::आयुक्त (अपील) 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 / O.I.O. No	दिनांक / Date
	V2/237/RAJ/2016	**33/ADC/PV/2016-17**	**29.09.2016**

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

RAJ-EXCUS-000-APP-071 -2017-18

आदेश का दिनांक / Date of Order: **21.09.2017** जारी करने की तारीख / Date of issue: **25.09.2017**

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

ग अवर 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 **Appellant &** Respondent :-
M/s. Rajoo Engineers Ltd.,, Survery No. 210/ Plot No.1,, Industrial Aread,Veraval,Shapar

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

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के 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 मामलों 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, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावी 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 दायर किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराना होगा ।/

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के 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 अवश्य रखें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा कराना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), 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 दायर करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण 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 अर्जी एवं अपील को लागू नहीं होंगे।/

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

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

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय 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 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 इयूटी क्रेडीट 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 समयावधि 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 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 केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क 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 अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों की ओरमेवर्तित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL :: 760

M/s. Rajoo Engineers Ltd., Survey No. 210/Plot No.1, Industrial Area, Veraval(Shapar) (hereinafter referred to as "the appellant") filed the present appeal against Order-in-Original No. 33/ADC/PV/2016-17 dated 29.09.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. The facts of the case are that the appellant had availed the cenvat credit of service tax paid on common input services such as Telephone Services, Banking Services and Internet Service etc. used in relation to manufacture of dutiable final products as well as in providing exempted services namely, trading of goods. The appellant neither maintained separate accounts of receipt and inventory of input services meant for use in manufacturing of dutiable final products as well as trading activity i. e. exempted service, as per Rule 6(2) of the Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004) nor availed options under Rule 6(3) of CCR, 2004. SCN No. VI/8(a)-56/EA-2000/AG-C/2015-16 dated 07.01.2016(hereinafter referred to as "the impugned SCN") proposed recovery of Rs. 27,72,837/- for the period from April-2011 to July-2013 under Rule 6(3) of CCR, 2004, under Rule 14 of CCR, 2004 read with Section 11A(5) of the Central Excise Act, 1944 and interest under Rule 14 of CCR, 2004 read with Section 11AA of the Act and imposition of penalty under Rule 15 of CCR, 2004 read with Section 11AC of the Central Excise Act, 1944. The lower adjudicating authority, vide impugned order, confirmed demand made under the impugned SCN, ordered recovery of interest and also imposed penalty equal to 50% of duty confirmed.

3. Being aggrieved by the impugned order, the appellant filed the present appeal, *interalia*, on the following grounds:-

(i) The trading activity is an exempted service as per explanation to Rule 2(e) of CCR, 2004 and clause (e) of Rule 2 of the CCR, 2004 was substituted w.e.f. 01.07.2012 vide Notification No. 28/2012 – CE (NT) wherein the said explanation has been omitted and new definition does not specify that trading activity is an exempted service.

(ii) The lower adjudicating authority travelled beyond the scope of the impugned SCN as no charge has been made under provisions of Section 66D(e) of the

Finance Act, 1994 (hereinafter referred to as "the Act") wherein it is stipulated that trading is covered under negative list w.e.f. 01.07.2012 whereas the impugned SCN has been issued with relation to definition of 'exempted service' as per revised Rule 2(e) of Cenvat Credit Rules, 2004. Hence, the adjudicating authority has traveled beyond the scope of the show cause notice for the period from 01.07.2012 onwards. The contention of the appellant that adjudicating authority cannot travel beyond the scope of the show cause notice has not been discussed in the impugned order. Thus, for the period effective from 1.7.2012, the show cause notice is not sustainable on the sole ground that no charges have been made in respect of amended provisions of law w.e.f. 1.7.2012. In this regard, the appellant relied on the following case laws:

(1) Sun Pharmaceutical Inds. Ltd reported as 2015 (326) ELT 3 (SC)

(2) Unitech Machines Ltd. reported as 2015 (329) ELT 860 (T)

(3) Essar Oil Ltd. reported as 2015 (329) ELT 401 (T)

(iii) The lower adjudicating authority has erred in applying the ratio of the judgment of the Hon'ble Bombay High Court in the case of Nicholas Piramal (India) Ltd. reported as 2009 (244) ELT 321 (Bom) since this case law was distinguished in the case of Mercedez Benz India (P) Ltd. reported as 2015 (40) STR 381 (T). The CESTAT held that the provisions of Rule 6(3) (i) (ii) (3A) have not been considered in the relied upon judgment, therefore the same are not applicable in the preset case.

(iv) The appellant also submitted that while considering the said case law of Mercedez Benz India (P) Ltd. reported as 2015 (40) STR 381 (T). The lower adjudicating authority has wrongly mentioned that option under Rule 6(3A) had been filed in that case. In fact, the CESTAT has held in the said case that the appellant filing returns regularly on monthly basis along with the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 to the Range Superintendent stood compliance of Rule 6(3A). The above conclusion was arrived at on the grounds that the returns contain almost all information as required under Rule 6(3A) of the CCR, 2004. Thus, the observation of the lower adjudicating authority that the ratio of the said case law will not apply is erroneous.

(v) The appellant has pleaded that the Government brought retrospective amendment in Rule 57CC of the Central Excise Rules, 1944 and Rule 6 of the Cenvat Credit Rules, 2002/2004 and in all such cases option was given to the assesee opt for payment of an amount of cenvat credit attributable to the exempted goods/services along with interest, then all proceedings shall stand concluded and no further demand shall be made.

(vi) The appellant has also argued that the lower adjudicating authority had brushed aside the case laws of Maize Products reported as 2009 (234) ELT 431 (Guj); Anil Starch Ltd. reported as 2010 (260) ELT 54 (Guj) and Maan Pharmaceuticals Ltd. reported as 2011 (263) ELT 661 (Guj) on the ground that all case laws pertained to the period when Cenvat Credit Rules, 2002 were applicable and as such the ratio of the same would not be applicable to the present case. The appellant further argued that Rule 6 in the erstwhile Cenvat Credit Rules, 2002 and the present Cenvat Credit Rules, 2004 is identical and as such the interpretation made by the High Court of Gujarat would be very much applicable to the facts under consideration. The lower adjudicating authority has also made a highly contradictory statement by saying that the decisions rendered in respect of Cenvat Credit Rules, 2002 would not be applicable to the matters covered under Cenvat Credit Rules, 2004 whereas he himself has relied upon the case law of Nicholas Piramal (India) Ltd. reported as 2009 (244) ELT 321 (Bom) which discussed the facts under the erstwhile Cenvat Credit Rules, 2002.

(vii) The appellant contended that they had taken cenvat credit of Rs. 4,41,844/- on Telephone Services, Banking Services and Internet Service used as common 'input services' during the period from 01.04.2011 to 31.07.2013 and against this, demand of Rs. 27,72,837/- has been raised which is against the spirit of the law. In such cases they would be required to reverse the proportionate cenvat credit used in exempted service viz. trading activity. In support to their contention, the appellant relied upon following case laws:

(1) Maize Products reported as 2009 (234) ELT 431 (Guj)

(2) Anil Starch Ltd. reported as 2010 (260) ELT 54 (Guj)

(3) Maan Pharmaceuticals Ltd. reported as 2011 (263) ELT 661 (Guj)

(viii) The appellant further contended that accepting the above judgements of the High Court, Rule 6 of the Cenvat Credit Rules, 2004 was amended vide Notification No. 13/2016 CE(NT) dated 01.03.2016 so as to provide for reversal of cenvat credit attributable to common inputs and input services which have been used in relation to manufacture of dutiable and exempted goods OR taxable and exempted services and new sub-rule 3AA has been inserted. This indicates that where the manufacturer has failed to file the option, he may also avail of the facility as specified under Rule 6(3A) of the Cenvat Credit Rules, 2004 and pay the amount due along with interest. This has been done with a view to reduce ongoing litigations in such issues and finds support in letter D.O.F No. 334/8/2016-TRU dated 29.2.2016.

(ix) The appellant argued that the trading activity in question pertains to High Sea Sales and banking service with relation to the High Sea Sales is very much identifiable from the records and total cenvat credit of Rs. 42,687/- taken on it, which is required to be disallowed as per the Explanation III of Rule 6(3) of the erstwhile Cenvat Credit Rules, 2004 and in such cases the provisions of Rule 6(3) would not be applicable. The appellant also argued that they have not made any international call in respect to purchase or sale of goods under High Sea Sales and as such the question of common service does not arise.

4. Personal hearing in the matter was attended by Shri Archit Kotwal, Consultant who reiterated the grounds of Appeal and submitted that the SCN has invoked Section 66D(e) (effective from 01.07.2012) but included period prior to 01.07.2012, which is not correct; that Rule 6(3AA) benefit has not been granted/considered even if order has been passed in September, 2016 whereas Rule 6(3AA) was effective from 01.03.2016 vide Notification No. 13/2016-CE(NT) dated 01.03.2016; that they are ready to reverse total cenvat credit of Rs. 4.41 lakhs taken by them; that this problem was/is being faced by all industries and hence no penalty needs to be imposed as they have done things as per law and due to the fact that they are ready to reverse entire cenvat credit required to be reversed.

Findings:-

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

6. The issues to be decided in the present appeal are as

(i) whether the appellant was required to pay the amount under Rule 6(3) of the CCR, 2004 for undertaking exempted service of "trading of goods" or otherwise.

(ii) whether order for recovery of interest under Rule 14 of the CCR, 2004 and imposition of penalty under Rule 15 of the CCR, 2004 is correct or not?

7. The appellant has contended that the trading activity is an exempted service as per explanation to Rule 2(e) of the CCR, 2004, however clause (e) of Rule 2 of the CCR, 2004 was substituted w.e.f. 01.07.2012 vide Notification No. 28/2012-CE (NT) wherein the said explanation has been omitted and the new definition does not specify that the trading activity is an exempted service; that the lower adjudicating

authority travelled beyond the scope of the impugned SCN as no charge has been made in the SCN under the provisions of Section 66D(e) of the Act which covers "trading of goods" under the negative list w.e.f. 01.07.2012 whereas the impugned SCN for the period from April, 2011 to July, 2013 has been issued only with relation to the definition of 'exempted service' as per revised Rule 2(e) of the Cenvat Credit Rules, 2004.

7.1 I find that the term "exempted service" defined under Rule 2(e) of the CCR, 2004 was amended by the Central Government w.e.f. 01.04.2011, vide Notification No. 3/2011-CE(NT) dated 01.03.2011, which reads as under:-

> *"exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act, and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.*
>
> *Explanation.- For the removal of doubts, it is hereby clarified that "exempted services" includes trading" ;*
>
> (Emphasis supplied)

7.2 I also find that the definition of 'exempted service' was amended vide Notification No. 28/2012-CE(NT) dated 20.06.2012 w. e. f. 01.07.2012 as under:

> *"exempted service" means a–*
>
> *(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*
>
> *(2) service, on which no service tax is leviable under Section 66B of the Finance Act; or*
>
> *(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;*
>
> (Emphasis supplied)

7.3 I further find 'trading of goods' has been included in the negative list of services as per Section 66D of the Act with effect from 01.7.2012, which reads as under:-

> *SECTION 66D. Negative list of services. — The negative list shall comprise of the following services, namely :—*
>
> *(a) .....*
>
> *(b) .....;*
>
> *(c) .....;*
>
> *(d) .....*

(e) trading of goods;

(Emphasis supplied)

7.4 It is clear from above that the amendment made vide Notification No. 3/2011-CE(NT) dated 01.03.2011, w.e.f. 01.04.2011, by way of insertion of explanation in Rule 2(e) of the CCR, 2004 has unambiguously clarified that trading of goods is required to be treated as 'Exempted Service" for the purpose of various provisions relating to cenvat credit. Further, w.e.f. 01.07.2012, Section 66D further specifies trading of goods as service but makes it in the negative list specifying that no service tax is payable on trading of goods. However, the fact remains that "trading of goods" under Section 66D of the Act has been treated as service. Similarly, Rule 2(e) of the CCR, 2004 amended vide Notification No. 3/2011-CE(NT) dated 01.03.2011 as well as Notification No. 28/2012-CE(NT) dated 20.06.2012 establishes that trading of goods is as exempted service. A service on which no service tax is leviable under Section 66B of the Finance Act has to be treated as an exempted service. Thus, I find that the trading of goods falls within ambit of definition of "exempted service" as per Rule 2(e) of the CCR, 2004 from 01.04.2011 itself and "trading of goods" remained exempted service even after 01.07.2012 in the negative list regime and exempted services are all those services which are placed under negative list under Section 66D of the Finance Act. The said intention of the legislation is further fortified vide explanation I (c) to Rule 6(3D) of CCR, 2004 wherein value on which payment of an amount under Rule 6(3) on trading of goods is stipulated to be considered as difference between sale price and the cost of goods sold or ten per cent of the cost of goods sold, whichever is more. Therefore, the Service Tax law and Cenvat Credit law in respect of trading of goods are unambiguous with effect from 01.04.2011 and even after 01.07.2012.

7.5 The appellant has contended that lower adjudicating authority has erroneously applied the ratio of the judgement in the case of Nicholas Piramal (India) Ltd. reported as 2009 (244) ELT 321 (Bom), which has been distinguished in the case of Mercedez Benz India (P) Ltd. reported as 2015 (40) STR 381 (T). I find that the facts in the case of Nicholas Piramal (India) Ltd. was that the assessee had availed cenvat credit on common inputs used in dutiable as well as exempted final products and the assessee had proportionately reversed credit of inputs used in the manufacture of exempted goods. The Hon'ble High Court held that "....once a manufacturer, manufactures from common inputs two final products, one dutiable and the other exempted; Rule 6(2) would be attracted and on failure to maintain separate records, Rule 6(3) would apply." I find that in the instant case, the appellant has used common input service for manufacture of dutiable final products and for providing exempted service, but neither maintained separate records as per Rule 6(2) of the Cenvat Credit

Rules, 2004 nor availed any options as per Rule 6(3) of the Cenvat Credit Rules, 2004. Hence, I find that the lower adjudicating authority has correctly applied the ratio of the said decision.

7.6 I find from the above discussion with regard to definition of the term 'exempted services' and that the trading activity is specifically included as exempted services, the intent and purpose of legislation are very clear not to allow credit on input services meant for use in trading activity under provisions of Rule 6 of the CCR, 2004. Thus, the manufacturer-trader cannot take credit on input services meant for used in trading activity. He is required to maintain separate records for availment and consumption of the input services meant for trading activity. On failure to comply with this provision, the only option available with him as per the Cenvat Credit Rules, 2004 is either he has to pay the amount as per Rule 6(3)(i) or as per Rule 6(3)(ii) of the CCR, 2004. In other words, the appellant is required to pay amount equal to 5% / 6% of the value of trading of goods or to pay amount as per relevant formula provided in Rule 6(3A) of the CCR, 2004. I, therefore, hold that the appellant has failed to maintain separate account as stipulated under Rule 6(2) of the Rules and is required to pay an amount under Rule 6(3) of the Rules.

8. The appellant contended that they had taken cenvat credit of Rs. 4,41,844/- on Telephone Services, Banking Services and Internet Service used as common 'input services' during the period from 01.04.2011 to 31.07.2013 and against this, demand of Rs. 27,72,837/- has been raised which is against the spirit of the law; that in such cases they would be required to reverse the proportionate cenvat credit used in exempted service viz. trading activity. However, the appellant shown their eagerness in their appeal memorandum to pay/reverse the said amount equivalent to total cenvat credit taken/availed of Rs. 4,41,844/- and relied upon following case laws:

(1) Maize Products reported as 2009 (234) ELT 431 (Guj)

(2) Anil Starch Ltd. reported as 2010 (260) ELT 54 (Guj)

(3) Maan Pharmaceuticals Ltd. reported as 2011 (263) ELT 661 (Guj)

8.1 I find that the appellant has made this plea before the lower adjudicating authority but the lower adjudicating authority rejected the plea on the grounds that the appellant already having an option, at the relevant time, to file under Rule 6(3A) of CCR, 2004 which they have not done and at this stage they cannot take benefit of the same when the law is clear. The appellant, during the course of personal hearing, has also shown their readiness to pay/reverse the said amount equivalent to total cenvat credit taken/availed of Rs. 4,41,844/-. In this regard, I find that the issue is no more

res-integra because of order of CESTAT, Ahmedabad in the case of Face Ceramics Pvt Ltd, as reported in 2010 (249) E.L.T. 119 (Tri. - Ahmd.), wherein by following earlier decisions of the Hon'ble Supreme Court and Allahabad High Court, it was held as under:-

> ***"2.*** *It is the appellant's contention that the above goods cannot be considered to be inputs and the credit has been availed as capital goods, in which case the condition of the Notification would not stand contravened. In any case, submits the learned Advocate that the credit of Rs. 4,76,146/- availed by them in respect of the above items stands subsequently reversed by them along with interest of Rs. 1,62,233/-, in which case the condition cannot be held to be contravened. He relies upon the Hon'ble Allahabad High Court judgment in the case of Hello Minerals Water Pvt. Limited v. UOI - 2004 (174) E.L.T. 422 (H.C.-Allahabad.) laying down that subsequent reversal of Modvat credit amounts to non-taking of credit on the inputs. Learned Adv. also refers the Hon'ble Gujarat High Court judgment in the case of CCE v. Ashima Dyecot Limited - 2008 (232) E.L.T. 580 (Guj.) = 2008 (12) S.T.R. 701 (Guj.) wherein the Tribunal's decision laying down that even if reversal of credit is as per the directions of the Tribunal, it has to be held as if no credit was availed. We note that both the above decisions are based upon the declaration of law by the Hon'ble Supreme Court in the case of Chandrapur Magnet Wires Pvt. Limited v. CCE - 1996 (81) E.L.T. 3 (S.C.).*
>
> ***3.*** *Though the above decision of Chandrapur Magnet Wires Pvt. Limited was placed before the adjudicating authority but he has not followed it, on the ground that the reversal of credit was not made prior to clearance of the goods. In terms of the above decision Hon'ble Gujarat High Court as also Hon'ble Allahabad High Court which have held that such reversal, even if made subsequently would amount as if no credit has been availed. In the present case, the appellants have reversed the entire credit along with interest. As such, it has to be held as if no credit was availed. If that be so, the condition of the Notification cannot be held to be contravened, in which case, the benefit of the same would be available to the assessee."*

8.2 Thus, it is held in the various higher judicial forums that subsequent reversal of the credit would amount as if no credit has been availed. Therefore, relying on the above decisions, the request made by the appellant in appeal memorandum and also at the time of personal hearing that they are ready to pay/reverse total cenvat credit taken by them along with interest at applicable rate appears tenable and legally correct. However, I am not in position to verify as to how much cenvat credit has been taken by the appellant on common input services during the period under question as no document is available with me for the purpose of quantification of the same. Hence, I am left with no option but to remand the order to the lower adjudicating authority, who shall verify the total cenvat credit taken by the appellant on common input services during the period in question.

8.3 In view of the above factual position, I direct the appellant to submit the

required documents to the lower adjudicating authority, who shall verify the facts and quantify cenvat credit taken by the appellant on common input services and shall pass speaking order offering fair and reasonable opportunities to the appellant to explain their case.

8.4 I find that remanding matter to the lower adjudicating authority is legal and proper in the light of the decision of the Hon'ble CESTAT in the case of Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del) wherein it is held that power to remand in appropriate cases is inbuilt in Section 35A(3) of the Central Excise Act, 1944 even after amendment. The Hon'ble CESTAT in the case of Honda Seil Power Products Ltd. reported as 2013 (287) ELT 353 (Tri-Del) has also held that Commissioner (Appeals) has inherent power to remand a case under the provisions of Section 35A(3) of the Central Excise Act, 1944. The Hon'ble High Court of Gujarat, in Tax Appeal No. 276 of 2014 of Associated Hotels Ltd. has held that even after amendment in Section 35A(3) of the Central Excise Act, 1944 in 2011, the Commissioner(Appeals) has powers to remand.

9. In view of above facts and circumstances, I set aside the impugned order and remand the matter back to the lower adjudicating authority to verify total cenvat credit taken on common input services by the appellant with direction to the appellant to submit all relevant documents in writing within 2 months from the date of receipt of this order.

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

9.1 The appeal filed by the appellant stands disposed off in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post

To

M/s. Rajoo Engineers Ltd., Survey No. 210/Plot No.1, Industrial Area, Veraval(Shapar)	मे. राजू एंजीनर्स ली., सर्वे नं. 210/प्लॉट नं. 1, इंडस्ट्रियल एरिया, वेरावल(शापर).

Copy to:

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