



::आयुक्त (अपील) 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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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/127 & 128/BVR/2016	23/AC/RURAL/BVR/RR/2016- 17	31.08.2016

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

BHV-EXCUS-000-APP-037-TO-38-2017-18

आदेश का दिनांक /
Date of Order: **28.09.2017** जारी करने की तारीख /
Date of issue: **29.09.2017**

कुमार संतोष, आयुक्त (अपील), 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 उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellants & Respondent :-**

1. M/s Kiran Ship Breaking Co., Plot No. 82, Ship Breaking Yard., Alang, Post Manar., Bhavanagar.,
2. Shri Vishal Jain Authorized Person of M/s Kiran Ship Breaking Co.

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

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

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति सलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म 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 सलग्न 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति सलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.-5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमवाली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (स. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ एवं अपील को लागू नहीं होंगे।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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) नियमवाली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमवाली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

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M/s. Kiran Ship Breaking Company, Plot No. 82, Ship Breaking Yard, Alang, District – Bhavnagar & Shri Vishal Jain, Authorized Person of M/s. Kiran Ship Breaking Company (hereinafter referred to as “the appellant No. 1” & “the appellant No. 2” respectively) filed the appeals against the Order-in-Original No. 23/AC/Rural/BVR/RR/2016-17 dated 31.08.2016 (hereinafter referred to as “the impugned order”) passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as “the lower adjudicating authority”).

2. The facts of the case are that an enquiry was initiated against the appellants which revealed that the appellant No. 1 had cleared their final products to their Consignment Agents at an assessable value including transportation charges for transportation of goods from their factory premises to the premises of Consignment Agent; that the Consignment Agent had initially paid transportation charges to the transporter and service tax on GTA but subsequently recovered from the appellant No. 1 through Consignment Sale Notes; that the appellant had availed cenvat credit of service tax of Rs. 4,78,993/- during April, 2011 to March, 2015 paid by Consignment Agent on transportation charges for removal of goods from the factory gate to the premises of Consignment Agent; that the appellant availed such cenvat credit of service tax paid on GTA on the basis of Consignment Sale Notes issued by their Consignment Sale Agents which is not a document prescribed for availment of cenvat credit under Rule 9(1) of the Cenvat Credit Rules, 2004 (hereinafter referred to as “the CCR, 2004”). SCN No. V.73/03-01/D/Rural/2016-17 dated 02.05.2016 was issued to the appellants demanding wrongly availed cenvat credit of Rs. 4,78,993/- along with interest and for imposition of penalty. The adjudicating authority, vide impugned order, confirmed Central Excise duty of Rs. 4,78,993/- under Section 11A (4) of the Central Excise Act, 1944 read with Rule 14 of the CCR, 2004; ordered recovery of interest under Section 11AA of the Act and imposed penalty of Rs. 4,78,993/- under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Act and imposed penalty of Rs. 5,000/- also on Appellant No. 2 under Rule 15A of the CCR, 2004.

3. Being aggrieved with the impugned order, Appellant No. 1 filed the appeal, *inter alia*, on the following grounds: -

(i) The adjudicating authority has failed to correctly interpret Section 4 of the Act and Rule 9(2) of Cenvat Credit Rules in view of removal of excisable goods through approved Consignment Agent; that the lower adjudicating authority has wrongly held that cenvat credit availed on GTA is not falling under the definition of ‘input service’ under Rule 2(i) of the CCR, 2004 on the ground that the input service used beyond factory gate did not have nexus in or in relation to the manufacturing activities; that the lower adjudicating authority has failed to consider the submissions of the appellant that unless and until goods manufactured are reached in the hand of user, the process of manufacturing is not completed; that as per Section

4 of the Central Excise Act, 1944 read with Rules framed thereunder, warranty charges, commission charges and freight charges are required to be added in the cost of a manufactured product; that this charges are paid by a manufacturer as cost of manufacturing; that cenvat credit had been correctly taken as the sale of final product was completed at the premises of the Consignment Agent; that the appellant relied on a decision in the case of Rajasthan State Chemical Works reported as 1991 (55) ELT 444 (SC).

(ii) The department has not denied that the said Consignment Agent had paid Service Tax on the actual freight occurred towards removal of excisable goods from factory gate to place of Consignment Agent; that as per Central Excise Valuation Rules, 2000, service tax was not required to be paid on such freight charges as the cost of actual freight was duty paid; that sale of excisable goods had not been completed till it reached upto the place of Consignment Agent and sale got completed as soon as the excisable goods are sold to the independent buyers who are not related to the appellant; that department cannot levy two indirect taxes without any authority of law; that the adjudicating authority has failed to consider submissions made by the appellant including written submissions made during the course of personal hearing.

(iii) The impugned order has been passed on the ground of Final Audit Report No. 191/2013-14 dated 05.05.2014 without proper investigation of the issue raised by audit; that it is admitted fact that disputed cenvat credit had been availed on the basis of "Consignment Sale Notes"; that the appellant submitted sample copies of Consignment Sale Notes and proof of payment of service tax made by Consignment Sale Agent along with the Appeal Memorandum; that they had correctly availed cenvat credit on documents as provided under Rule 9(2) of Cenvat Credit Rules read with Rule 4A of Service Tax Rules; that from the said documents, it is seen that service tax or Central Excise duty was duly assessed on the actual freight charges shown separately in the Central Excise invoices issued by the appellant; that the appellant had also paid Central Excise duty on amount of freight from factory gate to the premises of the consignment agent.

(iv) The adjudicating authority has failed to give his findings that under what ground "Sale Note" is not a proper document for availing Cenvat Credit; that the factory gate was not the place of removal but premises of consignment agent was the place of removal; that as per definition of input service, the service tax paid by the consignment agent was eligible for availing cenvat credit as the said service relates to clearance of final products upto the place of removal; that they have availed disputed cenvat credit on the licit document under Rule 9(1)(e) of the CCR, 2004.

(v) The lower adjudicating authority relied on the decision of Hon'ble High Court of Gujarat, Ahmedabad in the case of Cadila Healthcare reported as 2013 (30) STR 3 (Guj.) and decision of CESTAT, Ahmedabad in the case of Astik Dyestuff Pvt. Ltd. reported as 2013 (31) STR 459 (Tri. – Ahmd.), however these are not applicable in the present case as the said decisions pertained to availment of cenvat credit on sales commission service but in the

present case, the issue is availment of cenvat credit of service tax paid on GTA by the consignment agent of the appellant which was subsequently adjusted under consignment sale notes. Rule 2(B)(i)(d) of the Service Tax Rules, 1994 stipulates that "... any person who pays or is liable for freight either himself or through his agent for the transportation of such goods by road in a goods carriage"; that consignment agents were agents for transportation of excisable goods to the place of the consignment agent by road in vehicle, therefore, whatever service tax has been paid by the consignment agent was the service tax paid by the appellant.

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(v) The lower adjudicating authority has ignored letter dated 09.06.2014 read with statement dated 24.02.2016 wherein the appellant had disclosed the facts and circumstances for sales made through Consignment Sale Agent; that consignment agent is acting on behalf of the appellant for subsequent sale of excisable goods to the independent customers; that service tax paid by Consignment Sale Agent is to be treated as paid by the appellant; that the appellant has paid Central Excise duty on freight as well as Service Tax under the category of GTA .

(vi) Various ship breaking units had been audited before but department never pointed out such observations earlier; that during the disputed period the appellant had filed periodical returns and maintained cenvat credit accounts and raised Central Excise invoices wherein all such particulars had been mentioned; that the appellant had provided the information before conducting audit; that the appellant had not suppressed any facts with intent to evade payment of Central Excise duty, therefore, penalty under Section 11AC(1)(a) of the Act is wrong.

(vii) It has not been denied that the service tax has been paid and that input service has not been availed in or in relation to the excisable goods sold through Consignment Sale Agent.

(viii) The adjudicating authority has failed to consider various case laws cited by the appellant in the defense reply and case laws cited in written submissions. The appellant relied on following case laws in addition to those relied.

- Amal Rasayan Limited – 1993 (68) ELT 446 (Tribunal)
- Graphite (I) – 2007 (212) ELT 54 (Tri. - Mumbai)
- Lloyds Steel Industries – 2007 (211) ELT 275 ((Tri. - Mumbai)
- Bhilai Auxiliary Industries – 2012(277) ELT 192 (Tri. – Del.)
- Wadpack Pvt. Ltd. – 2013 (293) ELT 400 (Tri. – Bang.)
- Dalmia Chini Mills Ltd. – 2014 (35) STR 973 (Tri. – Del.)
- Pushpam Pharmaceuticals Co. – 1995 (78) ELT 401 (SC)

4. Being aggrieved by the impugned order, Appellant No. 2 also filed appeal, on the same grounds of appeal as filed by Appellant No.1.

5. Personal hearing in the matter was attended to by Shri N.K. Maru, Consultant on behalf of both the appellants, who reiterated grounds of Appeal and submitted that Central Excise duty has been paid including transportation cost also as the consignee is his agent; that the agent is an assessee as defined in Section 65(7) of the Finance Act, 1994; that M/s. Kiran Ship Breaking Co. has appointed M/s. S.K. Bansal & Co. as their consignment agent, hence cenvat credit taken is legal and proper; that affidavit also has been executed to this aspect; that they emphasize case laws mentioned in written submissions; that their appeals should be allowed in view of above facts and case law relied upon by them. 117

5.1 The appellant in additional submissions submitted that the consignment agents have paid service tax on GTA on behalf of them; that the appellant had also paid Central Excise duty on the freight charges incurred for transferring the final products to the place of registered consignment agents; that the consignment agents were not required to pay service tax on freight charges which were considered as part and partial of transaction value as provided under Section 4 of the Act; that an affidavit is sworn to justify that the consignment agent M/s. S.K. Bansal & Co., Punjab was their consignment agent.

5.2 It is admitted fact that the appellant had transferred duty paid final products under Central Excise invoices to their appointed consignment agents who subsequently sold the said goods to the independent customers on behalf of them. The appellant had paid Central Excise duty on transaction value inclusive of actual freight under Rule 5 of Central Excise Valuation Rules, 2000. The adjudicating authority has not denied these facts. The Consignment Sales Agent was not required to pay service tax under GTA as they were only "Appointed Agents" for sale of said goods on behalf of them. The appellant referred definition of "assessee" provided under Section 65 of the Finance Act, 1994. The appellant had paid two taxes viz. (1) Central Excise duty and (2) Service tax, therefore the revenue implication is "Neutralized Impact of Revenue". The adjudicating authority has failed to give his independent findings in this regard.

5.3 The appellant has availed cenvat credit on the basis of "Consignment Sale Note" which consisted name of the service provider, nature of service, Registration No. of consignment sale agent. Therefore, these documents were licit documents for availment of cenvat credit paid on GTA. The appellant relied on decision in the case of Graphite reported as 2007 (212) ELT 54 (CESTAT-SMB) wherein Cenvat credit on basis of 'cash memo' was held admissible and held that hyper technicalities should not be made to disallow cenvat credit.

5.4 The department had wrongly and without authority of law had initiated unwarranted inquiry and wrongly imposed penalty upon Shri Vishal Jain, Authorized person of the firm. The SCN was time barred as the department was well aware about marketing pattern being followed by various ship breaking units situated at Alang. The lower adjudicating authority failed to disclose the ground to sustain invocation of larger period. The appellant had not attempted to evade payment of service tax and the Appellant No. 2 was not concerned in any way for initiating penal action under Rule 15A of the CCR, 2004. The appellant relied on

decision in the case of Wearwell Tyres & Tubes Ind. P. Ltd. reported as 2010 (257) ELT 126 (Tri. Del.) in this regard. 110

5.5 The appellant submitted copy of Consignment Sales Agreement dated 04.04.2011 entered into with M/s. S.K. Bansal & Co., Punjab and copy of Affidavit dated 28.08.2017 wherein it has been affirmed that M/s. S.K. Bansal & Co., Punjab was their authorized Consignment Sale Agent in pursuance of agreement dated 04.04.2011.

5.6 The Department has neither submitted any comments on the grounds raised by the appellants in their present appeals nor appeared for the hearing. I therefore proceed to decide the case on merit on the basis of records available on file.

Findings:-

6. I have carefully gone through the facts of the case, impugned order, grounds of appeals and submissions made by the appellants. I find that the issue to be decided in the present appeals is whether in the facts and circumstances of the case, availment of cenvat credit of service tax paid by their consignment agents on the transportation charges from the factory gate of the appellant to the premises of Consignment Agents is correct or not.

6.1 It is on record that the appellant at the time of clearance of goods from factory gate paid central excise duty in terms of Explanation-2 to Rule 5 of Central Excise Valuation Rules, 2000, on value inclusive of freight charges from the factory gate to the place of consignment agent. The availment of GTA service and payment of service tax by their consignment agents are also not under dispute.

6.2 The adjudicating authority has denied cenvat credit of service tax paid by their Consignment Agent on the ground that the said service is neither used directly or indirectly in or in relation to manufacture of final products and appears to be availed by the appellant after clearance of finished goods from the factory gate i.e. beyond place of removal. I find that the appellant has availed cenvat credit of service tax paid on outward transportation of excisable goods upto the place of removal i.e. premises of consignment agent from where excisable goods have been sold, which is covered under the definition of "input service" as provided under Rule 2(l) of Cenvat Credit Rules, which reads as under: -

"input service" means any service –

(i)

(ii) *used by a manufacturer, whether directly or indirectly, in or in relation to manufacture of final products and clearance of final products upto the place of removal,*

and includes services used in relation tooutward transportation upto the place of removal.

(Emphasis supplied)


6.3 I also find that in the cases of sale of goods through Consignment Agent, the premises of a consignment agent from where the excisable goods are to be sold, is to be

considered as "place of removal" as defined under Section 4 of the Act, which reads as under: 115

"place of removal" means –

- (i) a factory or any other place or premises of production of manufacture of the excisable goods;
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
- (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory; from where such goods are removed.

(Emphasis supplied)

6.4 The appellant has contended that Consignment Sale Agent has acted on their behalf for subsequent sale of excisable goods to the independent customers and hence service tax paid by Consignment Sale Agents is to be treated as having been paid by the appellant. I find that in common business parlance, role of consignment agent is to receive goods from the principal for the purpose of sale. The ownership of the goods remains with the principal and the agent sells the goods on behalf of the principal as per his instructions. The agent will then deduct his commission from the proceeds of sale received and transfer the remaining amount to the principal. Section 4(3)(a) of the Act defines an assessee as *a person who is liable to pay the duty of excise under this Act and includes his agent*. Since the dispute is about cenvat credit of service tax paid under GTA, it is important to refer the relevant clause of Finance Act, 1994 also. I find that Section 65B (12) of Finance Act, 1994 defines the phrase "assessee" as *the person who is liable to pay tax and includes his agent*. I find that the consignment agents of the appellant have issued Consignment Sale Notes wherein the expenses incurred while receiving the goods from the appellant such as freight, labour and service tax on freight charges and their commission and discount, have been deducted from the sale proceeds of the excisable goods. Therefore, the expenses till the excisable goods reached from factory gate to the premises of consignment agent were borne by the appellant. I find that the person liable to pay freight, is liable to pay service tax, under reverse charge mechanism in case of transportation of goods by Road. Therefore, I find that contention of the appellant that service tax paid by Consignment Sale Agent is to be treated as having been paid by the appellant is correct. 

6.5 From the harmonious reading of the definition of "assessee", "place of removal" and the role of consignment agent in selling the excisable goods, I find that service tax paid in respect of transportation of goods by road from factory gate to the premises of consignment agent is nothing but "input service" for the appellant which have been used for transportation of goods upto the (extended) place of removal and cenvat credit of service tax thereof is allowable to the appellant. I find that this has been explained by the Hon'ble CESTAT, New Delhi, in the case of N.H.K. Springs Ltd. reported as 2007 (215) E.L.T. 354 (Tri. - Del.), by holding as under: -

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8.1 The expression 'clearance of final product from the place of removal' has to be understood in the context of the preceding words, which refer to service used by the manufacturer in relation to the manufacture and clearance of final products, from the place of removal, which itself may require input service. Outward transport of final products would start after the clearance of the final product from the place of removal. The clearance of final product, is an activity contemplated for the purpose of removing the final products from the place of removal. Till the point they are removed, 'input service' for clearance can properly be called input for the purpose of clearance. The expression 'outward transportation upto the place of removal', delineates the extent to which 'input service' in respect of transportation, could be claimed. The definition of 'place of removal' has expanded by virtue of Section 4 of Central Excise Act, 1944, beyond the factory premises to other place or premises wherein the goods are permitted to be deposited without payment of duty, from where the goods are removed, and also depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory. In view of the expanded meaning of the expression 'place of removal', outward transportation upto the place of removal has been recognized as 'input service'. It is not the intention of the Legislature to bring about a dichotomy in respect of credit of 'input service' of inward and outward transportations. Even the services referred to in the inclusive part of the definition, would necessarily have to be used by the manufacturer in relation to the manufacture of final products and their clearance, to qualify as 'input service'. It cannot be the intention of the Legislature, for all services, not specified in the inclusive part of the definition, used by the manufacturer, for manufacture and clearance of final products that outward transport service from the place of removal, be considered as 'input service' and in respect of services specified in the inclusive part of the definition, that outward transportation only upto the extended place of removal, should be considered as 'input service'.....

(Emphasis supplied)

6.6 The lower adjudicating authority relied on the decision of Hon'ble High Court of Gujarat, Ahmedabad in the case of Cadila Healthcare reported as 2013 (30) STR 3 (Guj.) and decision of CESTAT, Ahmedabad in the case of Astik Dyestuff Pvt. Ltd. reported as 2013 (31) STR 459 (Tri. – Ahmd.) and held that consignment agent is directly concerned with sales rather than sales promotion and as such service provided by the commission agent would not fall within the purview of main or inclusive part of the definition of input service as per Rule 2(l) of the CCR, 2004. I find that this is not the case of avilment of credit of service tax availed by the appellant for service tax paid by consignment agents on commission charges but the dispute is that whether the appellant can avail cenvat credit of service tax paid on GTA by their consignment agents which was subsequently borne by the appellant. Hence, I find that the ratio of the above relied upon decisions is not relevant to the facts and circumstances of the present case.

6.7 The appellant submitted copy of Affidavit dated 28.08.2017 affirming that M/s. S. K. Bansal & Co., Punjab (one of their consignment agents) was their authorized Consignment Sale Agent. Under the circumstances, if service tax paid by all of their Consignment agents during the period under reference, the benefit of cenvat credit can be extended to them. Since, the amount of service tax paid by the consignment agents of the appellant has not been

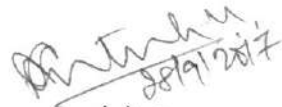
disputed and the payment of service tax made by the consignment agents can be considered as payment of service tax made by the appellant, the cenvat credit thereof is admissible to the appellant. Needless to state that once cenvat credit is allowable, the question of recovery of interest or imposition of penalty upon both the appellants would not arise. The lower jurisdictional authority shall verify challans evidencing payment of service tax by consignment agents related to the disputed cenvat credit, and ensure that such consignment agents were approved consignment agents of the appellant. Therefore, I am of considered view that the impugned order is required to be set aside and the matter is required to be remanded back for verification by the lower adjudicating authority. The appellant is directed to submit all relevant facts and document by way of written submissions within 2 months from the date of receipt of this order.

6.8 I find that the Commissioner (Appeals) has power to remand appeals as decided by the Hon'ble CESTAT in the case of CCE, Meerut Vs. Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del). I also rely upon decision of the Hon'ble CESTAT in the case of CCE, Meerut-II Vs. Honda Seil Power Products Ltd. reported in 2013 (287) ELT 353 (Tri-Del) wherein it has been held that Commissioner (Appeals) has inherent power to remand a case under the provisions of Section 35A of the Act. The Hon'ble Gujarat High Court in Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd. has also held that even after the amendment w.e.f. 11.05.2011 in Section 35A (3) of the Central Excise Act, 1944, the Commissioner (Appeals) would retain the power to remand.

7. In view of above factual and legal position, I set aside the impugned order and allow the appeals by way of remand.

७.१ अपीलकर्ताओं द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

7.1. The appeals filed by the appellants stands disposed off in the above terms.


 (कुमार संतोष)
 आयुक्त (अपील्स)

By Regd. Post AD

To,

(i) M/s. Kiran Ship Breaking Company, Plot No. 82, Ship Breaking Yard, Alang, District – Bhavnagar	(i) मे. किरन शिप ब्रेकींग कंपनी, प्लॉट न. ८२, शिप ब्रेकींग यार्ड, अलंग, डिस्ट्रिक्ट – भावनगर
(ii) Shri Vishal Jain, Authorized Person, M/s. Kiran Ship Breaking Company	(ii) श्री विशाल जैन, औथोराइज़्ड पर्सन, मे. किरन शिप ब्रेकींग कंपनी

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.