::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
	V2/68/BVR/2017	**AC/JND/09/2017**	**20.01.2017**

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

BHV-EXCUS-000-APP-154-2017-18

आदेश का दिनांक / Date of Order:	**16.02.2018**	जारी करने की तारीख / Date of issue:	**05.03.2018**

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

अधिसूचना संख्या २६.१७दिनांक (.टी.एन) .शु.उ.के-२०१७/१० २०१७.के साथ पढे बोर्ड ऑफिस आदेश सं . .१६दिनांक .टी.एस-२०१७/०५११ ,के अनुसरण मे २०१७.श्री सुरेश नंदनवार ,आयुक्त , केंद्रीय वस्तु एवं सेवा कर (लेखा परीक्षा)की धारा १९९४अहमदाबाद को वित्त अधिनियम , ८७की १९४४केंद्रीय उत्पाद शुल्क अधिनियम , के अंतर्गत दर्ज की ३५धारा गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप मे 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 Gujarat Sidhee Cement Limited,, Siddheegram Off Veraval Kodinar Highway,, Sutrapada Taluka, Gir- Somnath

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

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

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

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

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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

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

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

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

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

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

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

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

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

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

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

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 ।
जैहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल 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 पेढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

BRIEF FACT OF THE CASE:

M/s. Gujarat Siddhi Cement Ltd., Siddhigram, Off Veraval-Kodinar Highway,Tal:Sutraada,Dist:Somnath(Gir)(hereinafter referred to as 'the appellant') has filed the appeal on 20.03.2017 against Order-in-Original No. AC/JND/09/2017 dated 20.01.2017(hereafter referred to as "the impugned order")passed by the Assistant Commissioner, Central Excise, Junagadh (hereinafter referred to as 'the adjudicating authority').

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.

The facts of the case are that the appellant are engaged in the manufacturing of cement and cement clinkers classifiable under Chapter 25 of the first schedule to the Central Excise Tariff Act, 1985 and are availing CENVAT credit under Cenvat Credit Rules 20004. On scrutiny of ER-1 returns for April to September 2012,it revealed that the appellant has wrongly availed CENVAT credit of input service on post sale transport of manufactured goods considering it as input service. A show causes notice bearing F.No. V/15-85/Dem/HQ/2012-13 dated 02.04.2013 for reversal of CENVAT credit/demand of duty Rs. 28,31,303/- was decided by the adjudicating authority confirming demand recovery of interest and imposing penalty.

Present appeal is filed against said OIO dated 20.01.2017 contesting interaila the following:

- Facts of the case and provisions of the Finance Act has not been appreciated in the order in original.
- Assumption of the adjudicating authority that GTA service involved is not correct. Supply of tangible goods service and sea freight were used.
- Copies of the invoices evidencing payment of tax under supply of tangible goods service were not examined.
- The appellant do not sale final product at factory gate and sale takes place only after clearance of final product from factory gate.
- Appellant clear the final product from factory on payment of excise duty and transports it to depot/dump/godown and also to Bombay branch/depot by sea freight from where goods are sold on commercial invoices.
- In case of transportation by sea freight,it is not a post sale transportation but transfer to depot from where it is sold to various customer.
- The title, ownership and risk of damage/loss of goods remain with the appellant when the goods are transported to their Bombay

depot and duty includes sea freight. Said fact is ignored by the adjudicating authority.

- Transfer and possession of the goods takes place at the premises of the buyer. In case of export such transfer/possession takes place on board the ship.
- Depot/dump/godown are used for storing duty paid goods before sale.
- Place of removal is dump/godown/depot and premises of buyer and in case of export it is on board the ship. Therefore any services used upto such place of removal comes under the definition of input service. Place of removal is place of sale.
- Trucks taken on hire were used only for the purpose of clearance of final product up to place of removal.
- Adjudicating authority has misconceived that where invoice is prepared is the place of removal. In fact, credit taken qualifies to be treated as input service.
- Adjudicating authority has failed to appreciate that supply of tangible goods service (hiring of truck) for transportation up to place of removal is a valid input service.
- Sales contract clearly stipulates delivery of goods and as such there cannot be completion of obligation of sale without delivery and transfer of title/possession of goods.
- Place or premises should be the place or premises from where the excisable goods are to be sold which means that such goods are to be transferred by way of transfer of title and possession of goods. Sale cannot take place unless and until goods are delivered to the buyer.
- Adjudicating authority has failed to appreciate that hiring of truck for outward transportation were used only up to the place of removal.
- It is wrongly held that goods are sold at factory gate.
- In case of transportation by sea Bill of Lading has been marked as self to self indicating that this is mare transfer of goods and after transportation were sold from Bombay.
- Ignorance of existence of dumps/godown by the department is mischievous.
- Contract with transport agency shows that it is not for provision of GTA service but only for hiring of truck on periodical basis. Also no consignment note has been issued which is part of definition of GTA Service.
- Materials were taken from Veraval to Mumbai after discharging duty at factory gate. Duty was paid on sale price at Mumbai which the freight cost from Verval to Mumbai. Goods are subsequently sold from Mumbai depot under invoices. Said documents were not verified by the adjudicating authority.
- They sighted following judgments in support of their claim:
  1. Parth Poly Woven Sack Ltd 2012(25) STR 4(Guj)
  2. CCE vs Ellora Times Ltd. 2014(34) STR 801(Guj).

3. Ambuja Cements Ltd., Vs. Union of India-2009(14) STR 3(P&H).
4. Lafarge India Ltd. Vs Commissioner-2014 (307) ELT 7 (Chattisgarh).
5. Ultratech Cement Ltd. vs Commissioner -2014 (307) ELT 3 (Chattisgarh).
6. Ultratech Cement Ltd. vs CCE Rohtak 2015 (37) S.T.R. 364 (Tri-Delhi) etc.

- CA certificate to support that outward transportation service rendered to buyer is upto the place of removal and not beyond which has not been considered.
- As per the contract transfer and possession of goods as taken place in buyer premises.
- The OIO is bases on wrong understanding of the provision and hence liable to be set aside.

PERSONAL HEARING:

Personal hearing was given to the appellant on 05.02.2018 wherein Shri Saurabh Dixit, advocate appeared on behalf of the appellant and reiterated the ground of appeal and submitted copies of PO, invoices, LR etc. in respect of sale.

DISCUSSION AND FINDING:

I have carefully gone through the record of the case, appeal memorandum, submissions made by the appellant during personal hearing. The issue to be decided in present appeal is admissibility or otherwise of CENVAT credit of service tax paid on transportation of finished goods from factory gate to buyers premises. The contention of the appellant is that factory gate is not a place of removal in their case, instead it is depot/dumps/godown and therefore services used upto depot/dumps/godown is admissible to them. As per the definition of input service, the services used in or in relation to manufacture and clearance of final product upto the place of removal are eligible as input service. After amendment of definition of 'input service' w.e.f. 01.04.2008 the word 'clearance of final product from the place of removal' was substituted with the word 'clearance of final product upto the place of removal' and hence no credit of input service would be available beyond the place of removal. Transportation services used for purpose of outward transportation of goods i.e. from factory to customers premises is not covered within the ambit of definition of input services.

It is contended by the appellant that, in their case 'place of removal' is not the factory gate, instead it is the depot/dumps/godown and therefore outward transportation upto depot/dumps/godown would be eligible as input service. I find that in absence of sufficient documentary evidence related to existence of such depot during material time, the plea cannot be accepted. Furthermore,

finding of the lower authority in this regard which was made after verification of the facts at material time also holds good.

I find that Hon'ble Supreme Court in Judgment dated 01.02.2018 of Civil Appeal No.11261 of 2016 in case of Commissioner of Central Excise v/s M/s. Ultratech Cement Ltd., has held that the approach of the lower courts (i.e. Commissioner(Appeals), High court etc.) on applicability of Board circular No. 97/8/2007-ST dated 23.08.2007 was untenable. The reasons of the same as observed by Hon'ble Supreme Court are reproduced as under:

> *" (9) We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:*
> *(10) In the first instance, it needs to be kept in mind that Board's Circular dated August 23, 2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition. Relevant portion of the said circular is as under:*
>
> *" ISSUE: Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?*
>
> *COMMENTS: This issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. vs CCE, Ludhiana [2007 (006) STR 0249 Tri-D]. In this case, CESTAT has made the following observations:-*
>
> *"the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".*
>
> *Similarly, in the case of M/s Ultratech Cements Ltd vs CCE Bhavnagar 2007-TOIL-429-CESTAT-AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer / consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.*
>
> *8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in CENVAT Credit Rules. In terms of sub-rule (t) of rule 2 of the said rules, if any words or expressions are used in the CENVAT Credit Rules, 2004 and are not defined therein but are defined in the Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the CENVAT Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under section 4 of the Central Excise Act, 1944. It states that,-*
>
> *"place of removal" means-*
>
> *(i) a factory or any other place or premises of production or manufacture of the excisable goods ;*
>
> *(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty ;*
>
> *(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;*
>
> *from where such goods are removed."*
>
> *It is, therefore, clear that for a manufacturer /consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much*

problem. However, there may be situations where the manufacturer /consignor may claim that the sale has taken place at the destination point because in terms of the sale contract /agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place."

(11) As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions (i.e. (a)regarding ownership of the goods till the delivery of the goods at the purchasers door step, (b)seller bearing the risk or loss or damage to the goods during transit and (c)freight charges to be integral part of the price of the goods) which were mentioned explaining the "place of removal" as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board' s Circular, nor it could be.

(12) Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, 2004 and such a situation cannot be countenanced.

(13) The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing officer is restored. "

In context of above observations made by Hon'ble Supreme Court wherein it is finally held that CENVAT Credit on goods Transport Agency service availed for transport of goods from place of removal to buyers premises was not admissible. I also find that the pattern of clearance of goods used by M/s. Ultratech Cement Ltd., i.e. clearance of cement from the parent unit on stock transfer basis and further sale etc., are similar in nature with the clearance of finished goods by the present appellant. The said judgment is therefore, squarely applicable to the present case and therefore extension of benefit of CENVAT credit on the services used for transport of goods from place of removal to buyers premises would be clearly in contradiction to above verdict of Hon'ble Supreme Court.

Other contention of the appellant i.e. provisions of the Finance Act has not been appreciated in the order in original, the appellant do not sale final product at factory gate as the sale takes place only after clearance of final product from factory gate, clearing of final product from factory on payment of excise duty and transports to depot/dump/godown, transfer and possession of

the goods takes place at the premises of the buyer, terms under sales contract etc. - do not holds ground as the issue availability or otherwise of CENVAT credit on transportation services used for outward transportation of goods has reached to its finality in the above referred judgment of Hon'ble Supreme Court.

In view of the above finding, I do not find frailty in the order of the lower authority. Accordingly I passed the following order.

ORDER

I reject the appeal and uphold the impugned order.

(Suresh Nandanwar)
Commissioner
Central Tax Audit
Ahmedabad.

F.No.V2/68/BVR/2017 **Date: 16.02.2018.**

To,
M/s. Gujarat Sidhee Cement Ltd.,
Veraval-Kodinar Highway,
Siddhigram 362276.
Dist;Gir Somnath

Copy to :
1. The Chief Commissioner, CGST, Ahmedabad Zone.
2. The Commissioner, CGST, Bhavnagar.
3. The Assistant Commissioner, CGST, Division, Junagadh.
4. The Assistant Commissioner(system), CGST, Junagadh.
5. The Superintendent, CGST, Range-II, Veraval.
6. Guard file.

BRIEF FACT OF THE CASE:

M/s. Gujarat Siddhi Cement Ltd., Siddhigram, Off Veraval-Kodinar Highway,Tal:Sutraada,Dist:Somnath(Gir)(hereinafter referred to as 'the appellant') has filed the appeal on 20.03.2017 against Order-in-Original No. AC/JND/09/2017 dated 20.01.2017(hereafter referred to as "the impugned order")passed by the Assistant Commissioner, Central Excise, Junagadh (hereinafter referred to as 'the adjudicating authority').

The facts of the case are that the appellant are engaged in the manufacturing of cement and cement clinkers classifiable under Chapter 25 of the first schedule to the Central Excise Tariff Act, 1985 and are availing CENVAT credit under Cenvat Credit Rules 20004. On scrutiny of ER-1 returns for April to September 2012,it revealed that the appellant has wrongly availed CENVAT credit of input service on post sale transport of manufactured goods considering it as input service. A show causes notice bearing F.No. V/15-85/Dem/HQ/2012-13 dated 02.04.2013 for reversal of CENVAT credit/demand of duty Rs. 28,31,303/- was decided by the adjudicating authority confirming demand recovery of interest and imposing penalty.

Present appeal is filed against said OIO dated 20.01.2017 contesting interaila the following:

- Facts of the case and provisions of the Finance Act has not been appreciated in the order in original.
- Assumption of the adjudicating authority that GTA service involved is not correct. Supply of tangible goods service and sea freight were used.
- Copies of the invoices evidencing payment of tax under supply of tangible goods service were not examined.
- The appellant do not sale final product at factory gate and sale takes place only after clearance of final product from factory gate.
- Appellant clear the final product from factory on payment of excise duty and transports it to depot/dump/godown and also to Bombay branch/depot by sea freight from where goods are sold on commercial invoices.
- In case of transportation by sea freight,it is not a post sale transportation but transfer to depot from where it is sold to various customer.
- The title, ownership and risk of damage/loss of goods remain with the appellant when the goods are transported to their Bombay depot and duty includes sea freight. Said fact is ignored by the adjudicating authority.
- Transfer and possession of the goods takes place at the premises of the buyer. In case of export such transfer/possession takes place on board the ship.
- Depot/dump/godown are used for storing duty paid goods before sale.
- Place of removal is dump/godown/depot and premises of buyer and in case of export it is on board the ship. Therefore any services

used upto such place of removal comes under the definition of input service. Place of removal is place of sale.

- Trucks taken on hire were used only for the purpose of clearance of final product up to place of removal.
- Adjudicating authority has misconceived that where invoice is prepared is the place of removal. In fact, credit taken qualifies to be treated as input service.
- Adjudicating authority has failed to appreciate that supply of tangible goods service (hiring of truck) for transportation up to place of removal is a valid input service.
- Sales contract clearly stipulates delivery of goods and as such there cannot be completion of obligation of sale without delivery and transfer of title/possession of goods.
- Place or premises should be the place or premises from where the excisable goods are to be sold which means that such goods are to be transferred by way of transfer of title and possession of goods. Sale cannot take place unless and until goods are delivered to the buyer.
- Adjudicating authority has failed to appreciate that hiring of truck for outward transportation were used only up to the place of removal.
- It is wrongly held that goods are sold at factory gate.
- In case of transportation by sea Bill of Lading has been marked as self to self indicating that this is mare transfer of goods and after transportation were sold from Bombay.
- Ignorance of existence of dumps/godown by the department is mischievous.
- Contract with transport agency shows that it is not for provision of GTA service but only for hiring of truck on periodical basis. Also no consignment note has been issued which is part of definition of GTA Service.
- Materials were taken from Veraval to Mumbai after discharging duty at factory gate. Duty was paid on sale price at Mumbai which the freight cost from Verval to Mumbai. Goods are subsequently sold from Mumbai depot under invoices. Said documents were not verified by the adjudicating authority.
- They sighted following judgments in support of their claim:

  1. Parth Poly Woven Sack Ltd 2012(25) STR 4(Guj)
  2. CCE vs Ellora Times Ltd. 2014(34) STR 801(Guj).
  3. Ambuja Cements Ltd., Vs. Union of India-2009(14) STR 3(P&H).
  4. Lafarge India Ltd. Vs Commissioner-2014 (307) ELT 7 (Chattisgarh).
  5. Ultratech Cement Ltd. vs Commissioner -2014 (307) ELT 3 (Chattisgarh).
  6. Ultratech Cement Ltd. vs CCE Rohtak 2015 (37) S.T.R. 364 (Tri-Delhi) etc.

- CA certificate to support that outward transportation service rendered to buyer is upto the place of removal and not beyond which has not been considered.
- As per the contract transfer and possession of goods as taken place in buyer premises.
- The OIO is bases on wrong understanding of the provision and hence liable to be set aside.

PERSONAL HEARING:

Personal hearing was given to the appellant on 05.02.2018 wherein Shri Saurabh Dixit, advocate appeared on behalf of the appellant and reiterated the ground of appeal and submitted copies of PO, invoices, LR etc in respect of sale.

DISCUSSION AND FINDING:

I have carefully gone through the record of the case, appeal memorandum, submissions made by the appellant during personal hearing. The issue to be decided in present appeal is admissibility or otherwise of CENVAT credit of service tax paid on transportation of finished goods from factory gate to buyers premises. The contention of the appellant is that factory gate is not a place of removal in their case, instead it is depot/dumps/godown and therefore services used upto depot/dumps/godown is admissible to them. As per the definition of input service, the services used in or in relation to manufacture and clearance of final product upto the place of removal are eligible as input service. After amendment of definition of 'input service' w.e.f. 01.04.2008 the word 'clearance of final product from the place of removal' was substituted with the word 'clearance of final product upto the place of removal' and hence no credit of input service would be available beyond the place of removal. Transportation services used for purpose of outward transportation of goods i.e. from factory to customers premises is not covered within the ambit of definition of input services.

It is contended by the appellant that, in their case 'place of removal' is not the factory gate, instead it is the depot/dumps/godown and therefore outward transportation upto depot/dumps/godown would be eligible as input service. I find that in absence of sufficient documentary evidence related to existence of such depot during material time, the plea cannot be accepted. Furthermore, finding of the lower authority in this regard which was made after verification of the facts at material time also holds good.

I find that Hon'ble Supreme Court in Judgment dated 01.02.2018 of Civil Appeal No.11261 of 2016 in case of Commissioner of Central Excise v/s M/s. Ultratech Cement Ltd., has held that the approach of the lower courts (i.e. Commissioner(Appeals), High court etc.) on applicability of Board circular No. 97/8/2007-ST dated 23.08.2007 was untenable. The reasons of the same as observed by Hon'ble Supreme Court are reproduced as under:

" (9) We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:

(10) In the first instance, it needs to be kept in mind that Board's Circular dated August 23, 2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition. Relevant portion of the said circular is as under:

" *ISSUE: Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?*

COMMENTS: This issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. vs CCE, Ludhiana [2007 (006) STR 0249 Tri-D]. In this case, CESTAT has made the following observations:-

"the post sale transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".

Similarly, in the case of M/s Ultratech Cements Ltd vs CCE Bhavnagar 2007-TOIL-429-CESTAT-AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer / consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in CENVAT Credit Rules. In terms of sub-rule (t) of rule 2 of the said rules, if any words or expressions are used in the CENVAT Credit Rules, 2004 and are not defined therein but are defined in the Central Excise Act, 1944 or the Finance Act, 1994, they shall have the same meaning for the CENVAT Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under section 4 of the Central Excise Act, 1944. It states that,-

"place of removal" means-

(i) a factory or any other place or premises of production or manufacture of the excisable goods ;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty ;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed."

It is, therefore, clear that for a manufacturer /consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer /consignor may claim that the sale has taken place at the destination point because in terms of the sale contract /agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place."

(11) As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) of Rules, 2004. The three conditions (i.e. (a)regarding ownership of the goods till the delivery of the goods at the

purchasers door step, (b)seller bearing the risk or loss or damage to the goods during transit and (c)freight charges to be integral part of the price of the goods) which were mentioned explaining the "place of removal" as defined under Section 4 of the Act, there is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input service' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is this amendment which has made the entire difference. That aspect is not dealt with in the said Board' s Circular, nor it could be.

(12) Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, 2004 and such a situation cannot be countenanced.

(13) The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency service availed for transport of goods from place of removal to buyer's premises was not admissible to respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing officer is restored. "

In context of above observations made by Hon'ble Supreme Court wherein it is finally held that CENVAT Credit on goods Transport Agency service availed for transport of goods from place of removal to buyers premises was not admissible. I also find that the pattern of clearance of goods used by M/s. Ultratech Cement Ltd., i.e. clearance of cement from the parent unit on stock transfer basis and further sale etc., are similar in nature with the clearance of finished goods by the present appellant. The said judgment is therefore, squarely applicable to the present case and therefore extension of benefit of CENVAT credit on the services used for transport of goods from place of removal to buyers premises would be clearly in contradiction to above verdict of Hon'ble Supreme Court.

Other contention of the appellant i.e. provisions of the Finance Act has not been appreciated in the order in original, the appellant do not sale final product at factory gate and sale takes place only after clearance of final product from factory gate, clearing of final product from factory on payment of excise duty and transports to depot/dump/godown, transfer and possession of the goods takes place at the premises of the buyer, terms under sales contract etc. - do not holds ground as the issue availability or otherwise of CENVAT credit on transportation services used for outward transportation of goods has reached to its finality in the above referred judgment of Hon'ble Supreme Court.

In view of the above finding, I do not find any frailty in the order of the lower authority. Accordingly I passed the following order.

ORDER

I reject the appeal and uphold the impugned order.

16.2.18

(Suresh Nandanwar)
Commissioner of CGST,
Audit, Ahmedabad.