::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::

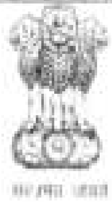
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

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



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / OIO No.	दिनांक / Date
	V2/32/GDM/2017	**26/JC/2016**	**23.12.2016**

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

KCH-EXCUS-000-APP-110-2017-18

आदेश का दिनांक / Date of Order:	**01.12.2017**	जारी करने की तारीख / Date of issue:	**05.12.2017**

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

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपलिखित 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 **Appellant &** Respondent :-

M/s. Natural Petrochemicals P. Ltd., Survey No., 443, 440/1-3, NH 8-A, Village : Bhimasar., Taluka Anjar - Kutchh- 370240.

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

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

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

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असरवा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक 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 नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक 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 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 प्रतियाँ संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

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

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

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

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

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 मामलो 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 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) 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 (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

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

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

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की 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, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

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M/s. Natural Petrochemicals Pvt Ltd, Survey No. 443, 440/1-3, NH 8/A, Village: Bhimasar, Taluka: Anjar (Kutch)-370240 (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-In-Original No. 26/JC/2016 dated 23.12.2016 (hereinafter referred to as 'the impugned order'), passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham-Kutch (hereinafter referred to as "the lower adjudicating authority").

2. Briefly stated facts of the case are that the appellant are holding Central Excise Registration No. AACCD0223HXM001 and engaged in manufacture of excisable goods viz. Unsaturated Polyster Resin, Epoxy Resins and Alkyl Resin falling under CETH 39079120, 3973010 and 39075000 respectively of the first schedule to the Central Excise Tariff Act, 1985. They are also availing Cenvat Credit of duty paid on inputs, capital goods and input services under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as "the Rules"). During the course of audit for the period from April, 2009 to February, 2014, it was revealed that the raw material was being supplied by M/s. Ashland India Pvt Ltd., Mumbai (hereinafter referred to as "Ashland"). The appellant manufactured the finished goods as per specifications and after affixing brand name of Ashland and appellant cleared/removed the goods under invoice with remarks as "Stock Transfer" on payment of duty. The appellant had signed/entered in Memorandum of Understanding with Ashland to start production of Polyester Resins and Gel-Coats for Ashland which would be supplied to customer in India.

2.1 The scrutiny of the Cenvat credit records/registers revealed that the appellant had debited the Cenvat Credit for payment of duty. Further, the appellant had, in addition to Excise Duty, debited the Cenvat credit in the said register with remark "Service Tax Debited on Fixed Charges for the month ....." Subsequently, Ashland had availed Cenvat credit of the Service Tax paid by the appellant. Thereafter, Ashland had issued "Input Service Distributor (ISD)" invoices to the appellant for taking Service Tax paid by the appellant. The appellant had wrongly availed Cenvat Credit of Rs. 59,61,126/- on the basis of various ISD invoices issued by Ashland vide Entry No. 14 & 15 both dated 31.05.2012 and 154 dated 31.09.2012 in their

Cenvat Credit Register. The Cenvat credit availed by the appellant of ISD invoices was in contravention of Rule 7, Rule 3 and Rule 14 of the Rules. The appellant accepted and reversed/paid the said Cenvat credit of Rs. 59,61,126/- vide Entry No. 224 to 226 all dated 31.03.2014 in their Cenvat Credit Account. However, the appellant had not paid interest amounting to Rs. 19,32,440/- which was required to be recovered from the appellant under Rule 14 of the Rules read with Section 11AA of the Central Excise Act, 1944 (hereinafter referred to as "the Act").

2.2 Show Cause Notice No. V/Gnd-Dvn/Gnd-V/Commr/135/2016 dated 18.02.2016 proposed to disallow and demand Cenvat credit of Rs. 59,61,126/- under Section 11A(4) of the Act read with Rule 14 of the Rules and to appropriate already reversed/paid Cenvat Credit. It also proposed to recover interest of Rs. 19,32,440/- under Section 11AA of the Act read with Rule 14 of the Rules and to impose penalty under Section 11AC of the Act read with Rule 15 of the Rules. The Show Cause Notice was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed the demand of Cenvat Credit of Rs. 59,61,126/- and appropriate reversed/paid Cenvat credit against the said demand. The lower adjudicating authority also ordered to recover interest of Rs. 19,32,440/- and imposed penalty of Rs. 59,61,126/- upon the appellant.

3. Being aggrieved with the impugned order, appellant preferred the present appeal, inter-alia, on the following grounds:

The Appellant submitted that the impugned order passed by lower adjudicating authority is incorrect on facts as well as law.

3.1 Interest under Section 11AA of the CEA, 1944 read with Rule 14 of the CCR, 2004 is incorrect. Legislative history of the Rule 14 of CCR 2004, clears intent of the Legislature. Section 11AA of the Act, produced below, provides for interest liability when the assessee liable to pay duty has delayed the payment of the same.

Section 11AA: Interest on delayed payment of duty. -

(1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, <u>who is liable to pay duty, shall, in addition to the duty, be liable to pay interest</u> at the rate specified in sub-section (2), whether such payment is made voluntarily or after determination of the amount of duty under

section 11A.

From the above, it is clear that the provision only provides for interest on delayed payments of excise duty in case of failure to credit the tax or any part thereof to the account of the Central Government within the prescribed periods. It is therefore submitted that since, in the present case, there is no liability on the appellant towards excise duty, nor any utilization of CENVAT Credit for such liability, application of Section 11AA is not warranted. Also, any kind of short payment or non-payment of excise duty is out of the scope and accordingly, question of payment of interest under Section 11AA of the Act does not arise at all. Thus, interest that should only be a consequence of a tax demand cannot be eventually levied even in case where CENVAT credit was taken wrongly but not utilized. In view of the same interest under Section 11AA would not be leviable. They rely on the judgment of the Apex Court in the case of *Prathiba Processors vs. Union of India [1996 (88) ELT 12 (SC)]* wherein it has been held that interest is levied to compensate the loss sustained by the Revenue. In other words, it can be said that interest is payable for the period during which the Revenue is deprived of the duty, which it was legitimately entitled to and as the assessee had the benefit of the duty by not paying the duty payable on the due date. Interest is compensatory in character, and is imposed on the assessee who has withheld payment of any tax as and when it is due and payable.

3.1.1 They relied on legislative history of Rule 14 of CCR, 2004 in order to understand the real intention of the provision, which is as under:

a. Rule 14 of CCR, 2004 till 16.03.2012 - During the said period, the relevant part of the Rule 14 of CCR, 2004 read that CENVAT credit wrongly taken 'or' utilized or erroneously refunded. During the said period, there existed the confusion that the interest could be imposed on existence of any of the above referred facts (availment, utilization, erroneously refund) and various courts interpreted the said provision in different ways leading to one interpretation that, employment of two 'or' in the provision has to be meant and construed as 'and' (thereby implying that, both availment and utilization has to be there for imposition of interest), other interpretation being that, even of one of the said criteria is satisfied, the interest can be recovered. Thus, this leaded to judicial tussle between various courts and interpretation of the said provision.

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b. Rule 14 of CCR, 2004 from 17.03.2012 till 28.02.2015 - To overcome the above issue of interpretation, the Legislature on 17.03.2012 vide Notification No. 18/2012-C.E. (N.T.) amended Rule 14 and replaced 'or' with 'and' thereby implying that for recovery of interest both wrong availment and utilization of CENVAT credit should be present.

c. Rule 14 of CCR, 2004 from 01.03.2015 - Further, in order to segregate the concept of mere availment of CENVAT credit from utilization of CENVAT credit, the Legislature vide Notification No. 06/2015-C.E. (N.T.) dated 01.03.2015, again amended the relevant portion of Rule 14 of CCR, 2004 and bifurcated Rule 14(1) of CCR, 2004 into two distinct clauses, one dealing with mere availment wherein, only wrongly availed CENVAT could be recovered without any interest and other, dealing with both availment and utilization, wherein the interest should also be recovered.

The perusal of the above legislative history of Rule 14 of CCR, 2004, clearly outlines that the Legislature always was very clear about the fact that, in case there is no utilization of wrongly availed CENVAT credit, the interest can in no manner be recovered. They rely on the following judgments in support of their claim:

1. Zile Singh Versus State of Haryana and others, 2004 (8) SCC 1,
2. Bengal Immunity Company Ltd. Vs. The State of Bihar &Ors., [1955] 2 SCR 603, Heydon's case (3 Co. Rep.7a; 76 E.R.637)
3. Allied Motors (P) Ltd. Vs. Commissioner of Income- tax, Delhi, (1997) 3 SCC 472

3.1.2 Thus, referring the above judicial precedents, they submitted that for recovery of interest on the CENVAT credit availed wrongly, they should have availed said CENVAT credit and also utilized said CENVAT credit, for the reason that interest is just the shadow of the demand/ duty evaded and till the time, one has actually utilized the said CENVAT credit the duty can in no manner be said to have been evaded. In the instant case, they had not utilized the disputed CENVAT credit, which is supported by the perusal of the Cenvat credit register and ER-1 returns, which shows that the CENVAT balance never went below the disputed CENVAT amount. They rely on the following judgments in support of their arguments:

1. Commissioner of C. Ex. & S.T., LTU, Bangalore v. Bill Forge Pvt. Ltd., 2012 (279) E.L.T. 209 (Kar.).
2. CCE, Ludhiana Vs Jagatjit Industries Ltd. [2011 (22) S.T.R. 518 (P & H)]
3. Bidhata Industries Pvt. Ltd vs. CCE, Thane [2007 (220) ELT 919 (Tri-Mum)]
4. CCE vs. Gupta Steel [2006 (205) ELT 24 (Guj)]
5. CCE, Madurai v. Strategic Engineering (P) Ltd. - 2014 (310) ELT 509 (Mad.)

Therefore, in light of the above judicial precedents and relevant facts, a purposive construction giving retrospective effect of the amendment in the Rule 14 of CCR, 2004 is a must and the only inevitable solution. Hence, no interest can be charged from the Appellants. They has obtained a favourable order in their own case having similar issue vide Order-in-Original No. 07/AC/ANJAR/2016-17 dated 10.11.2016 wherein the Assistant Commissioner had held that with substitution of the words "*taken and utilized wrongly*" in Rule 14 of CCR 2004 w.e.f. 17.3.2012, the demand of interest on the amount of CENVAT credit taken wrongly on or after 17.3.2012 is not sustainable. Thus, in the present case as well the same effect should be rendered with regards to the applicability of the provision of Rule 14 of CCR 2004 considering the amendment w.e.f. 17.3.2012 for the period post 17.3.2012. Therefore, they submitted that for the period from 17.3.2012, interest under Rule 14 of the CCR, 2004 cannot be charged and so the demand of interest in the impugned order is liable to be set aside.

3.2 They further submitted that it is an undisputed fact, that CENVAT Credit availed on the ISD invoices was not utilised towards discharge of excise duty liability. Accordingly, it is submitted that the impugned CENVAT Credit wrongly taken by the Appellants has not been utilised thus leading to no loss to the exchequer in this account. The closing balance of CENVAT Credit reflected in the monthly ER-1 returns filed during the period from April 2012 to March 2014. The same adds credibility to the above argument that '*CENVAT Credit wrongly taken by the Appellants has not been utilized for the purposes of payment of any duty*'. It would also be worthy to note that the invoices pertaining to ISD and the amount of CENVAT Credit deemed to have been wrongly taken were identified and reversed by them during the course of Revenue audit only.

3.2.1 The entire issue is revenue neutral and therefore there can be no

malafide intention to defraud Revenue during the disputed period. Thus, the demand against them is liable to be dropped on the ground that the issue is revenue neutral. They rely on

1. Commercial Engineers & Body Builders Vs C.C.E. Bhopal, 2017 (1) TMI 298 - CESTAT NEW DELHI.
2. Cadbury India Ltd. Vs CST, 2017 (2) TMI 208 - CESTAT MUMBAI
3. M/s. Modern Woolens Vs CCE, 2016 (11) TMI 1353 - CESTAT NEW DELHI
4. CCE v. Coca Cola India Pvt. Ltd. 2007 (213) E.L.T. 490 (S.C.)
5. Steel Authority of India Ltd. v. CCE 1985 (22) E.L.T. 487 (Tribunal)

Affirmed in 1991 (51) E.L.T. A42 (S.C)

6. Matrix Telecom (P) Ltd. vs. CCE 2013 (32) S.T.R. 423 (Tri. - Ahmd.)
7. CCL Products (India) Ltd. vs. CST 2012 (27) S.T.R. 342 (Tri. - Bang.)
8. Essar Steels Ltd. vs. CCE 2009 (13) S.T.R. 579 (Tri. - Ahmd.)

Thus, the impugned order demanding interest and penalty when the CENVAT credit has been already reversed before the issuance of SCN is liable to be dropped, as the entire issue is revenue neutral.

3.3 They also submitted that they were under bonafide belief in view of the submissions made above, that the CENVAT credit so availed under ISD invoices was duly available to them. They reversed the entire CENVAT credit wrongly availed as pointed out by the Audit department before the issuance of the SCN. Thus, there was no wilful suppression with an intention to evade duty. They submitted that there is no rule which compels them to inform the Department about availment of the CENVAT credit on ISD invoices. They had fully disclosed in entirety all the transactions and the details of the CENVAT credit availment and utilization in the periodical excise returns so filed by during the disputed period and had also co-operated and disclosed the records and documentation in this regard to the Department officials at the time of Audit. It is a well settled law that where a particular information is not required to be submitted under law, if not supplied does not amount to suppression. They rely on following judgements:

i. Apex Electricals v. Union of India, 1992 (61) ELT 413 (Guj)

ii. Unique Resin Industries v. CCE, 1995 (75) ELT 861 (T)

iii. Gufic Pharma v. CCE, 1996 (85) ELT 67 (T)

Affirmed by Supreme Court at 1997 (93) ELT A186.

3.3.1 Without any deliberate intention to withhold/ suppress information from the Department, invocation of the extended period of limitation cannot be justified. Further, in the present case, they have not committed any

positive act to suppress information from the Department with the intent to defraud Revenue. They rely on the judgment of M/s Anand Nishikawa Co Ltd Vs Commissioner of Central Excise, Meerut reported at 2005-TIOL-118-SC-CX, Padmini Products Limited v CCE reported at 1989 (43) ELT 195 (SC). In view of the above, demand beyond normal period of limitation is not sustainable.

3.4 They have not contravened any of the provisions of the CCR, 2004 and the question of imposing penalty under Rule 15 (2) does not arise. The penalty under Section 11AC of the Act is imposable only when there is an element of fraud, wilful suppression or misstatement of facts etc. with an intention to evade payment of duty. In the instant case has no revenue implication as they have already reversed the CENVAT credit wrongly taken before issuance of SCN. Therefore, the question of intention to evade any payment of duty does not arise in the present case. That no penalty can be imposed upon the assessee under Section 11AC of CEA, 1944 read with Rule 15 (2), CCR 2004 where the situation is revenue neutral and there is no loss to the department. They rely on the following decisions:

(i) Patel Alloys Steel Pvt. Ltd. v. CCE - 2013 (293) ELT 264
Affirmed by Hon'ble Gujarat High Court in 2014 (305) ELT 476 (Guj.)
(ii) CCE v. Sharda Energy & Minerals Ltd. - 2013 (291) ELT 404
(iii) Cosmo Films Ltd. v. CCE, Aurangabad - 2010 (251) ELT 130

3.4.1 They were under bonafide belief as to the admissibility of credit on ISD invoices. There was no malafide intention to defraud Revenue. They rely upon the following ratio as laid down in the respective judgements:

1. CCE., Meerut-II Vs Rana Sugar Ltd [2010 (253) E.L.T. 366 (All.)]
2. CCE, Thance Vs Parle Tablet Tools Pvt Ltd [2009 (245) E.L.T. 302 (Tri. - Mumbai)]:
3. EssEss Engineering *Vs. CCE, Chandigarh [2010 (20) STR 669 (Tri-Del.)]*
4. M/s. Hindustan Steel Ltd. v State of Orissa reported at 1969 (2) SCC 627,
5. *Kellner Pharmaceuticals Ltd. v. CCE reported at 1985 (20) ELT 80 (T).*
6. Order-in-Original No. 07.AC/ANJAR/2016-17 dated 10.11.2016

3.4.2 Thus, it can be concluded that Cenvat Credit wrongly taken but reversed suo-moto before utilization shows absence of any malafide intention and thus

would not attract penalty under Section 11AC of the CEA, 1944 read with Rule 15 of the CCR, 2004. In absence of the primary ingredients for imposition of penalty under Rule 15 of the CCR, 2004 as well as Section 11AC of the CEA, 1944, in the instant case, no penalty can be imposed.

4. A personal hearing in the matter was attended by Shri Ishan Bhatt who reiterated the grounds of appeal and submitted that they have taken Cenvat credit in May, 2012 and September, 2012 when Rule 14 of Cenvat Credit Rules, 2004 and interest and penalty is payable only if that Cenvat credit is utilized also. They have not utilized this Cenvat credit as is evident from all returns from April, 2012 to March, 2014 when they had reversed that Cenvat credit vide entry Sr. No. 224, 225 and 226 dated 31.03.2014. There were case laws deciding this issue as per compilation submitted by them at Sr. No. 9, 10 & 11 of the judgement of Hon'ble High Court & CESTAT.

FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submissions made by the appellant including during the personal hearing.

5.1 The issue to be decided in the present case is as to whether the appellant was eligible to avail Cenvat credit on ISD invoices distributed by M/s. Ashland India Pvt. Ltd. and is liable to pay interest as well as penalty for wrongly availed Cenvat credit availed on the basis of ISD invoices issued by M/s. Ashland India Pvt. Ltd., Mumbai which is not their group company to distribute ISD credit to the appellant being jobworker of Ashland, or not.

6. I find that appellant has reversed Cenvat credit on ISD invoices issued by Ashland on being pointed out by the Audit. The appellant has vehemently argued that though they had availed Cenvat credit wrongly but had reversed the Cenvat credit without utilizing the same, which means they had not availed the said Cenvat Credit at all. They have put forth arguments and stated that balance in their Cenvat credit account was never less than that of availed by them during the material time. The period of dispute in the case on hand is May, 2012 and September, 2012, during which they had wrongly availed Cenvat credit on ISD invoices. They also relied upon the amendments made in Rule 14 of the Rules, which is re-produced below as amended from 01.04.2012:

Rule 14: Recovery of CENVAT credit wrongly taken or erroneously refunded. - Where the CENVAT credit has been taken and utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of output service and the provisions of section 11A and 11AA of the Excise Act or section 73 and 75 of the Finance Act, shall apply *mutatis mutandis* for effecting such recoveries.

6.1 On perusal of the above mentioned Rule 14 and wordings used, it is clear that the Cenvat credit taken wrongly and also utilized subsequently shall be recovered along with interest, hence both conditions i.e. Cenvat credit taken and utilized are required to be fulfilled for recovery of interest. It means if anyone has taken wrong Cenvat credit but not utilized the same and on being pointed out reversed the same before utilization, interest on the said Cenvat credit not required to be recovered.

6.2 In the case on hand, the appellant has wrongly availed Cenvat credit of Rs. 59,61,126/- in the month of May, 2012 and September, 2012. On going through ER-1 returns for the month of April, 2012 to March, 2014, it revealed that they had balance of Service Tax credit more than Rs. 59,61,126/- in their Cenvat credit account all along. Hence, they had not utilized this Cenvat credit, which was taken wrongly by them. Therefore, I hold that applying the language of the Rule 14 of the Rules, the interest is not required to be recovered from the appellant.

7. As far as penalty under Rule 15(2) of the Rules imposed upon appellant is concerned, I find that Rule 15(2) reads as under:

"(2) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilized wrongly by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of Section 11AC of the Excise Act."

(Emphasis supplied)

7.1 Here the words used are 'taken or utilized' and hence differ drastically from the language used in Rule 14 of the Rules. It means penalty can be imposed in case of suppression of facts or contravention of any of the provisions of the Central Excise Act, 1944 or of the rules made thereunder. In this case, the appellant has wrongly availed Cenvat credit of Rs. 59,61,126/- on

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the basis of ISD invoices issued by Ashland vide Entry No. 14 & 15 both dated 31.05.2012 and 154 dated 31.09.2012 in their Cenvat credit Account. The appellant reversed the wrongly availed Cenvat credit vide Entry No. 224 to 226 all dated 31.03.2014, after a period of two years but not on their own but on being pointed out by the department. The appellant has argued that there is no rule which compels them to inform the Department about availment of the Cenvat Credit on ISD Invoices as they had fully disclosed all transactions and the details of the Cenvat credit availed and utilized in the periodical returns. I find that Rule 7 of the Rules deals with manner of distribution of credit by input service distributor, wherein the procedure to distribute Cenvat Credit. Rule 9(6) of the Rules, re-produced below, casts obligation on manufacturer and the burden of proof regarding admissibility of the Cenvat credit lies upon the manufacturer.

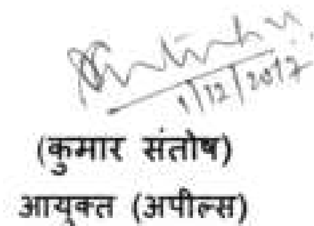
> *(6) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit.*

7.2 Therefore, the plea advanced by appellant is of no help to them since they are working under self-assessment regime and legislature has put faith on the assessees to work as per law and procedure. Since, the appellant has violated the provisions of Cenvat Credit Rules, 2004 read with Central Excise Act, 1944. Hence, I find that appellant is liable to penalty under Section 11AC of the Act read with Section 15(2) of the Rules.

8. In view of the above facts and findings, I set aside the impugned order for recovery of interest but uphold the impugned order for imposition of penalty.

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

8.1 The appeal filed by the appellant is disposed of in above terms.



(कुमार संतोष)
आयुक्त (अपील्स)