



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



सत्यमेव जयते

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/21 & 22/GDM/2017	20 & 21/ST/AC/2016-17	24.01.2017

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

KCH-EXCUS-000-APP-108-TO-109-2017-18

आदेश का दिनांक / Date of Order:	01.12.2017	जारी करने की तारीख / Date of issue:	05.12.2017
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अगर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गान्धिधाम द्वारा उपरोक्तित जारी मूल आदेश से उत्पन्न /
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 Appellant & Respondent :-
M/s. ALMAC Enterprise, Plot No. 2/F, Sector 12, Gandhidham (Kutch).

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / अधिकरण 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) विशेषकरण मूल्यांकन से सम्बंधित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 in classification and valuation.

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रॉंग ब्याज की रॉंग 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 संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of 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 नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ वित्त आदेश के विषय अपील की गयी हो, उसकी प्रति साथ में संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की रॉंग ब्याज की रॉंग 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 संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee 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/-.



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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत दंड की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उप-आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपील को न्यायाधिकरण को आवेदन करने के लिए 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 S.T.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 अपील न्यायाधिकरण (सेस्टैट) 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 अपील न्यायाधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेवक जमा की गई राशि
- (iii) सेवक जमा नियमावली के नियम 5 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्राधान्य वित्तीय (सं. 2) अधिनियम 2014 के अंतर्गत से पूर्व किसी अपील न्यायाधिकरण के समक्ष विचारणीय स्थिति अर्थात् अपील को लागू नहीं होवे।

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 अथवा सर्वोच्च, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन टॉप अवन, अरावली, 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 अथवा गृह के पारगमन के दौरान या किसी अन्य बरखंडे या फिर किसी एक अथवा गृह से दूसरे अथवा गृह परगमन के दौरान, या किसी अथवा गृह में या अथवा माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी अथवा 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 बरखंडे माल पर अभी नई 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) मुनिस्क्रिप्ट उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इच्छुटे 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 निर्यात की गई तरीके अथवा सम्प्रदायिकि 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण 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 उत्पादगी के साथ के लिए 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 दंग से किया जाना चाहिए। इस तथ्य के होने हुए भी की लिखा नहीं करने से बचने के लिए बहालविधि अपील न्यायाधिकरण में एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scripioria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंश्लेषित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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 अपील न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को उपनिर्दिष्ट 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 अपील न्यायाधिकरण को अपील दर्जित करने से संबंधित विषयक, विस्तृत और नवीनतम प्रावधानों के लिए, अपील न्यायाधिकरण 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 appellants may refer to the Departmental website www.cbec.gov.in.



:: ORDER IN APPEAL ::

M/s. Almac Enterprise, Plot No. 2/F, Sector 12, Gandhidham (hereinafter referred to as "Appellant") has filed present appeals, against Order-in-Original No. 20/ST/AC/2016-17 dated 24.01.2017 & Order-In-Original No. 21/ST/AC/2016-17 dated 24.01.2017 (hereinafter referred to as "impugned orders"), passed by the Assistant Commissioner, Service Tax Division, Gandhidham - Kutch (hereinafter referred to as "lower adjudicating authority").

2. Briefly stated, facts of the case are that appellant is engaged in providing 'Renting of Immovable Property' and 'Storage & Warehousing' services and holding Service Tax Registration No. AAAFA2410QST002. Audit revealed that the appellant availed cenvat credit on M.S. Plates/Sheets, etc., during the period from April, 2013 to September, 2013, which were used for repair and fabrication of civil structure and for repair of storage tank. The appellant has also availed cenvat credit of service tax paid on welding, fabrication and erection service provided by the service provider in relation to storage tank during the period from June, 2012 to January, 2014. It was alleged that these materials neither qualify as input for providing storage & warehousing service nor qualify as capital goods and also the fabrication/erection and welding of these material for civil structure do not qualify as input service for providing output service, the cenvat credit of Rs. 9,40,683/- being duty paid on these materials and cenvat credit of Rs. 3,95,864/- being service tax paid on such services is not admissible to the appellant. SCN No. V.ST/15-05/Audit-III/ADC-06/2015-16 dated 08.10.2015 was issued to the appellant proposing recovery of wrongly availed cenvat credit of Rs. 13,36,547/- under Rule 14 of Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004") read with proviso to Section 73(1) of Finance Act, 1994 (hereinafter referred to as "the Act"), to recover interest under Rule 14 of CCR, 2004 read with Section 75 of the Act; to impose penalty under 77 of the Act and to impose penalty under Rule 15 of CCR, 2004 read with Section 78 of the Act. The periodical SCN No. V.ST/15-53/ST/ADJ/2015 dated 22.03.2016 for recovery of cenvat credit of 2,49,440/- along with interest and to impose penalty under Section 77 of the Act was also issued to the appellant covering the period of F.Y. 2014-15. The adjudicating authority, vide Order-In-Original No. 20/ST/AC/2016-17 dated 24.01.2017 confirmed demand of Rs. 13,36,547/- along with interest and also imposed penalty of Rs. 10,000/- under Section 77 of the Act and imposed penalty of Rs. 13,36,547/- under Rule 15(1) of CCR, 2004 read with Section 78 of the Act with an option to pay penalty of 25% of such service tax payable under Section 78(1) of the Act and vide Order-In-Original No. 21/ST/AC/2016-17 dated 24.01.2017 confirmed demand of Rs. 2,49,440/- along with interest and also



imposed penalty of Rs. 10,000/- under Section 77 of the Act.

3 Being aggrieved by the impugned orders, appellant preferred the present appeals, *interalia*, on the following grounds:

(i) Reliance placed by the lower adjudicating authority on CBEC Circular No. 58/1/2002-CX dated 15.01.2002 is completely misplaced as the Circular was never issued in connection with cenvat credit and it never envisaged a situation where the storage tanks made out of duty paid inputs and other goods are used to provide taxable service under Finance Act, 1994. The Circular dated 15.01.2002 was issued when storage and warehousing services were not even brought within the ambit of service tax net. The decision of Hon'ble High Court of Madras is not applicable to the facts of this case. Therefore, the impugned orders passed by the lower adjudicating authority by placing reliance on the above decision is not sustainable.

(ii) In the facts and circumstances of the case where the allegation regarding wrong availment of cenvat credit is not sustainable, demand of interest and imposition of penalty cannot be sustained. The issue involves interpretation of law and hence, no penalty can be imposed on the appellant under Section 77 of the Act.

4. Personal hearing in the matter was attended to by Shri Bhaskar J. Joshi, Advocate, who reiterated submissions made in the Grounds of Appeal. On query whether the storage tanks are movable or fixed to earth like structures, he replied that these are huge storage tanks and fixed to earth and cannot be moved; that these are not movable. No one appeared from the department despite P.H. notices issued to them.

FINDINGS: -

5. I have carefully gone through the facts of the case, impugned orders, appeal memorandum and submissions made by the appellant. The issue to be decided is whether in the facts and circumstances of the present case, the impugned orders passed by the lower adjudicating authority denying cenvat credit of inputs/capital goods and cenvat credit of input services used for repairing of storage tank and for construction of civil structure is correct or not.

6. The lower adjudicating authority held that M.S. Sheets/M.S. Plates used for fabrication of civil structure and repair of storage tank, which neither qualified as inputs nor qualified as capital goods within the meaning of inputs/capital goods provided under Rule 2(k)/Rule 2(a) of CCR, 2004. I find that the appellant is not a manufacturer of excisable of excisable goods but provider of output service providing "storage & warehousing service" and storage tank is required to provide service of 'storage and warehousing' service. I further find that storage tank is specifically



covered under the definition of capital goods as provided under Rule 2(a) of CCR, 2004, reads as under: -

Rule 2(a) "capital goods" means -

(A) the following goods, namely: -

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90 of the First Schedule to the Excise Tariff Act;

(ii)

(iii)

(iv)

(v)

(vi)

(vii) storage tank

(Emphasis supplied)

6.1 I would like to reproduce the definition of 'input' as provided under Rule 2(k) of CCR, 2004 as applicable to provider of taxable service during the period of dispute i.e. from April, 2013 to March, 2015, which read as under: -

Rule 2(k) "input" means -

(i)

(ii)

(iii)

(iv) all goods used for providing any output service;

but excludes -

(A)

(B) any goods 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;

(C)

(D)

(E)

(F)

(Emphasis supplied)

6.2 It could be seen from the definition of 'input' substituted vide Notification No. 3/2011-CE(NT) dated 01.03.2011 made effective from 01.04.2011, that the definition has been widened so as to cover all goods used for providing any output service for availment of cenvat credit. However, the said definition excludes goods used for construction of a civil structure or a part thereof or used for laying of foundation or making of structures for support of capital goods. In the instant case, cenvat credit availed on M.S. Sheet/M.S. Plate, etc. were denied on the ground that the said goods were used for used for fabrication of civil structure and repair of storage tank as the same is neither qualified as inputs nor qualified as capital goods. I find that goods used for construction of civil structure or part thereof or goods used for laying of



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 foundation or making of structures for support of capital goods have been specifically excluded from the definition of 'input' as provided under Rule 2(k) of CCR, 2004. Hence, cenvat credit in respect of goods used for civil structure or for support of capital goods is not admissible to the appellant. However, I find that cenvat credit of goods used for repair and maintenance of storage tank is available to the appellant as without storage tank, the appellant cannot provide 'storage and warehousing' service. I find that in various decisions which were pronounced in context of substituted definition of 'input' vide Notification No. 3/2011-CE(NT) dated 01.03.2011 w.e.f. 01.04.2011, the Hon'ble CESTAT has allowed cenvat credit of input used in repair and maintenance of capital goods.

7. The lower adjudicating authority has also denied cenvat credit of service tax paid on welding, fabrication and erection service provided by the service provider with respect to storage tank in view of definition provided under Rule 2(l) of CCR, 2004. I would like to reproduce the definition of 'input service' as provided under Rule 2(l) of CCR, 2004 as it may applicable to provider of taxable service during the period of dispute i.e. from June, 2012 to March, 2015, which read as under: -

"(l) "input service" means any service, -

- (i) used by a provider of output service for providing an output service; or
 (ii)

and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."

but excludes -

- (A) *service portion in the execution of a works contract and construction services including service listed under clause(b) of section 66E of the Finance Act in so far as they 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....*
 (B)
 (BA)
 (C)

(Emphasis supplied)

7.1 It could be seen from the definition of 'input service' substituted vide Notification No. 3/2011-CE(NT) dated 01.03.2011 made effective from 01.04.2011, that the said definition has been widened so as to cover any service used by a provider of output service for providing an output service for availment of cenvat credit. However, the said definition excludes service which are used for construction or execution of works contract of a civil structure or a part thereof or used for laying of



foundation or making of structures for support of capital goods. In the instant case, cenvat credit availed on welding, fabrication and erection service denied on the ground that the said service was used for fabrication of civil structure. I find that services used for construction of civil structure or used for laying of foundation or making of structures for support of capital goods have been specifically excluded from the definition of 'input service' as provided under Rule 2(i) of CCR, 2004. Hence, cenvat credit in respect of such services used for civil structure or for support of capital goods is not admissible to the appellant. However, cenvat credit of such services used for repair and maintenance of storage tank is available to the appellant as without storage tank, the appellant cannot provide 'storage and warehousing' service.

7.2. In view of above, it is clear that cenvat credit of M.S. Plates/M.S. Sheets, etc. and cenvat credit of welding, fabrication and erection service used for repair and maintenance of capital goods i.e. storage tank is admissible to the appellant as per rules of Cenvat Credit Rules, 2004. The cenvat credit of these inputs and input services, which have been used for construction of civil structure or for laying of foundation or for making of structures for support of capital goods, is not admissible under rules of CCR, 2004. In the instant case, the lower adjudicating authority has denied entire cenvat credit of goods and services without verifying the usage of disputed goods in terms of CCR, 2004. Hence, I find that impugned orders passed by the lower adjudicating authority is not correct, legal & proper and hence I have no option but to set aside the impugned orders.

7.3. I find that the lower adjudicating authority has not determined the quantity of inputs and portion of services used for repair and maintenance of storage tank. Therefore, I find this case is a fit case to be remanded to the lower adjudicating authority who shall undertake necessary verification and pass orders within 4 months of receipt of this order as to how much quantity of inputs and input services have been availed by the appellant for repair and maintenance of storage tanks giving fair and reasonable opportunities to the appellant to explain facts and circumstances of to this effect. The appellant is directed to submit their written submissions along with all relevant documents evidencing use of such disputed goods and input services for repair and maintenance of storage tanks within 2 months from the date of receipt of this order.

8. I find that Commissioner (Appeals) has inherent power to remand a case as decided by the Hon'ble CESTAT in the cases of CCE, Meerut Vs. Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del) and CCE, Meerut-II Vs. Honda Seil Power Products Ltd. reported as 2013 (287) ELT 353 (Tri-Del). The Hon'ble



22 Gujarat High Court in Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd. has also held that even after the amendment of Section 35A (3) of the Central Excise Act, 1944 after 11.05.2001, the Commissioner (Appeals) would retain the power to remand an appropriate case.


9. In view of the above, I set aside the impugned orders and allow the appeals by way of remand.

१०.१ अपीलकर्ता द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

10.1. The appeals filed by the appellant stands disposed off in above terms.

सत्यापित,

 एम. एम. चोपड़ा
 अधीक्षक (अपील्स)


 (कुमार संतोष)
 आयुक्त (अपील्स)

By Regd. Post AD

To,

M/s. Almac Enterprise,
 Plot No. 2/F,
 Sector 12,
 Gandhidham

मे. अल्माक एंटरप्राइज़,
 प्लॉट न. २/एफ,
 सेक्टर १२,
 गांधीधाम

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise Commissionerate, Gandhidham.
- 3) The Assistant Commissioner, GST & Central Excise Division, Gandhidham-Kutch.
- 4) Guard File.

5) F'u - V2/22/WOM/2017

