

	<p>आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क: O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,</p>	
	<p>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</p>	

रजिस्टर्ड डाक ए. डी. द्वारा :-

क. अपील / फाइल संख्या / Appeal / File No. V2/126/BVR/2017	मूल आदेश सं / O.I.O. No. 20/Demand/2016-17	दिनांक / Date 30.01.2017
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ख. अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-127-2017-18

आदेश का दिनांक / Date of Order:	12.02.2018	जारी करने की तारीख / Date of issue:	14.02.2018
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Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या 26/2017-के.उ.शु. (एन.टी.) दिनांक 17.10.2017 के साथ पढ़े बोर्ड ऑफिस आदेश सं. 05/2017-एस.टी. दिनांक 16.11.2017 के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम 1994 की धारा 86, केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35 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 Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, 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 Yash Gases P. Ltd., 218, Sterking Point, Waghawadi Road Bhavnagar - 364 001

इस आदेश(अपील) से व्यक्ति 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 न 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

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) नियमवली, 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 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) नियमवली, 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 नियमवली, 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.

- (iii) सीमा 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

- धारा 11 डी के अंतर्गत रकम
 - सेनवेट जमा की ली गई गलत राशि
 - सेनवेट जमा नियमवली 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 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 :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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, केन्द्रीय 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, 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 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 संमायाविधि 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 पंटी 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, 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-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

The present appeal has been filed by M/s. Yash Gases P. Ltd., 218, Sterling Point, Waghawadi Road, Bhavnagar (hereinafter referred to as the appellant) against Order-in-Original No. 20/Demand/2016-17 dated 30.01.2017 passed by the Assistant Commissioner, Central Excise, City Division, Bhavnagar (hereinafter referred to as the adjudicating authority).

2. The appellant have filed the appeal on 85th day from date of receipt of order and have requested for condonation of delay of 25 days with a reason that their consultant being Chartered Accountant firm, was busy with the reply work of notices issued by the income tax department due to demonetization of currency and statutory audit work of Nationalised Banks. As per section 35(1) of the Central Excise Act, 1944, Commissioner (Appeals) is empowered to condone the delay of 30 days, on sufficient cause being shown. Therefore, I condone the delay in filing of appeals by the appellant.

3. Briefly stated, during scrutiny of ER-3 returns filed by the appellant for the period from January-2012 to March-2012, it was noticed that Cenvat credit to the tune of Rs. 46,23,721/- was availed by them. On inquiry, it was learnt that they have availed such credit on capital goods like compressor, cooling tower, liquid oxygen pump, control panel, Steel Gas Oxygen cylinders, Cement sheets, M. S. Beams, Castor Oil, Nitrogen gas, etc. It appeared that Cenvat credit on goods like Steel Gas Oxygen Cylinder, Cement sheets, M. S. Beams, Castor Oil and Nitrogen Gas was not admissible as these goods are not capital goods in view of definition of capital goods provided in rule 2(a)(A) of the Cenvat Credit Rules, 2004. Therefore, it appeared that the appellant had wrongly availed Cenvat credit on these goods which were neither capital goods nor used as capital goods and hence Cenvat credit attributable to these goods amounting to Rs. 37,44,622/- was found ineligible and recoverable in terms of rule 14 of the Cenvat Credit Rules, 2004. Therefore, show cause notice dated 11.03.2016 was issued to the appellant, proposing recovery of wrongly availed credit of Rs. 37,44,622/- alongwith interest and also proposing penalty under rule 15(2) of the Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944. The SCN was adjudicated vide OIO No. 20/Demand/2016-17 dated 30.01.2017 by the adjudicating authority, who confirmed the demand of wrongly availed credit alongwith interest and also imposed equal penalty on the appellant. Being aggrieved the appellant have filed the present appeal.



4. The appellant are contending mainly on the following grounds:

- (i) The SCN is time barred and subsequently the impugned order is also illegal. The findings recorded by the adjudicating authority regarding time limit are also arbitrary and void. They have rightly taken the credit on goods, viz., Steel Gas Cylinders and Castrol Lubricating oil as capital goods which are used in their factory. There is neither any provision in the rules that the manufacturer has to disclose how the goods termed as capital goods nor to submit any intimation. Therefore the entire alleged action initiated is time barred as demand is for the period from January-2012 to March-2012 and SCN was received on 21.03.2016 alleging suppression with intent to evade payment of duty. Moreover, there is no evidence that they had any intention to evade payment of duty. Hence extended period cannot be applicable.
- (ii) They purchased empty high pressure seamless gas cylinders for storing their finished goods, viz., oxygen gas for storage of oxygen gas, which is their finished goods. As per definition of capital goods, storage tank used in the factory is eligible for Cenvat credit as capital goods.
- (iii) Lubricating oil is used as lubricant to the machineries and in plant and the same is falling under the definition of "input" and hence they have rightly taken Cenvat credit on the same.
- (iv) The adjudicating authority has not given any ground for contravention of which rule or for what act, they are liable for penalty under rule 15(2) of the Rules. Thus, no penalty can be imposed. Further, there is no intention on their part to defraud the revenue or evade payment of duty. Hence they are not liable for penalty. They relied upon the case law of CCE Vs Maruty Udyog - (2009) 23 STT 55 (P&H HC DB).

5. Hearing in the matter was held on 31.01.2018, which was attended by Shri Madhavkumar N. Vadodariya, C.A. and authorised representative of the appellant. He reiterated the submissions of appeal memo and sought for one week time for filing additional written submission. The appellant submitted additional submission dated 08.02.2018 and contended that:

- (i) SCN is time barred and subsequently impugned order is void and bad in law. There is no evidence or discussion in the SCN or OIO regarding suppression of facts with intent to evade duty. If you are not

allowing Cenvat credit, speaking order may be issued. They relied upon the case law of M/s. J. K. Steel & Alloy Vs CCE, Bhavnagar reported in 2009 (234) ELT 191 (Tri.-Ahmd.).

- (ii) Since credit is not availed and utilised on account of fraud, wilful mis-statement, collusion or suppression of facts, they are not liable to penalty under rule 15(2) of the CCR. They rely upon the judgment of Hon. Tribunal in case of CCE, Rohtak Vs Surya Vinayak Industries Pvt. Ltd. - 2007 (215) ELT 423 (Tri-Del).
- (iii) There is no intention on their part to defraud the revenue or evade payment of duty. Hence, they are not liable for penalty. Also, adjudicating authority has not given any ground in his findings that for contravention of which rule they are liable for penalty under rule 15(2) of the Rules and there was no *mens rea* noticeable from record nor any impeachable conduct in respect of the transaction, no penalty could be levied.

6. I have carefully gone through the entire case records, SCN and OIO, grounds of appeal as well as contentions raised during hearing. I find that the limited issue to be decided is - whether Cenvat credit is admissible to the appellant on items like steel gas cylinders and Castrol lubricating oil, etc. as capital goods or otherwise. I find that the appellant are not contesting for credit on Cement Sheets, M. S. Beams and Nitrogen gas and that they have already paid the amount of Rs. 24,598/- on account of Cenvat credit availed on these items, alongwith interest of Rs. 18,537/-, as submitted by them.

7. Coming to the issue of availment of credit on Steel Gas Cylinders, I find that the appellant used to purchase empty cylinders and fill the same with their final product, viz., Oxygen Gas. Apparently, such cylinders were used for dispatch/transportation of their finished goods and not used in the process of manufacture of Oxygen Gas. In case of M/s. GNFC Ltd. Vs CCE, Vadodara - 2012 (278) ELT 273 (Tri-Ahmd.), it was held by the Tribunal that if the cylinders are not used in the factory directly and chlorine is transferred to storage tank before using the same, credit may not be admissible since in such a case, the usage of the cylinder will be only for transportation and not as a storage tank. Otherwise, credit may be admissible since cylinder performs dual function of storage tank as well as for transportation of chlorine. Thus, it is clear that if cylinders containing inputs for manufacture of the goods are connected directly to the plant, then only such cylinders can be treated as capital goods. If such cylinders are used only for transportation, they cannot be

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treated as capital goods. In the present case, the appellants are using such cylinders for supply of Oxygen Gas to their buyers and therefore it cannot be said that such cylinders are used/connected in/with the manufacturing plant and therefore, such cylinders cannot be treated as capital goods. Regarding case law of M/s. J. K. Steel & Alloys, cited by the appellants, I have gone through the same. I find that in that case, the party was using Gas cylinders for storage of high pressure gas used for production in factory. Therefore, as discussed above, the facts being different, the ratio of said judgment cannot be applied to the present case.

8. Regarding Castor Oil (Lubricant), it has been contended by the appellants that since it was used in manufacturing, the same is to be treated as "input". Even if this argument of the appellants is considered, the appellants would not have been eligible for availment of input credit on the same as during the material period, they were working under SSI exemption. Even otherwise, as per definition of Capital Goods, provided under rule 2(a) of the Cenvat Credit Rules, 2004, Castor Oil do not qualify as Capital goods and as per rule 2(k) of the Cenvat Credit Rules, 2004, Castor Oil do not qualify as "input" also. Therefore, I find that both the items under dispute do not qualify for Cenvat credit. Since in case of other items like Cement Sheet, M. S. Beams and Nitrogen Gas, the appellants have accepted non-availability of credit and paid up the amount of credit availed, alongwith interest, I do not find it necessary to discuss the same here.

9. Now coming to the issue of limitation, the appellants have contended that the credit pertains to January to March-2012 and SCN was issued in 2016 and there is no evidence regarding suppression of facts and therefore extended period is wrongly availed and penalty under rule 15(2) of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944 is wrongly imposed upon them. In this regard, I find that as per rule 9(5) of the Cenvat Credit Rules, 2004, the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit. Therefore, in the era of self assessment more reliance is placed on the assessee. When more reliance is placed by the Government on assessee, more responsibility is also attached to such reliance. Therefore, taking any credit wrongly would attract extended period of limitation. Mere filing of ER-3 return showing total figure of credit taken would not absolve an assessee from his responsibility to ensure that credit is admissible to them. In case of breach of the responsibility, it can be treated as breach of act/rule with

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intent to evade payment of duty and as a result, department would be at liberty to invoke extended period of limitation. Therefore, I find that extended period of limitation is correctly invoked in the present case and accordingly penalty imposed under rule 15(2) of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944 is justified. Regarding case law of M/s. Surya Vinayak Industries Pvt. Ltd., cited by the appellant, the facts in that case was that the party took full Cenvat credit of capital goods in the year the same was received. However, they had utilised only 50% of the credit as stipulated in the rule and therefore it was held that penalty is not imposable. However, facts of present case being different, the case law is not applicable here.

10. In view of the above, I upheld the order passed by the adjudicating authority and reject the appeal by the appellant.



(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

F. No. V2/126/BVR/2017

By R.P.A.D.

To,
M/s. Yash Gases P. Ltd.,
218, Sterling Point,
Waghawadi Road,
Bhavnagar.

Copy to:

- 1) The Chief Commissioner, CGST, Ahmedabad.
- 2) The Commissioner, CGST, Bhavnagar.
- 3) The Assistant Commissioner, CGST, City Division, Bhavnagar.
- 4) The Assistant Commissioner (Systems), CGST, Bhavnagar.
- 5) The Superintendent, Central Excise, AR - 1. Sihor, Bhavnagar.
- 6) Commissioner (Appeals), CGST, Rajkot.
- 7) Guard File.

ORDER IN APPEAL

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received. However, they had utilised only 50% of the credit as stipulated in the rule and therefore it was held that penalty is not imposable. However, facts of present case being different, the case law is not applicable here.

10. In view of the above, I upheld the order passed by the adjudicating authority and reject the appeal by the appellant.

(Handwritten Signature)
12/12/2018

(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

F. No. V2/126/BVR/2017

By R.P.A.D.

To,
M/s. Yash Gases P. Ltd.,
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