of the Cenvat Credit Rules 2004 read with Section 11A of Central Excise Act, 1944, of interest at appropriate rate under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of Central Excise Act 1944 and rightly imposed the penalty of Rs. 26,43,260/- under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

I find that the appellant had suppressed and mis-declared the material facts and wrongly availed the Cenvat Credit which was in-admissible as per the provisions of Cenvat Credit Rules 2004 to them. The appellant under the guise