



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



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/108/BVR/2017

मूल आदेश सं /
O.L.O. No.
31/Excise/D/16-17

दिनांक /
Date
31.01.2017

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

BHV-EXCUS-000-APP-222-2017-18

आदेश का दिनांक / Date of
Order:

14.03.2018

जारी करने की तारीख /
Date of issue:

23.03.2018

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत टर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरोक्त जारी मूल आदेश से सूचित: /

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 :-**

1. M/s S. S. Industries, Survey No. 23/1, 23/2,, Sihor Ghanghli Road, Village : Vadia - 364 240 Dist; Bhavnagar.

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। /

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

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

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

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

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CFSTAT) 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 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 भगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर 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 भगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भगतान, 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 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), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी।

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

(iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (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 भगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

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

- (i) धारा 11 डी के अंतर्गत रकम
 - (ii) सेनवेट जमा की ली गई गलत राशि
 - (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

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

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

- (i) amount determined under Section 11 D;
 - (ii) amount of erroneous Cenvat Credit taken;
 - (iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार की पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, 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) सनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं।
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेट्री कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलाधी 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

:: ORDER IN APPEAL ::

M/s. S. S. Industries, Survey No. 23/1,23/2, Sihor-Ghanghali Road, Village-Vadia, Taluka-Sihor, Pin-364240 (**hereinafter referred to as 'the appellant'**) has filed the present appeal against the Order-In-Original No. 31/Excise/D/16-17 Dated. 31.1.2017 (**hereinafter referred to as "the impugned order"**) passed by the Assistant Commissioner of Central Excise & Service Tax, City Division- Bhavnagar (**hereinafter referred to as "the Adjudicating Authority"**).

2. During the course of scrutiny of records of the appellant by the Audit team of the Central Excise, Audit Circle-VI, Bhavagar, it was found that the appellant had availed and utilized Input Credit on Capital Goods i.e. MS Angels, MS Channels, CI Rail, MS Round Bars (**hereinafter referred to as the impugned goods**) etc. for the use of foundation/support of the capital goods ;as the impugned goods did not fall within the scope of "Capital Goods" and the said goods were not the inputs for the assessee, the Cenvat Credit taken/utilized by the appellant was found to be not admissible. Accordingly, Show Cause Notice No.VI/8(a)-43/EA-2000/AG-C/2015-16 dated 11.1.2016 was issued to the appellant which was adjudicated by the Adjudicating Authority under the impugned order dated 31.1.2017,wherein disallowed the Cenvat Credit taken/utilized on ineligible input goods amount to Rs. 43,698/- ;ordered for its reversal/recovery under the provisions of Rule 14 of the Cenvat Credit Rules, 2004(**hereinafter referred to as "CCR,2004"**) read with provision to sub section 4 & 5 of Section 11A of Central Excise Act,1944(**herein after referred to as "CCA,1944"**) along with interest under Rule 14 of CCR,2004 read with Section 11AA of CEA,1944;also imposed penalty of Rs. 43,698/-under Rule 15(2) of the CCR,2004 read with the provisions of Section 11AC of CEA,1944.

3. Being aggrieved by the impugned order, the Appellant filed the present appeal along with an application for Condonation of Delay dated 24.4.2017 , inter alia, mainly on the following grounds;

- (i) There were delay of 19 days in filing the appeal as their consultant was busy with Adjudicating proceedings of various authorities due to drive of adjudication and further their consultant being a Chartered Account firm ,were busy with the reply work of notices issued by the Income Tax department due to demonetization of currency and statutory audit work of Nationalized Banks. Apart, the delay was not intentional and if not condoned, there would be irreparable loss to them. Also place reliance on various decisions of the

higher judicial forum in support of their above contention.

- (ii) that the impugned goods on which Cenvat Credit taken/utilized had not been used for foundation/support of the Capital goods.
- (iii) It is also not clear that how the audit officers had alleged that that impugned goods was for the use of foundation/support of the Capital Goods.
- (iv) invoking explanation 2 to Rule 2(k) of the Rules avaiement of Cenvat Credit in their case was admissible.
- (iv) The burden to prove that the impugned goods were for the use of foundation/support of the capital goods was on the department and department failed to discharge their burden while issuance of show Cause Notice and subsequently while issuance of impugned order.
- (v) The case law i.e. of Vandana Global Limited cited by the Adjudicating Authority are irrelevant as it was given in context with the Cement and Steel items used for foundation and for building supporting structures for capital goods, whereas in their case the impugned goods were used as inputs.
- (vi) The facts of the case law i.e. Goodyear India limited referred by the adjudicating authority are different and not applicable to their case as in that case the assessee did not act in a *bona fide* manner, whereas in their case there was no evidence that the appellant had acted with mala fide intention.
- (vii) The appellant had very well assumed his responsibility by recording the receipt of the raw material in the respective raw material register Form-IV; manufactured the finished goods by using the same; and recorded the details of finished goods in RG-1 and thereby followed the instruction given at Para 3.10 of Chapter 5 of CBEC's Excise Manual of Supplementary Instructions, 2005.
- (viii) The show cause notice is time barred as the demand is for the period from November 2010 to November 2014 and show cause notice was issued on 11.1.2016 and subsequently impugned order is also illegal. The appellant had rightly taken the CENVAT credit on the goods as capital goods used in the manufacture of their finished goods. There was neither any provision in the Rules that the manufacturer had to disclose the actual use of the inputs nor to submit any intimation; there is no any evidence that the



appellant had any intention to evade the payment of duty.

- (ix) Further, adjudicating authority has not given any grounds in his findings that for which rule or for what act, the appellant was liable for penalty under Rule 15(2) of the Rules and accordingly to the legal precedence no penalty can be imposed on them. There was no intention on the part from the appellant side to defraud the revenue or evade payment of duty. Hence, the appellant was not liable for penalty and same was also not justified.

4. Hearing in the matter was held on 21.02.2018, wherein Shri Sarju Mehta, Chartered Accountant and Authorized Representative appeared on behalf of the appellant and reiterated the submission of their appeal memorandum and also filed additional submission of dated. 22.2.2018, wherein they submitted that ;

4.1 impugned goods were used in the manufacture of capital goods that were further used in the factory and were covered under the ambit of definition of input. Further referred to the clarification issued by the board under their circular No. 943/04/2011-CX dated. 29.4.2011 wherein it was clarified that *the credit of all goods used in the factory was allowed except in so far as it was specifically denied;* the expression "no relationship whatsoever with the manufacture of a final product" must be interpreted and applied strictly and not loosely; only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product was not allowed. Hence, the credit taken by the appellant on the goods which were parts of the capital goods and used in the manufacture of the final product within the factory were allowed. Also placed reliance on the judgement of the Hon'ble Tribunal in the case of M/s Sakthi Sugar Ltd Vs Commissioner of Central Excise, Salem reported in 2008(227)ELT(107)(Chennai CESTAT).

4.2 the show cause were time barred as there is no evidence or discussion in the show cause notice and subsequent in the impugned order regarding suppression of facts by the appellant and hence extended period can not be invoked.



4.3. there was no intention on the part of the appellant to defraud the revenue and hence the appellant was not liable for penalty. Also the show Cause notice was issued on the basis of Audit and there was no *mens rea* noticeable from the record nor any impeachable conduct in respect of the transaction, no penalty could be levied.

5. I have gone through the appeal memorandum, written and oral submission made as well as documents submitted during personal hearing. Since the appellant has made payment of mandatory deposit of Rs.3278/- (7.5% of the Cenvat Credit of Rs.43,698/- vide IOB Challan No. 50025 dated. 12.4.2017 and thereby complied with the requirement of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act,1944. I proceed to decide the case on merits

6. I find that the appellant filed appeal on the 79th day from the date of their receipt of impugned order and for such 19 days delay in the aforesaid manner, the appellant has filed Application for condonation of delay wherein, it is submitted that as their consultant was busy with the adjudicating proceedings of various authority and also busy in the Income Tax matters post demonetization, the appeal could not be filed in time. Finally, requested to condone the delay of 12 days. I find the reason to be genuine and simultaneously find that delay is well within the prescribed time limit of 30 days for which Commissioner (Appeals) is empowered to grant extension as per Section 35 of the Central Excise Act, 1944. Accordingly, I condone the delay and proceed further on merits.

7. Undisputed facts of the case is that the appellant had availed and utilized Input Credit on capital Goods i.e. MS Angles, MS Channels, CI Rail, MS Round Bars, MS Beams, Cut length pipe CS welded etc; As per the explanation given under Rule 2(k) of CCR,2004 Input shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items **used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods.**



7.1 It is also undisputed that impugned goods fall under Chapter Heading No. 72 & 74 of Central Excise Tariff Act, 1985 and not covered under the definition of Capital Goods(reproduced below).

"Rule 2. Definitions. -

In these rules, unless the context otherwise requires,-
(a) **"capital goods"** means-

(A) *the following goods, namely:-*

- (i) *all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;*
- (ii) *pollution control equipment;*
- (iii) *components, spares and accessories of the goods specified at (i) and (ii);*
- (iv) *moulds and dies, jigs and fixtures;*
- (v) *refractories and refractory materials;*
- (vi) *tubes and pipes and fittings thereof, and*
- (vii) *storage tank, used-*
 - (1) *in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or*
 - (2) *for providing output service;*

7.2 Now, the core issue remains before me to be decided in the present appeal is

- a. whether the impugned goods on which CENVAT credit taken/utilized used for foundation/support of Capital Goods or otherwise Or impugned goods covered within the ambit of Input in view of the Explanation 2 of Rule 2(k) of the Cenvat Credit Rules, 2004(Reproduced below).

"Rule 2. Definitions.

In these rules, unless the context otherwise requires.....

(k) **"input"** means-

(i).....;

(ii).....;

Explanation 1.-

Explanation 2.- *Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer, but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods."*

7.3 I find that the appellant has contended that the impugned goods were not used for foundation/support for capital goods. Further in their reply to the Show Cause Notice vide their letter dated. 6.4.2016 it was submitted before the Adjudicating Authority **that they required cooling bed and Kilan (Furnace) and flooring of iron for their rolling mill for the movement of hot rolled products and cover of rolling machines; a cooling bed and Kilan (Furnace) and flooring were part of their plant, which were required for their production i.e. hot rolled products and the same were the basic necessity; The C.I. Rail was used for the movement of hot rolled products in their factory. The M. S. Round bars, M. S. Flats and M. S. Channel were used in making of the cooling bed for their finished products and were also used for installing various utility services needed for operation of machine, machinery and plant in the factory. Hence, the cooling bed was nothing but their capital goods.**

7.4 From the department side, the adjudicating authority has recorded the findings w.r.t. the above contention of the appellant at para 11.5 wherein it is recorded that **"I find that there is no any evidence brought by the Noticee on record that they have not utilized these goods for foundation/support of the capital goods."**; para 11.6 of the impugned order wherein it is recorded that **" I find that there is no any evidence brought by the Noticee on record that that they have utilized the impugned goods as capital goods and accordingly, the credit availed and utilized by the Noticee was not correct."**

7.5 I feel that as the main issue in question revolves around/stuck around the actual usage of impugned goods, merely saying that there was no any evidence brought by the Noticee is not sufficient enough for the departmental side to rebut the appellant contention but the veracity of the contention of the appellant needs to be checked on factual basis.; their manufacturing process needs to be re-visit; their application submitted while taking Central Excise Registration(Application submitted afterwards in case of any amendments, if any) needs to be verified wherein the manufacturer had to furnish details of their major input: re-visit the respective audit files, if the auditors might have brought any records in this regard or



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any other relevant records needs to be verified and then to draw the conclusion. Further on the appellant side also merely submitting few lines, without any corroborative evidence, is not enough to conclude anything but need to submit further evidence in support of their contention.

7.6 I find that the Hon'ble Supreme Court in the case of M/s Tata Engineering & Locomotive Co. Ltd. Vs Collector of C.Ex. Pune [2006 (203) E.L.T. 360 (S.C.)] has passed the following observation.

"4. The Tribunal with one line concluded the matter against the appellant-assessee by observing "while it is not the case of the assessee that the goods were so used". The Tribunal has not recorded a clear finding that the production was not being carried out by the assessee in the workshop situated within the factory or that the goods were being used for repair or maintenance of the machinery installed therein. By cryptic and non-speaking order, the Tribunal has upheld the order passed by the Commissioner by applying the ratio of the decision of the Larger Bench in TISCO LTD. (supra) without recording a finding of fact that the production carried out by the appellant was not in the workshop situated within the factory or that the goods produced by it were not used for repair or maintenance of the machinery installed therein. It is not sufficient in a judgment to give conclusions alone but it is necessary to give reasons in support of the conclusions arrived at. The finding recorded by the Tribunal, being cryptic and non-speaking, is set aside and the case is remitted back to the Tribunal for a fresh decision by a speaking order in accordance with law after affording due opportunity to both the parties."

7.7 In my view, the entire case needs reconsideration by the adjudicating authority. Accordingly, keeping all the other issues open, I set aside the impugned order and remand the matter back to the adjudicating authority to reconsider the issue afresh in view of my observation at para 7.1 to 7.6 after following the principles of natural justice and pass a speaking order. Decision of remitting matter back to the adjudicating authority is also supported by decision in the case of Commissioner of Central Excise, Meerut-II Vs Honda Seil Power Products Ltd. reported at 2013(287) E.L.T.353(Tri.-Del) wherein Hon'ble Tribunal hold that the Commissioner(Appeals) have power to remand the matter back to the original adjudicating authority even after the amendment of Section 35A(3) of the Central Excise Act, 1944. Appellant is also directed to cooperate with the Adjudicating Authority by attending personal hearing granted to them and submit documents they wish to rely upon.



८. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeal filed by the appellant stands disposed off in above terms.

(Handwritten Signature)
(गोपी नाथ) 14/3/18

अपर महानिदेशक ऑडिट / आयुक्त (अपील्स)

By Regd. Post A.D. / Speed Post
F.NO.V2/108/BVR/2017

Dated .3.2018

M/s. S. S. Industries,
Survey No. 23/1,23/2,
Sihor-Ghanghali Road,
Village-Vadia,
Taluka-Sihor, Pin-364240

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner (Appeals), Central Taxes, Rajkot.
- 3) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 4) The Assistant Commissioner, GST & Central Excise, Division....., Bhavnagar.
- 5) The Superintendent, Range-....., GST & Central Excise, Division....., Bhavnagar.
- 6) Guard File.
- 7) Guard File for O/o the Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.

PERSONAL HEARING RECORD SHEET

- 1) Name of the appellant : **M/s S. S. Industries, Bhavnagar.**
- 2) Date & time of Hearing: **22.02.2018/15.00 Hrs to 17.30 Hrs.**
- 3) OIO No. & date: **31/Excise/D/16-17 dated 31.01.2017**
- 4) Appeal Number: **108/BVR/2017**
- 5) Appellant/Authorized Signatory present during Personal hearing:

Sr. No.	Name of the Appellant	Name & Designation of the Authorized Representative	Signature
1.	M/s S. S. Industries, Bhavnagar	CA Sanjay Mehta	<i>[Signature]</i> 22.02.2018

Sh. Sanjay Mehta, CA. appeared for hearing, reiterated the submissions of appeal memo and filed additional submissions also 22.2.18 before Commissioner.

[Signature]
22/2/18
ADG/Case (A)

[Signature]
(CA Sanjay Mehta)
22.02.2018.

Date: 22/02/2018

**Before the Commissioner (Appeals) & Additional
Director General of Audit,
Central Tax & Central Excise, Ahmedabad**

Written Submission

Sub.: Appeal against Order-in-Original No. 31/Excise/D/16-17 dated 31/01/2017 passed by the Assistant Commissioner, Central Excise, City Division, Bhavnagar, filed by M/s. S S Industries, Sihor.

Ref.: Letter F. No. V2/108/BVR/2017 dated 01/02/2018

Sir,

- 1.0 We are thankful to your honour for granting us personal hearing in the matter.
- 2.0 Our client has already filed the grounds of Appeal in the Appeal Memorandum. On behalf of our client, we state and submit that what is stated in the aforesaid Appeal Memorandum may kindly be perused and the same is not repeated here for sake of brevity.
- 3.0 On behalf of our client, we submit that CI Rail, M. S. Round and M. S. Channel, Angel, Flat constitute parts used in the manufacture of capital goods that are further used in the factory and are covered under the ambit of definition of input. On behalf of our client, we further submit that the Board has further clarified the scope of some of the clauses vide circular no. 943/04/2011-CX dated 29/04/2011, the credit of all goods used in the factory is allowed except in so far as it is specifically denied. The expression "no relationship whatsoever with the manufacture of a final product" must be interpreted and applied

strictly and not loosely. The expression is not in synchronization with the definition of capital goods and if that be the intention of the policy maker, the definition of capital goods is rendered redundant accepting the provision of 50% of the credit. It has been clarified by the Board that the clause does not include any goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. Only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product is not allowed. Goods such as furniture and stationary used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of same is allowed. Therefore, the credit taken by our client on the goods which are parts of the capital goods and used in the manufacture of the final product within the factory.

- 4.0 We rely on the judgment of the Hon. Tribunal in the case of Sakthi Sugar Ltd. Vs. Commissioner of Central Excise, Salem reported in 2008 (227) ELT 107 (Chennai CESTAT).
- 5.0 Without prejudice to the above submission, we also submit that the Show Cause Notice issued to our client is time barred and subsequently impugned order is also void and bad in law. There is no evidence or discussion in the Show Cause Notice and subsequent in the impugned order regarding suppression of facts by our client with intent to evade the Central Excise duty. Therefore, extended period cannot be invoked and the Show Cause Notice is time barred. We request your Honour to give the speaking order on this issue if you are not allowing the CENVAT credit and not considering the Show Cause Notice as time barred.
- 6.0 There is no intention on the part from our client to defraud the revenue or evade payment of duty. Hence, our client is not

liable for penalty and the same is also not justifiable. Also, the show cause notice was issued on the basis of Audit and there was no *mens rea* noticeable from the record nor any impeachable conduct in respect of the transaction, no penalty could be levied.

7.0 Having regard to above submission, most respectfully, we pray that, the impugned Order-in-Original may please be quashed and set aside, as the same is contrary to the settled legal position.

Thanking you.

Yours faithfully,
For, **S S M & Co.**
Chartered Accountants
FRN: 129198W



CA Sarju Mehta
Partner
M. No: 106804