::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 क्रमांक / Appeal / File No.	मूल आदेश सं / OIO No.	दिनांक / Date
	V2/360/BVR/2017	12/Excise/Demand/2017-18	28.04.2017

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

BHV-EXCUS-000-APP-200-2017-18

आदेश का दिनांक / Date of Order: **15.03.2018** जारी करने की तारीख / Date of issue: **16.03.2018**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/संयुक्त आयुक्त/उपायुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरनिर्दिष्ट 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 Madhu Silica Pvt. Ltd. DU-IV Plot No. 147, Vartej, Bhavnagar-364060.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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 अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत 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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावी 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) अपीलीय न्यायाधिकरण के समक्ष अपील पेश्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 6 के अन्तर्गत 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 रजिस्ट्रार 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 कराना 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 अन्तर्गत सेवाकर नियमावली, 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 रजिस्ट्रार 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 कराना 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 दायर की गयी अपील, सेवाकर नियमावली, 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), केंद्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों (जिसमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दायर 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 के समक्ष कहां उत्पाद शुल्कदावा 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 किये जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मांग किए गए शुल्क' में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष लंबित 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 मामले में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत वित्त 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 का दावा माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(iv) अनिवार्यित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इकट्ठी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा तत्पश्चात्‌ 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 आवेदनों 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 उपरोक्त ढंग में किया जाना चाहिये। इस तथ्य के होते हुए भी की विक्षा पेटी कार्य में बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण की एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

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

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 की वर्तित एवं अन्य संबन्धित मामलों को समाविष्ट 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 है । /
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

:: ORDER IN APPEAL ::

M/s. Madhu Silica Pvt. Ltd., DU-IV, Plot No. 147, Vartej, Bhavnagar (*hereinafter referred to as* "Appellant") filed appeal against Order-In-Original No. 12/Excise/Demand/2017-18 dated 28.04.2017 (*hereinafter referred to as* 'the impugned order') passed by the Assistant Commissioner, Central Excise, City Division, Bhavnagar (*hereinafter referred to as* 'the lower adjudicating authority').

2. The brief facts of the case are that scrutiny of records of Appellant for the period from January, 2016 to July, 2016 revealed that the Appellant had taken Cenvat credit of Rs. 1,88,281/- on MS Angles, MS Beams, MS Plates/Stainless Steel place/HR Plates/ channels / S.S. Patti etc. treating them as capital goods whereas these appeared to have been used for Civil construction or repairs and maintenance of Capital goods, which was allegedly in contravention of provisions of Rule 2(a)(A) of the Cenvat Credit Rules, 2004 (*hereinafter referred to as* "the Rules"). It was also alleged that as per Rule 2(a)(A)(iii) of the Rules components, spares and accessories of the goods specified would qualify as capital goods only if the components, spares and accessories fell under Chapter 82, 84, 85, 90 of the Central Excise Tariff. Rule 2(k)(B) of the Rules excludes goods from the definition of inputs, which are used for --- (a) construction or execution of works contract of a building or a civil structure or a part thereof; or (b) laying of foundation or making of structures for support of capital goods and cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items if used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods, then it would not be eligible as inputs for manufacture of capital goods.

2.1 AR-II/SCN/Madhu Silica-Audit Para/2015-16 dated 21.11.2016 was issued to Appellant demanding Central Excise duty under Rule 14 of the Rules read with Section 11A of the Central Excise Act, 1944 (*hereinafter referred to as* "the Act") and interest under Rule 14 of the Rules read with Section 11AA of the Act and proposing penalty under Rule 15 of the Rules read with Section 11AC of the Act on the ground that they have been wrongly availing Cenvat credit on ineligible items as capital goods. The lower adjudicating authority, vide the impugned order, confirmed demand of Rs. 1,88,281/- along with interest and also imposed equal penalty equal of Rs. 1,88,281/- under Rule 15(2) the Rules read with Section11AC of the Act with option of reduced penalty of 25 % of demand involved under section 11AC(1)(b) of the Act to the appellant.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter alia*, contending that the lower adjudicating authority has not followed the principles of natural justice, as their defense stated at Para 8 and 9 of the impugned order have not been properly discussed while delivering findings at Para 11 to 21 of the impugned order and therefore the matter should be remanded back to the lower adjudicating authority; that their plea on limitation has not been addressed in the impugned order and therefore on this ground also the matter needs to be remanded back; that as per definition provided under Rule 2(a)(A)(iii) of the Rules, the goods covered and used as components, spares and accessories of any chapter sub-heading of Central Excise Tariff Act, 1985 any goods specified at (i) and (ii) are considered within the meaning of capital goods; that the disputed items such as M.S. Beam, M.S. Plates, Stainless steel plates, H.R. Plates, M.S. Channels, S.S. Patti though falling under Chapter 73 of Central Excise Tariff have been used / consumed to fabricate parts, components of capital goods installed to carry out manufacturing process and to manufacture their final product. In support of their above contention the appellant relied upon the following case laws :-

(i) CCE & Service Tax Vs. India Cements Ltd. 2014 (310) ELT 636 (Mad.)

"Cenvat credit - Availment of, on capital goods - Structural steel items viz., M.S. Plates, Angles, Channels and HR Sheets, used for civil construction activity/erection of various machineries such as Electrostatic Precipitator for raw mill project, additional fly ash handling system, MMD crusher, etc. for Dry Process Cement Manufacturing Plant - HELD : User test was satisfied - Impugned items were capital goods eligible for credit in terms of Rule 57Q of erstwhile Central Excise Rules, 1944 as it stood at relevant time - Rule 2(a)(A)(ii) of Cenvat Credit Rules, 2004. [paras 8, 9]"

(ii) CCE Vs. Rajasthan Spinning and Weaving Mills 2010 (255) ELT 481 (SC)

"Cenvat/Modvat - Capital goods - Steel plates and M.S. channels used in fabrication of chimney for diesel generating set - User test evolved in Jawahar Mills judgment [2001 (132) E.L.T. 3 (S.C.)] applicable to instant case - No case that steel plates and M.S. channels not required for fabrication of chimney as integral part of diesel generating set - Mandatory under pollution control laws that all plants emitting effluents to be equipped with apparatus to get rid of effluent gases and any equipment used therefor to be treated as accessory to goods specified as capital goods - Impugned Tribunal order holding steel plates and M.S. channel as capital goods and credit thereon admissible, sustainable - Rule 57Q of erstwhile Central Excise Rules, 1944 - Rule 2(a)(A) of Cenvat Credit Rules, 2004. [paras 1, 12, 13, 14]

Cenvat/Modvat - Capital goods - Pollution control equipment, accessories therefor - Any equipment used for getting rid of effluents to be treated as accessory to specified capital goods and credit thereon admissible - Rule 57Q of erstwhile Central Excise Rules, 1944 - Rule 2(a)(A) of Cenvat Credit Rules, 2004. [para 13]"

(iii) Associated Cement Co. Ltd. reported as 2015 (317) ELT 44 (chhat)

"Cenvat - Capital goods - Components of capital goods - H.V. water spray, M.V. water spray, cut off gates, M.S. angle, M.S. angle (ISME), fabricated structure, fabricated structure of steel for bed ash handling system and lower hopper impact block are the components of capital goods and an assessee is entitled to claim Modvat credit in respect of components of capital goods - Cenvat credit allowed - Rule 57Q of erstwhile Central Excise Rules, 1944 - Rule 2(a) of Cenvat Credit Rules, 2004. [para 9]"

(iv) Hindustan Petroleum Corpn. reported as 2015 (317) ELT 134(Tri-Bang)

"Cenvat - Inputs - HR Sheets and Steel plates used for maintenance of storage tanks - Storage tanks specifically covered under definition of capital goods - HR steel sheets and plates, etc., used for repair and maintenance within factory, eligible for credit - Rule 2(k) of Cenvat Credit Rules, 2004. [para 4]"

3.1 The appellant contended that the lower adjudicating authority at Para 16 of the impugned order has accepted that the disputed item were used in the capital goods but held that these disputed items do not fall within the definition of capital goods as these items do not fall under Chapter 83, 84, 85, 90, 6801 and 6802 of the Central Excise Tariff is not correct inasmuch as the disputed items were used as components, spares and accessories of the capital goods and hence the Cenvat credit is admissible to them; that the decisions of M/s. Dhampur Sugar Mills Ltd. reported as 2012(280) ELT 70 (Tri-Delhi) and M/s. DSCL Sugar reported as 2012 (280) ELT 89 (Tri-Del) are not applicable as subsequently Hon'ble Supreme Court has settled the issue; that instructions issued by CBEC vide F. No. 267/11/2010-CX dated 08.07.2010 on the basis of the judgment of M/s. Vandana Global Ltd. reported as 2010(235) ELT 440 (Tri-LB) is not applicable in the present case.

3.2 The appellant has also submitted that the findings of the lower adjudicating authority regarding non – availability of Certificate of the Chartered Engineer is not correct as this Certificate dated 16.03.2015 was already submitted to the lower adjudicating authority at the time of personal hearing.

4. The Assistant Commissioner, Central Excise and CGST Division, Bhavnagar submitted report vide F.No. IV/11-08/Misc.Corres.Recovery/2017-18/1187 dated 18.12.2017 wherein he, inter alia, submitted report wherein he stated that the disputed goods have been used in different plants of the factory viz. packing plant, boiler, coal crusher, melter etc.; that one-to-one correlation of the disputed goods and its actual usage at particular plant could not be ascertained; that the disputed goods have been mostly used in structural construction for supporting capital goods / machinery; that structures such as stairs, platforms, barriers with the help of channels, beams, plates etc.; that

cables are placed on the structural construction carried out with the help of TMT bars/angles/channels etc.; that the disputed goods like, SS Patti, SS HR Plates, Sheet, beam used under the duct; ISMC used in Cerawool, Plates used in Coal fire hot air generator; SS Patti, Coil, SS Flat used in hot air duct were not visible; that racks, conventional pellet packing, spares were used in racking system spray dryer for storage of finished goods; that MS angles, SS Round were used in maintenance of storage of all plant spares; that some pipes were used to transport waste water to effluent treatment plant, wherein water is purified and then discharged outside the factory premises.

4.1 Personal hearing in the matter was attended by Shri R. R. Dave, Consultant wherein he, *inter alia*, reiterated the grounds of appeal and submitted detailed Written submission pointing out the capital goods heading number and use of each specific parts/tanks in the manufacturing process; that flow chart of manufacturing process and Write-up showing stage wise machineries used/required and inputs used in the manufacture of said part in the factory; that certificate of Chartered Engineer dated 28.03.2016 has not been considered by the lower adjudicating authority in the impugned order; that all inputs have been necessarily used to manufacture machineries classified as capital goods at the factory premises; that the appeal may allowed on the basis of the above facts.

4.2 The appellant submitted item wise explanation along with photographs as under :-

- ***Photo No. 01*** -

  The photograph of Machinery taken, which covered under Sr. No. 21 to 23 of Annexure to the Show Cause Notice No. AR-II/SCN/Madhu-Silica-Audit Para/2015-2016 Dated: 21.11.2016. In this photograph one can see that it is a photo of High Total Dissolved Salt Tank (HDST) this item covered under the definition of capital goods provided under Rules 2(a)(A)(vii) of the Cenvat Credit Rules, 2002, and fall under 7309 / 7310 of the Central Excise Tariff Act, 1985, this High Total Dissolved Salt Tank (HDST) made out of material such as M.S. Plate, S.S. Coil and Channels (Sr. No. 21 to 23 of Annexure to Show Cause Notice - Photo No. 1) and used for the purpose of material consumed in manufacture of dutiable excisable goods.

- ***Photo No. 02*** -

  This is the photo of Machinery namely, Screw Conveyer Centrifuges which made out from S.S. Plate, H.R. Plate and H.R. Coil (Sr. No. 43 to 45 of Annexure to Show Cause Notice- Photo No.2), this machinery is fall under Chapter Sub-Heading No. 84211960which required for conveying the Silica Powder (Final Product) for further manufacturing process or packing of Final Product which removed by the Appellant on payment of Excise Duty.

- ***Photo No. 03***:-

  This is the photo of Platform made for unloading of S.S. Glass (Input of Precipitated Silica) made out of M.S. Plate and M.S. Channel (Sr. No. 27 to 30 of the Annexure to Show Cause Notice-Photo No. 3). This Platform called Melter section silicate unloading of S.S. Glass; this platform is required for to prevent the wastage of S.S. Glass while unloading from the hydraulic truck, which further taken for melting purpose from this platform, commonly known as Melter Section Silicate unloading Section, this platform fall under 8431 39 / 8428 of the Central Excise Tariff Act, 1985.

- ***Photo No. 04***:-

  In Photo No. 4 –this is the photo of Gate Valve which is part of machinery of Jumbo Bag Packing, made out of S.S. Round, S.S. Sheet and M.S. Plate (Sr. No. 17 to 20 of Annexure to Show Cause Notice-Photo - 4). These parts all under Chapter Sub-Heading No. 84229090 of Central Excise Tariff Act, 1985. The Jumbo Bag is placed below the Valve and Final Product is packed through Packing Machine as required.

- ***Photo No. 05*** -

  This is the photo of Bag Filter Resting Structure which required for / utilized for or function as separator i.e. separation of Air and Solid (Powder) contained in Finished products i.e. Precipitated Silica without this process the product cannot be fit for market. This Resting Structure made out of M.S. Angle, M.S. Channel M.S. Plate and S.S. Round (Sr. No. 14 to 16 of Annexure to Show Cause Notice-Photo - 5). This Resting Structure fall under Chapter Sub- Heading No. 84213990 of the Central Excise Tariff Act, 1985.

- ***Photo No. 06*** -

  This is the Photo of Old Melter Y Piece made out of M.S. Angle, M.S. Plate and H.R. Coils (Sr. No. 33 to 42 of Annexure to Show Cause Notice-Photo- 6). Which is used for conveyer of Silicate Glass and dropped the Silicate Glass in Melter for melting the same. This is in Y Shape for the reason this Y shape dropped the S.S. Glass in two Melting Tank OLD MELETER Y PIECE fall under Chapter Sub-Heading No. 8431 39 / 8428 of the Central Excise Tariff Act, 1985.

All machineries have been fabricated within our Factory Premises and Installed / Erected / Commissioned without carrying out any Civil Construction Work as well as no activity of Construction of Structural Foundation is required. Moreover, in case of any requirement of updated Technology all the above Machines may be dismantle easily with nominal % of waste and it may be assemble at other Place of Factory Premises. It is further to clarify that the Materials Covered under Sr. No. 01 to 13 and Sr. No. 46 to 49 of Annexure to Show Cause Notice, have been also used in above machineries as parts / components or the utilization of respective Material is described in Last column of Annexure where no Civil Construction Work is carried out / required.

All the above machinery is operated for the purpose of Manufacture of dutiable

Excisable Goods which were either Exported or removed on payment of Duty in DTA."

4.3 The appellant also submitted Write-up during personal hearing wherein stage-wise process and utilisation of various machineries which were fabricated/repaired by using the disputed items, is show. The process submitted by the appellant is reproduced as under :-

" Stage 1

The sodium silicate glass from the truck unloaded in the melter section silicate Unloading platform (Annex. Sr. No. 27 to 30 –MS Plate – MS Channel – Photo No. 3) through Truck Tripler operated with the help of Jack. The whole truck gets tilted on the Platform and unloads the SS glass within short period of time. This will save the manpower to unload the material and time also.

Then the sodium silicate Glass is being feed in the melter hopper through bucket elevator. The Melter hopper is situated above the melter having load cell to feed the fixed quantity of SS glass in to melter. At the melter Hopper outlet we have connected Y chute – Called Y piece – (Old Melter Y piece - Annex. Sr No. 33 to 42 – MS Angle, MS plate HR Plate, HR Coil – Photograph No. 6) to feed the SS Glass in two melters from one hopper.

The function of melter is to dissolve the glass in water under the pressure of 4 KG at temp. of 150 degree. In t he meter the SS glass is being feed from the feed hopper after opening the top lid of melter. There is a platform on the melter where the operator is feeding the glass. Then the water is being feed in the melter and steam is given to raise the temp. up to 150 degree with pressure of 4 kg/cm2. The Water is being circulated in the melter through pump and after 2.5 hrs the complete glass is being dissolved in the water. By this way the solid sodium silicate is get melt in the water and become liquid silicate.

This liquid silicate is transferred to the unloading tank where we check the quality and then transfer it to settling tank. In settling tank the liquid silicate is being kept for 24 hrs to settle all the impurities in liquid silicate.

The Settled liquid silicate is being transferred to process tank. We use this settled liquid silicate during the process in reactor.

Stage 2.

In stage 2 we are doing reaction between liquid silicate & Sulphuric Acid and water in reactor. We provide steam to maintain the required temp. in reactor. With the controlled flow of liquid silicate, Acid and water at a required temp. the precipitation start inside the reactor. We have a reaction batch time cycle from 1 hr to 3 hrs as per the grade & quality to be produced. Once the reaction completed the slurry is being transferred to Slurry holding tank. The reaction process is fully automatic for all the batches and controlled by DCS hence there is no error in the reaction occur.

Stage 3

The slurry produced in the reactor is being feed in to filter press through pump for separation of liquid to solid. During filter feeling the High TDS water is coming out from the filter press. In this High TSD water there are chances of silica going – when any cloth got damaged. So we are collecting the High TDC water in to HTDS tank (Annx. Sr. No. 21 to 23 – MS Plate, SS Coil, MS Channel – Photo No. 1) and pass this water again through filter press so that silica could not goes in waste.

In the filter press - from the slurry the water gets removed and cake of silica formed The cake is being transferred through belt conveyor to Scrapper hopper which give control feed of cake to the dryer via paddle mixer. The silica cake is having 80% moisture.

Stage 4

There are two types of dryers - 1. Flash dryer and 2. Spray dryer.

In flash dryer the silica cake is being feed to the cage mill where the cake gets disintegrate. We inject hot air in the cage mill. The hot air is generated from the hot air generator and conveyed from hot air generator to the cage mill through hot air duct.

The cake come in contact with hot air and water gets evaporated from the cake hence Cake is converted in to powder. The stream of powder and air pass through the bag filter for the separation of air & solid (powder). The bag filter is fixed on the resting structure (Bag filter resting structure – Annex Sr. no. 14 to 16 – MS Channel, MS Plate, SS round – Photo No. 5)

The finished powder from the bag filter is being passed through the vibro shifter to remove any foreign material from the finished product.
The powder is being conveyed to the finished product silo with the help of pneumatic conveying system for packing.
In Spray Dryer the silica cake sends to the slurry preparation tank (Liquefaction tank) where it gets mixed with the small proportion of acid and the cake is converted in to slurry. The slurry is being transferred to slurry holding tank.

The slurry is feed in to spray dryer through screw feed pump. In spry dryer the slurry is passing through atomiser wheel. The hot air is being injected in to the dryer chamber where the water gets evaporated from slurry and powder separated. The fine particles of powder are being collected in bag filter and the heavy particles are collected at chamber. Both the silica powder is conveyed through the screw conveyor (Screw conveyor - Annex. Sr. No. 43 to 45 – SS plate, HR Plate, HR Coil – Photograph No. 2) vibro screen for removal of foreign material from the finished product.

The powder is being conveyed to the finished product silo with the help of pneumatic conveying system for packing.

Stage 5

The finished powder is then conveyed to the Pre hopper with the help of rotary valve & screw conveyor. The pre hopper is a feed hopper for automatic packing machine. There is slide gate valve (Jumbo bag packing machine slide gate valve – Annex. Sr. No. 17 – 20 Photograph

No. 4) below pre hopper which control the flow of powder for packing.

The automatic packing machine ate of two types one is for small bags and another is for jumbo bag packing.

After packing the material is being stacked in the racks of the racking system arranged in finished ware house.

In spray dryer plant we have roller compactor machines which produce the granules from the powder. To operate the machine we have fabricated the platform attached to the compactor machine. It is required for ease in operation and maintenance."

4.4 No one appeared from Department despite personal hearing notice sent to the Commissionerate.

Findings :-

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal, written and oral submissions made by the appellant. I find that the Appellant has filed this Appeals delaying it by 1 (one) day along with Application for condonation of delay on the ground that the delay has occurred in delivery of appeal papers from consultant by the courier. I condone delay of 1 day in filing appeal under Section 35 of the Act and proceed to decide the appeal on merits.

5.1 The issues to be decided in the instant appeal are -

(i) Whether the impugned order confirming demand of Rs. 1,88,281/- under Rule 14(1)(ii) of the Rules read with Section 11A(1) of the Act is correct or not;

(ii) Whether interest is payable under Rule 14 of the Rules, read with Section 11AA of the Act;

(iii) Whether penalty equal to demand is imposable under Rule 15(2) of the Rules read with Section 11AC(1)(a) of the Act or not.

6. The lower adjudicating authority has confirmed demand on the ground that Cenvat credit is not available on items like HR Coil, MS Angle, M.S. Plate, S.S. Plate, HR Plate etc. as per Rule 2(a)(A)(iii) and Rule 2(k) of the Rules recording his findings in Para 15 and 16 as under :-

"15 ..... From the definition of the "Capital Goods", it is seen that the material viz. MS Angles/MS Beam/ MS Plates / Stainless Steel Plates, HR Plates / MS Channels / Sub-section Patti and other items against which the Cenvat credit availed by the Noticee cannot be considered as 'Capital Goods' as these goods are neither the parts/components nor the accessories of goods of Chapter 82, 84, 85 or 90 or pollution equipments. <u>These are only structural / construction materials which are used for maintenance and repair of their plant and machinery, hence the same cannot be covered by the definition</u>

of Capital goods as defined under Rule 2(a)(A) of the Cenvat Credit Rules, 2004. Further, since these materials are used by Noticee for the purpose of repairing and maintenance of Capital Goods, hence the same also cannot be considered as 'input' as defined under Rule 2(k) of the Cenvat Credit Rules, 2004.

16. There is no doubt that these items are essentially used in the capital goods for positioning, fixing etc. But they are used with capital goods and accordingly, they cannot be treated as inputs for manufactured items. Further, Rule 2 of Cenvat Credit Rules, 2004 defines the capital goods exhaustively and the said goods on which the Noticee had availed the Cenvat credit do not fall within the definition of the capital goods as they are neither goods falling under Chapters 82, 84, 85, 90 and Heading No. 6802 and sub-heading No. 6801 of the first schedule to the Central Excise Tariff Act, 1985 nor components, spares and accessories of such capital goods. In short the said goods cannot be classified under any of the categories of capital goods as defined in the Cenvat Credit Rules, 2004."

6.1 I find that the lower adjudicating authority has disallowed Cenvat credit on the disputed items even when the same have been used for repairs and maintenance of the capital goods. The appellant, during personal hearing has provided item-wise use along with photographs to explain that the disputed inputs had been used in fabrication of the parts of machinery for repairs and maintenance. It is evident from the findings at Para 15 and 16 above, the lower adjudicating authority has accepted the fact of usage of the disputed items in repairs and maintenance of capital goods but even then denied Cenvat credit on the ground that credit is not admissible if used for repairs and maintenance of the capital goods, which is not correct and is against the settled legal position by way of the following decisions :-

(i) CCE Vs. Jindal Stainless reported as 2016(343) ELT 527 (Tri-Bang)

"6. I have considered the submissions made by both the sides. In the case of the Andhra Sugars Ltd., this Tribunal had taken a view that credit of Central Excise Duty would be available in respect of MS Bars/Plates, etc., used in workshop meant for repairs and maintenance of machinery which are used for manufacture of final products. The Tribunal had also relied upon the decision of the Hon'ble High Court in the case of Hindustan Zinc Ltd. [2007 (214) E.L.T. 510 (Raj.)] to take a view that MS Plates, Sheets, etc., used in the workshop for repair are eligible for Cenvat credit. This Tribunal also relied upon Paragraph 5 of the decision in the case of Panipat Co-operative Sugar Mills Ltd. relied upon by the learned counsel to come to the conclusion that credit is admissible. Paragraph 5 is reproduced for better appreciation:

"5. I have considered the submissions from both the sides and perused the records. The appellant in course of proceedings before the Deputy Commissioner as well as Commissioner (Appeals) pleaded that during the operation of sugar mill certain parts and components of the machinery get worn out and to replace the same, the new components have to be fabricated by using the steel items. On going through the impugned order-in-appeal, I find that the Commissioner (Appeals) has not disputed the usage of the M.S. Angles, Channels, Plates, H.R. Sheet, etc. The

Commissioner (Appeals) has, however, simply relied upon the judgment of Larger Bench of the Tribunal in the case of Vandana Global Ltd. v. CCE, Raipur reported in 2010 (253) E.L.T. 440 (Tri.-LB) and has upheld the Deputy Commissioner's order. In my view when the fact that the items, in question, have been used for repair and maintenance of the plant and machinery, that is, for fabrication of the parts of machinery which had got worn out and have to be replaced, is not disputed, in view of the judgments of three High Courts Hon'ble Chhattisgarh High Court, Hon'ble Rajasthan High Court and Hon'ble Karnataka High Court, as mentioned above, the inputs used for repair and maintenance of machinery would be eligible for Cenvat credit. Though in a recent judgment in case of Sree Rayalaseema Hi-Strength Hypo Ltd. v. C.C. & C.E., Tirupati (supra) Hon'ble A.P. High Court has taken a different view holding that welding electrodes used for repair and maintenance are not eligible for Cenvat credit as the activity of repair and maintenance is distinct from manufacture, in my view when three High Courts as mentioned above have held that the items used for repair and maintenance of plant and machinery are eligible for Cenvat credit it is this view which has to be adopted. Moreover, for permitting Cenvat credit what is relevant is as to whether the use of the item has nexus with manufacture and whether without that item manufacture is commercially possible. Since repair and maintenance is an activity which is essential for smooth manufacturing operations and without regular repair and maintenance, manufacturing activity is not commercially feasible, the inputs used for repair and maintenance of the plant would be eligible for Cenvat credit. I, therefore, hold that the impugned order disallowing the Cenvat credit is not sustainable. The same is set aside. The appeal is allowed."

[Emphasis supplied]

(ii) CCE Vs. Hira Power & Steels reported as 2015 (330) ELT 365 (Tri-Del)

"3. Learned AR submits that these items are not capital goods and are structural items, therefore, respondents are not entitled to take Cenvat credit on these items as per the decision of Vandana Global Ltd. [2010 (253) E.L.T. 440 (Tri-LB)]. He further submits that as per the Rule 5 of Central Excise (Appeals) Rules, 2001, the learned Commissioner (Appeals) cannot consider the additional evidence produced before him. Therefore, impugned order is required to be set aside.

5. Heard the parties and considered the submissions.

6. In this case Cenvat credit is sought to be denied on the items mentioned hereinabove in Para 1 on the premise that these items were used as structural items, the usage of which items has been explained by the respondents in reply to the show cause notice and same has been recorded by the adjudicating authority but same has not been controverted by the adjudicating authority with cogent evidence and denied the Cenvat credit on the ground that respondent has not provided drawings and design but nowhere from the said order it is coming out that adjudicating authority has asked to show these documents from the respondents during the course of hearing. Therefore, evidence provided by the respondent before learned Commissioner (Appeals) for consideration are admissible as per Rule 5(4) of the Central Excise (Appeals) Rules, 2001. In these circumstances, learned Commissioner (Appeals) has considered the usage of all items and thereafter arrived at the decision that these items have been used in manufacturing or repair and maintenance of capital goods. Therefore, I do not find any infirmity in the impugned order. Same is upheld. Appeal filed by the Revenue is dismissed."

[Emphasis supplied]

6.2 In light of the above decisions, I find that denial of Cenvat credit on the ground that the disputed items have been used for repairs and maintenance of the capital goods is not correct, legal and proper, inasmuch as repairs and maintenance of capital goods by way of fabrication of parts of the capital goods in the factory premises itself is required to be treated as an integral part to keep the capital goods in working condition to manufacture final products and Cenvat credit on such items, therefore, cannot be denied.

7. The appellant has submitted that the lower adjudicating authority has not taken cognizance of the Chartered Engineer's Certificate dated 16.03.2015, which is reproduced as under :-

E-mail : rd_vora99@yahoo.co.in
B/8, "NIRAV", Mahila Welfare Society,
Vidyanagar, Bhavnagar - 364 002.
Tel. : 0278 - 2425713, M. : 9979 824 513

DNV ENGINEERS

Dharmendra Vora
B. E. (Mech.) F.I.E.
First Class Boiler Proficiency Engineer
Chartered Engineers, Valuers
Safety Auditors & Technical Consultants

SCH. NO/
AR.II/CCH/MADHU SILICA/AUDIT YEAR/15-16

To Whom So Ever It May Concern

Report # : DNV / MSPL / 16-03 / 03 **Date** :- 28-03-2016

At The request of **M/S. MADHU SILICA PVT.LTD; DU-IV** at Plot no. 147, G.I.D.C. Vartej, Dist.Bhavnagar, I, the undersigned **Mr. Dharmendra Vora**, Chartered Engineer, Valuer-Plant & Machinery, visited the above site on dt. 27th of March, 2016 with our technical staff to find out the net utilized quantity of S.S Pipes, S.S Sheets,S.S. Patti, H.R. plates, Hot rolled Coils, H.R.Coils, M.S.Beams, M.S.Angles, M.S.Channels, etc. purchased from various suppliers for fabricating various types of equipments and structures.

We have collected & verified the list of 49 Nos.of purchase bills,challans,weighbridge slips,etc.of current Year 2015-2016 with aspect of its quality,quantity,usage and actually where it is used in the fabication work carried out in above plant, i.e shown in the last column of the table of attached sheet. Which is self explanatory.

Moreover as per my openion the usage of above items has nexus with manufacturing of best quality and uninterrupted commercial production.

I here by declare that :-
I have personally inspected the plant on Dt 27th of March' 2016.
The information furnished above is true & correct to the best of my knowledge and belief.
I have no direct or indirect interest in the above matter.

Your's Sincerely,

DHARMENDRA VORA
B.E. Mech., F.I.E. Chartered Engineer, F-101462/1
Govt. Regd. Valuer-Plant & Machinery.

DNV Engineers F-101462/1 IIE (India) Chartered Engineers

7.1 The appellant has submitted item wise usage of the disputed items along with photographs of the machineries where used as parts duly backed by technical write-up detailing use of said machinery in the manufacture of the excisable final products. I find that the lower adjudicating authority has recorded his findings in a generalized and casual manner without going in to the facts. I also find that the lower adjudicating authority has not examined Certificate dated 16.03.2015 of Chartered Engineer. I find that the Chartered Engineer has recorded findings after personally visiting the factory. I, therefore, find that the lower adjudicating authority was duty bound to consider such evidence and to give his findings with proper reasoning based on the facts. In this context, I rely on the following decisions :-

(i) CCE Vs Godavari Power & Ispat reported as 2016 (388) ELT 730(Tr-Del)

> *"Cenvat credit - Inputs - Capital goods - MS Beams, Angles, Channels, Flats, Plates and Rounds - Usage of said items in different types of fabrications and manufacture established in view of certificate from Chartered Engineer - Rejection of this certificate on account of mismatch of quantities used and usable, not justified as quantity would depend upon nature and size of each machine - Credit available - Rules 2(a) and 2(k) of Cenvat Credit Rules, 2004. [para 5]*
>
> *5. Specific reference has been made by the Revenue regarding certain reference nos. not tallying with that of originally examined by the original adjudicating authority. Without going into the correctness of such claim and the implication of such assertion, it is an admitted fact that the usage of various items even in different types of fabrication and manufacture has not been questioned with any amount of corroboration by the Revenue to controvert the submissions made by the respondent before the lower authorities. The original authority as well as in the grounds of appeal, observation has been made regarding the Chartered Engineer's Certificate being not quantitatively validated. Though it is not clear as to the nature of such validation, it would appear that the quantity of steel items used in a particular item of structure/equipment is alleged to have been higher or lower, considering the nature and size of the machine.*
>
> *6. Regarding the impugned order having been passed in violation of Rule 5 of the Appeal Rules, I find that the grounds of appeal is rather vague, without mentioning, which are all additional evidences, which will be barred under the said rule. Certain discrepancies between the drawings/chart as presented before the original authority which were also produced before the Appellate Authority were mentioned as the reason for alleging the said violation of Rule 5. The Commissioner (Appeals) is well within his right to seek clarification to explain any evidences submitted before him, before appreciating the said evidence for a finding. Seeking additional information or clarification on evidences on record to facilitate the proper finding cannot be apparently barred by the abovementioned rule. There is also no allegation that the new set of evidences have been submitted by the respondent which came into existence after the said case was decided by the original authority. I find no substantial ground in the appeal by the Revenue when there is no challenge on merit. A perusal of the impugned order to examine the merit reveals that the factual usage of various items have been examined by the*

Commissioner (Appeals) and he was guided by various decided cases including the application of "user test" as laid down by the Hon'ble Supreme Court in Rajasthan Spinning and Weaving Mills Ltd. - 2010 (255) E.L.T. 481 (S.C.) and in Jawahar Mills - 2001 (132) E.L.T. 3 (S.C.). The eligibility of the credit has been decided by the lower authority on such merits.

7. Considering the above discussion and analysis, I find no merit in the present appeal by the Revenue. Accordingly, the same is dismissed. "

[Emphasis supplied]

(ii) CCE Vs. SKS Ispat & Power Ltd. reported as 2015(326)ELT620(T-Del)

" 4. Matter is taken up for consideration and I have perused the impugned order wherein ld. Commissioner (A) has examined the issue on the basis of certificate issued by the Chartered Engineer saying that these rails were used for EOT cranes and they are essential components of EOT cranes. The ld. Commissioner has observed as under :

.....
.....

5.3 In the instant case I find that, the Adjudicating authority in the impugned Order-in-Original has disallowed Cenvat credit amounting to Rs. 18,20,321/- taken by the Appellant on structural steel items i.e. Rails of inputs by relying the judgment of Hon'ble CESTAT larger bench in the case of M/s. Vandana Global Ltd. v. CCE, Raipur reported in 2010 (253) E.L.T. 440 (Tri.-LB) and Board's Circular/Instruction No. 267/11/2010-CX, dated 8-7-2010 wherein Hon'ble Tribunal has categorically ruled that, goods like cement and steel items used for laying 'foundation' and for building 'supporting structures' cannot be treated as either inputs for capital goods or as inputs in relation to the manufacture final products and therefore, no credit of duty paid on the same can be allowed under the Cenvat Credit Rules, 2004. It has also been stated by the Tribunal that, amendment to Explanation 2 to Rule 2(k) of Cenvat Credit Rules, 2004 inserted vide Notification No. 16/2009-CE, dated 7-7-2009 is clarificatory in nature and has retrospective effect. Thus, in terms of Hon'ble Tribunal's aforesaid judgment as well as Board's instruction supra, Cenvat credit on Cement and Steel items used for laying foundation and for building supporting structures is not allowable. Further para 4 of the CBEC instruction No. 267/11/2010-CX, dated 8-7-2010 stipulate that, the credit on inputs used in the manufacture of capital goods, which are further used in the factory of the manufacture is also available, except for items like Cement, angles, channels, CTD or TMT bars and other items used for construction of factory shed, building or laying foundation or making of structures for support of capital goods. From the above it is obvious that, if an assessee manufactures items i.e. Capital goods or its parts, components, or accessory out of the structural steel items, then there is no bar/restriction in the availment of Cenvat credit on these items. In the instant case I find that, the Appellant had furnished the documentary evidences i.e. Chartered Engineer's Certificate dated 25-7-2012 showing the quantity of structural items i.e. Rails used for manufacture of components EOT Crane & Cooling Bed along with photographs. As per the said documents they have used impugned input items for manufacture components of EOT Crane for fabricating the track for movement of EOT Crane and cooling bed. On going through the detailed chart showing distinctively the description of structural steel items i.e. Rails, date of raw material received, quantity

received & used for final product and manufacture of resultant items said to have been manufactured out of the impugned items. I find that, they have availed Cenvat credit on structural items i.e. Rails used for manufacture of components of EOT Crane and Cooling Bed etc. which have a definite function in relation to manufacture of their final product i.e. Rolled products in Rolling Mills Division and is entirely different from the supporting structures of plant & Machinery or for foundation as held by the Adjudicating authority. Also I have gone through the photographs of EOT Crane and considering the function and use of the items it can firmly said that, these items are nothing but parts and components or accessories of the Rolling Mill Unit and thus fall within the purview of Capital goods as defined under Rule 2(a) of Cenvat Credit Rules, 2004.

.....

.....

5.7 In the instant case revenue has also failed to bring the evidences on record to show that the Appellant had used such inputs for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. On the other hand the appellant has shown that the said inputs were used in the manufacture of Capital goods, under clause (i) of Rule 2(a) of Cenvat Credit Rules, 2004.

5. I have gone through the observation made by the ld. Commissioner (A) in the impugned order who has relied on the certificate issued by the Chartered Engineer and Revenue has failed to produce any evidence contrary to them.

6. In these circumstances, I do not find any infirmity with the impugned order. Same is upheld. Appeal filed by the Revenue is dismissed."

[Emphasis supplied]

(iii) CCE Vs. Polyplastics Ind. reported as 2017 (351) ELT 129 (P & H)

"3. The assessee contends that the moulds have never left its premises. In this regard, the assessee relied upon the certificate issued by Chartered Engineer.

4. It is common ground that for the purpose of reversing the Cenvat credit, it was necessary for the moulds to have been physically removed from the respondent's premises. The only question, therefore, is one of fact, namely whether the moulds were physically removed from the respondent's premises or not?

5. The Adjudicating Authority relied upon the invoices to hold that the moulds had not been removed. The invoices merely evidence a sale. They do not evidence the movement of the goods in respect whereof, they are raised. Delivery challans would indicate the removal of the goods from out of the premises of the seller and to the destination indicated therein.

6. We will presume that absent anything else an invoice prima facie indicates the delivery of possession of the goods sold. However, in the present case, this presumption is rebutted by the certificate issued by the Chartered Engineer. There is nothing that indicates that the certificate issued by the Chartered Engineer is false. The Department could easily have ascertained this fact by an inspection of the assessee's premises itself. Even surprise checks could have been carried out. That was not done.

7. In the circumstances, the Tribunal cannot be faulted for having relied upon the certificate issued by the Chartered Engineer. The Tribunal rightly proceeded on the basis of the balance of probabilities. The finding is far from perverse or absurd. We are, in fact, in agreement with the approach adopted by the Tribunal.

8. The appeal, therefore, is dismissed."

[Emphasis supplied]

(iv) Shree Bhagwati Steel Roll Mill reported as 2015 (326) ELT 209(S.C.)

"43. We are in broad agreement with the Karnataka High Court view as it is clear that the load capacity of an induction furnace unit is certainly relevant material referred to in Rule 3(2) to determine the capacity of the furnace installed. It is obvious that it is not necessary to state such load capacity in terms for it to be included in Rule 3(2). Agreeing therefore, with the Karnataka High Court's view we set aside the judgment of the Punjab and Haryana High Court and declare that a ***Chartered Engineer Certificate*** *dealing with the sanctioned electrical load for a furnace is a relevant consideration which can be looked at in the absence of other factors mentioned in Rule 3. This appeal is disposed of accordingly."*

[Emphasis supplied]

(v) Air Carrying Crop (I) Pvt. Ltd. reported as 2009(248)ELT175(Bom)

"Evidence – Certificate of ***chartered engineer****, disbelief of - Statement of chartered engineer not recorded – If certificate was to be disbelieved, revenue ought to record his statement and/or call him for cross-examination. [para 8]"*

(vi) Mangal Sponge & Steel P. Ltd reported as 2015(326)ELT696(Tri-Del)

*"**5.** It is no doubt some of the items have been used by the appellant for fabrication of supporting structure embedded to earth for which the Chartered Engineer who is an expert in the field has already given in his report that appellant has used the quantity of 49.85 MT of these items for supporting structures and on the said quantity appellant has not claimed Cenvat credit. The appellant is able to show by way of Chartered Engineer Chartered that out of the total quantity 150 MT were used by the appellant for fabrication of capital goods. These observations of the Chartered Engineer which have been relied by the appellant have been discarded by the authorities below without any tangible evidence. Merely saying that all the items were used for supporting structure is not admissible evidence. Therefore, as the appellant has been able to show the usage of the items in question for fabrication of capital goods as directed by this Tribunal in the earlier round of litigation, I have no hesitation to hold that appellant is entitled to take Cenvat credit on this quantity. For the remaining quantity if revenue feels that appellant has taken the credit they may initiate another proceeding against the appellant. But to the quantity upto 150 MT appellant is entitled to take Cenvat credit.*

6. With these terms I dispose of the appeal by setting aside the impugned order."

(vii) Gagan Resources P. Ltd. reported as 2016(341)ELT363(Tri-Del)

"4. I find that the ld. Commissioner (Appeals) vide the impugned order has allowed the Cenvat credit, holding that the disputed goods have been used for manufacture of rotary kiln and rotary cooler, pollution control equipments (ES), conveyer, after burn chambers, etc., which are capital goods mentioned under Chapter Heading 84 of the Central Excise Tariff Act, 1985. I find from the impugned order that the ld. Commissioner (Appeals) has arrived at such conclusion based on the documents/records/photographs and the Chartered Engineer's certificate submitted by the respondent.

5. In view of the fact that upon analysis of the factual matrix, the ld. Commissioner(Appeals) has extended the Cenvat benefit to the appellant on the disputed goods, the impugned order does not warrant the appellate intervention. Therefore, I do not find any merits in the appeal filed by Revenue. Accordingly, the same is dismissed."

[Emphasis supplied]

7.2 I find that the above decisions including that of Hon'ble High Court have distinguished decision of the Hon'ble Larger Bench of CESTAT in case of M/s. Vandana Global Ltd. referred to in the impugned order. The above quoted decisions also signify that the Chartered Engineer Certificate has vital role to play and that cannot be brushed aside without establishing that the Certificate is false. It is held by the Hon'ble High Courts and CESTAT that Cenvat credit on items like HR Coils, M.S. Plates, M.S. Channels, M.S. Beam etc. have to be allowed if the same have been used for fabrication of parts and components of plant and machineries in the factory premises and Cenvat credit cannot be denied without supporting evidences produced by the department.

7.3 I also rely upon the following orders of the Hon'ble CESTAT wherein, it has been held that Cenvat credit on items used in fabrication of parts of the capital goods is allowable :-

(i) M/s. Saguna Metals reported as 2016 (339) ELT 119 (Tri-Hyd)

"4. I have heard the rival submissions and perused the appeal papers. The main ground for denying the credit as seen discussed in the impugned order is that the appellants failed to furnish sufficient documentary evidence that the impugned items were used in fabrication of capital goods/accessories/ parts/components. A Chartered Engineer's Certificate though produced before both the authorities has not been considered at all. The said expert has given details regarding the manner and use of the impugned items. Further, the fact of purchase of these items and their receipt in factory is not

disputed. Revenue does not have a case that such purchased items were diverted by the appellant in any manner. On such score, I am able to safely infer basing on the certificate issued by the Chartered Engineer and photographs that the impugned items were used for fabrication of capital goods/components/parts/accessories.

5. The issue whether MS items used for fabrication of capital goods/components/parts/accessories are eligible for credit is no longer res Integra. The decisions cited by the appellant stated supra have categorically held that credit is admissible. Facts of the present case being similar, applying the ratio laid therein, I find that the disallowance of credit is unjustified.

6. In the result, the impugned order is set aside, and the appeal is allowed with consequential reliefs, if any."

(ii) Yash Paper Ltd. reported as 2017 (349) ELT 662 (Tri-All)

"Cenvat credit - Inputs - Channels, Beams, Angles used in strengthening Storage Tank for storage of Caustic Lye in caustic recovery plant of paper factory, admissible for credit - Rule 2(k) of Cenvat Credit Rules, 2004. [para 5]

4. Heard the ld. DR who has supported the impugned Order-in-Appeal.

5. Having considered the rival contentions and on perusal of records it is very clear that through Installation Certificate the items used on which Cenvat credit was taken were used for increasing the strength of Storage Tanks. Therefore, I hold that they were used in relation to the manufacture of capital goods and therefore as per definition of inputs and capital goods they were eligible for Cenvat credit. Therefore, I hold that the appellant were entitled for Cenvat credit of Rs. 1,05,130/-. I, therefore, allow the appeal and set aside the impugned Order-in-Appeal. The appellant shall be entitled for relief, as per law."

[Emphasis supplied]

7.4 I find that the report submitted vide letter F. No. IV/11-08/Misc. Corres. Recovery/2017-18 dated 18.12.2017 is vague and does not clarify as to why the disputed items cannot be considered to be eligible for availment of Cenvat credit even when the report says that *"....On physical inspection, it is found that the said goods in question are used in different plants of the factory, viz. packing plant, boiler, coal crusher, melter etc....."*. The appellant has submitted photographs and detailed Write-up establishing that the disputed items have been used in the fabrication of parts of various machineries and repairs and maintenance thereof duly supported by the Chartered Engineer Certificate and denial of Cenvat credit even then would be not legal and proper at all.

7.5 In view of the above facts and legal position, I hold that Cenvat credit claimed by the appellant is admissible to them and hence, I have no alternative but to set aside demand confirmed by the impugned order.

7.6 Since the demand has been set aside, the question of recovery of interest and imposition of penalty do not arise and therefore, interest and penalty imposed under the impugned order are also liable to be set aside.

8. In view of above findings, I set aside the impugned order confirming demand, interest and imposing penalty and allow the appeal.

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

9. The appeal filed by the appellant is disposed off in above terms.

13/6/2018

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Madhu Silica Pvt. Ltd., **DU-IV,** **Plot No. 147,** **GIDC Vartej,** **Bhavnagar – 364 060.**	

Copy for information and necessary action to :-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
2. The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar
3. The Joint Commissioner, GST & Central Excise Division, Bhavnagar.
4. The Assistant Commissioner, GST & Central Excise, Bhavnagar
5. Guard File.