केन्द्रीय उत्पाद शुल्क अपील आयुक्त, राजकोट केन्द्रीय उत्पाद शुल्क भवन

CENTRAL EXCISE APPEALS COMMISSIONERATE, GST BHAVAN, RAJKOT

केन्द्रीय उत्पाद शुल्क भवन, सातवां मंजिल, 'जी' ब्लॉक,
राजकोट-360001
टेलीफोन नं. (0281) 2477952/2441142 Email: cexappealsrajkot@gmail.com

अपील / फाइल संख्या :

मूल आदेश संख्या :	दिनांक :	जारी करने की तारीख :
V2(GST)43/Rajkot/2019	25.04.2019	06.06.2019

द्वारा पारित :

Passed by Shri Vishwa Pal Singh, Commissioner (Appeals), Rajkot.

1 यह अपील आदेश उस व्यक्ति को जारी किया जाता है जिसके नाम पर यह जारी किया गया है।
This order is issued to the person in whose name it is issued.

2 अपीलकर्ता का नाम और पता / Name and address of the Appellant & respondent :

M/s Parth Enterprise, 101, Ratnakar Trading Co., Nr. Nana Mavadi Road, Near Police H/Quarter, Rajkot-360004.

3 इस अपील आदेश से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उचित प्राधिकारी 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 manner.

4 इस अपील आदेश के विरुद्ध अपील दायर करने वाले व्यक्ति को अपील के साथ निम्नलिखित शुल्क का भुगतान करना होगा।
The appellant shall pay the following fee with the appeal.

5 इस अपील आदेश के विरुद्ध अपील दायर करने वाले व्यक्ति को अपील के साथ निम्नलिखित शुल्क का भुगतान करना होगा।
The appellant shall pay the following fee with the appeal.

6 (i) The appeal to the Appellate Tribunal shall be filed in Form EA-3 as prescribed under Rule 3 of the Central Excise (Appeals) Rules, 2001 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. 1,000/- where the amount involved in Service Tax, Interest and Penalty, where such amount or penalty or fine or the difference in duty is Rs. 5 lakhs or less, Rs. 5,000/- where the amount involved is more than Rs. 5 lakhs but not exceeding Rs. 50 lakhs, Rs. 10,000/- where the amount involved is more than Rs. 50 lakhs, in the form of crossed bank draft in favour of the Registrar of the Bench of Nominated Public Sector Bank of the place where the Bench is situated.

7 अपील आदेश के विरुद्ध अपील दायर करने वाले व्यक्ति को अपील के साथ निम्नलिखित शुल्क का भुगतान करना होगा।
The appellant shall pay the following fee with the appeal.

:: ORDER-IN-APPEAL ::

M/s. Parth Poly Weave Pvt. Ltd. Plot No.1321/2, G.I.D.C. Sabalpur Junagadh hereinafter referred to as the appellant) filed following two appeals against Orders-in-Original (hereinafter referred to as "impugned orders") sanctioned against each appeal passed by Superintendent, Central GST, Range-I, Division - Junagadh (hereinafter referred to as "lower adjudicating authority").

Sr.No	Appeal No.	O.I.O. No. & Date	Period	Cenvat credit disallowed (in Rs.)
1	V2(GST)JUN/APPL/2018-19	19/Supdt/CGST/JUN/2018-19 dated 11.5.2018	August, 2016 to March, 2017	28,921
2	V2(GST)JUN/APPL/2018-19	87/Supdt/CGST/JUN/2018-19 dated 22.6.2018	April, 2017 to June, 2017	22,116

2. The brief facts of the case are that periodical SCNs dated 27.7.2017 and dated 21.8.2017 were issued to the appellant demanding recovery of cenvat credit respectively of Rs. 28,921/- and Rs. 22,116/- availed on service tax paid on inward freight (GTA service) under Rule 11 of Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004") read with Section 11A of the Central Excise Act, 1944 (hereinafter referred to as the Act), recovery of interest under Rule 14 of CCR, 2004 read with Section 11AA of the Act and for imposition of penalty under Rule 15 of CCR, 2004. The lower adjudicating authority vide impugned orders confirmed the demands of cenvat credit along with interest and imposed penalty respectively of Rs. 28,921/- and Rs. 22,116/- under Rule 15 of CCR, 2004.

3. Being aggrieved by the impugned orders, the appellant preferred the present appeals mainly on the following grounds.

(i) They are a private limited company engaged in manufacture of Printed Films and are registered with Central Excise and are availing Cenvat credit facility. As a part of their business activity, they are clearing their excisable goods on payment of Central Excise duty to their customers at their door step i.e. on FOR basis and for the cases where the goods are delivered at factory gate, no transportation charges are incurred. Wherever the transactions are on FOR basis, the transportation charges are borne by them and accordingly, service tax payable thereon is discharged by them under Reverse Charge Mechanism.

(ii) Since the transactions are on FOR basis, in view of various decisions of the appellate authorities as also clarification issued by the CBEC, New Delhi, the said freight is 'outward service' as defined under Rule 2(l) of the Cenvat Credit Rules, 2004 and they availed Cenvat credit of such service tax paid. However, the Department was of the view that such transactions are not covered by the definition of

the word "free supply" though the transactions were for the supply of the products of the Customers, and accordingly issued Show Cause Notices proposing recovery of Cenvat credit along with interest and imposition of penalty.

(ii) In reply to SCNs, it was submitted that the proposals made were imposed and unjustified in as much as the transactions were on FOR basis and therefore in view of the clarification issued by the CBEC, Cenvat credit is admissible to be recovered. During the course of personal hearing before the adjudicating authority, they had submitted copy of sale terms evidencing the fact that the transactions were on FOR basis. They have submitted copy of relevant Sale Invoices wherein they have also produced copy of Lorry Receipt that transportation charges were included by them and service tax was paid by them. Attention was also drawn to the decision of CESTAT, Ahmedabad in case of Ambuja Cement Rajasthan Pvt. Ltd. wherein on similar issue, it was held by the Tribunal that Cenvat credit of service tax on transportation is available even after the amendment to the definition w.e.f. 01.04.2008.

(iii) The lower adjudicating authority rejected such claim on the grounds that arguments are not relevant to the facts of the cases. The contention of the adjudicating authority that the clarification issued by the CBEC, New Delhi and also the decisions of the Hon'ble Apex and authorities are not applicable is improper and unjustified. The impugned orders are hence liable to be set aside. The lower adjudicating authority has not set aside the objections given by the Hon'ble Commissioner (Appeals) in the order dated 30.10.2015 as well as the decision of the Hon'ble Karnataka High Court relied upon during personal hearing.

(iv) The availment of Cenvat credit on the above transaction was known to the department and hence, the demands raised were not by limitation.

(v) The lower adjudicating authority has erred in confirming demands on the grounds that the documentary evidences submitted along with the submissions do not prove beyond doubt that the transactions were on F.O.R. basis and that the appellant has not substantiated their claim in light of the contended agreements showing terms and conditions of sale is transparent and as per law, and CBEC vide Circular dated 8.9.2015 has clarified that while determining the place of removal, the payment of transportation, inclusion of transportation charges in value, payment of freight to third parties are relevant and the relevant consideration.

(vi) The penalty imposed under Rule 17 of CCR, 2004 is also in law in as much as the appellant had no knowledge of the fact that the appellant is availing Cenvat credit of service tax paid on outward transportation.

4. Personal hearing in the matter was attended by Shri Paresh Shah, Advocate who reiterated the grounds of appeal and submitted that they are not claiming freight cost

buyers but freight is being borne by them as is evident from the duty invoices submitted with Appeal Memoranda and the transportation bills and it is their case that the purchase orders from M/s. KSE Ltd. submitted with Appeal Memoranda very clearly say delivery at Kolkata's (Kolkata). That the impugned orders have been issued on 25.5.2018 and 11.9.2018 but even the impugned order dated 25.5.2018 did not consider CBIC Circular No. 1035/1/2018-CX. dated 5.2.2018, that the then Commissioner (Appeals) Rajkot vide OIA dated 1.11.2018 had held that their sale is on F.O.R. basis and they also submitted that their sale is on F.O.R. basis, that in each case, cenvat credit is admissible to them on actual transportation of their final products as clarified by CBIC vide Circular dated 5.2.2018. That appeal No. V2/170/RK/2018 has been filed with COD explanation for condoning delay of 27 days, which may kindly be allowed that these are not cases for imposing penalty as these involve interpretation of law.

FINDINGS:

6. I find that the appellant has filed the Appeal No. V2/170/RK/2018 & 19 beyond period of 60 days but within further period of 30 days with request to condone the delay. Since the appeal has been filed within further period of 30 days as prescribed under the Act, I condone delay in filing the appeal and proceed to decide both these appeals on merits since the issue involved is identical in both appeals.

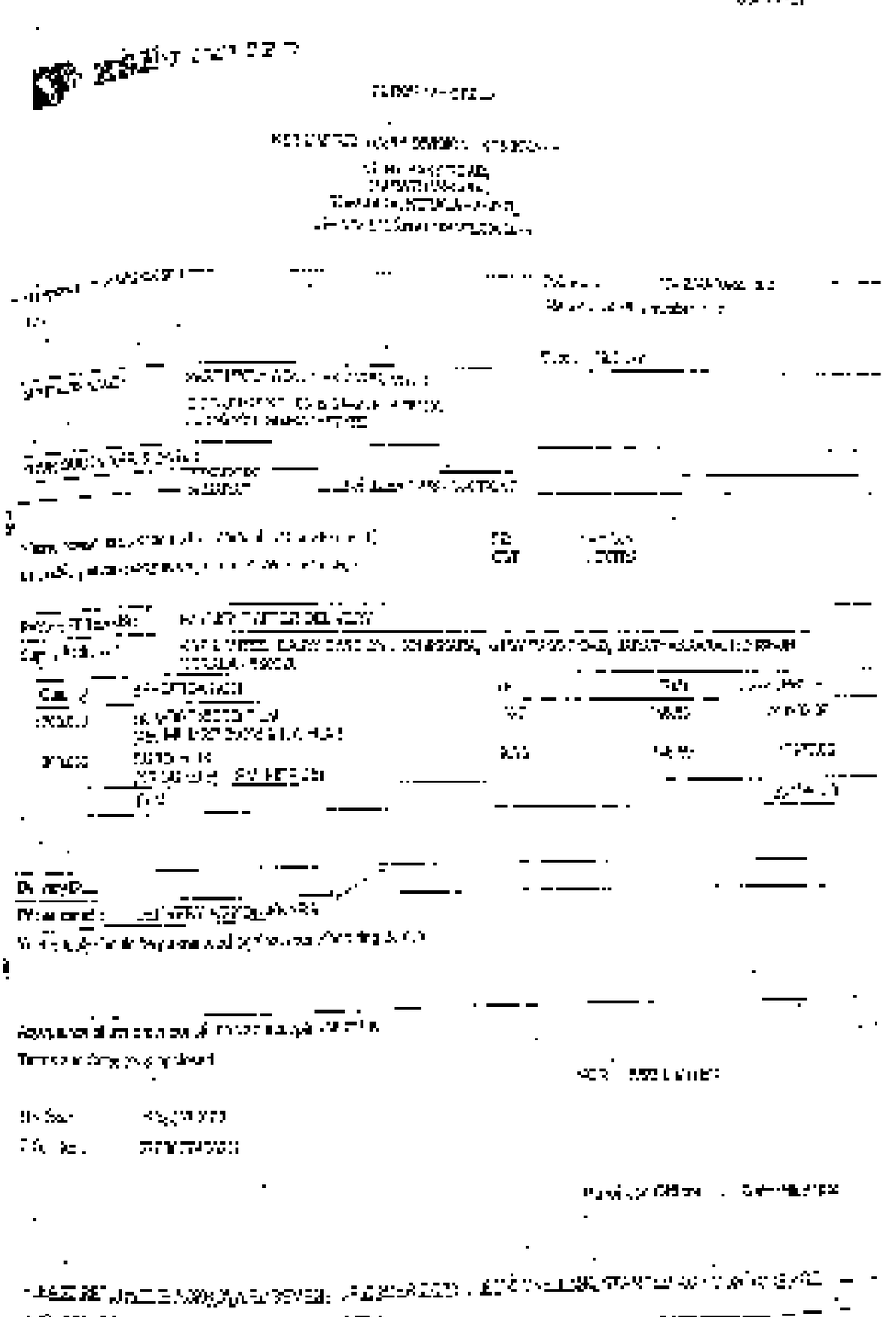
7. I find that the appellant has deposited 7.5% of demand confirmed vide Orders-in-Original dated 30.11.2018 as stated by them in terms of Section 35F(1) of the Act and the Department has not submitted any report contrary to these claims.

8. I have carefully gone through the facts of the case, the impugned order, the appeal memoranda and submissions made by the appellant during the personal hearing. The issue to be decided in the present appeals is as to whether the impugned orders passed by the adjudicating authority is correct, legal & proper or not.

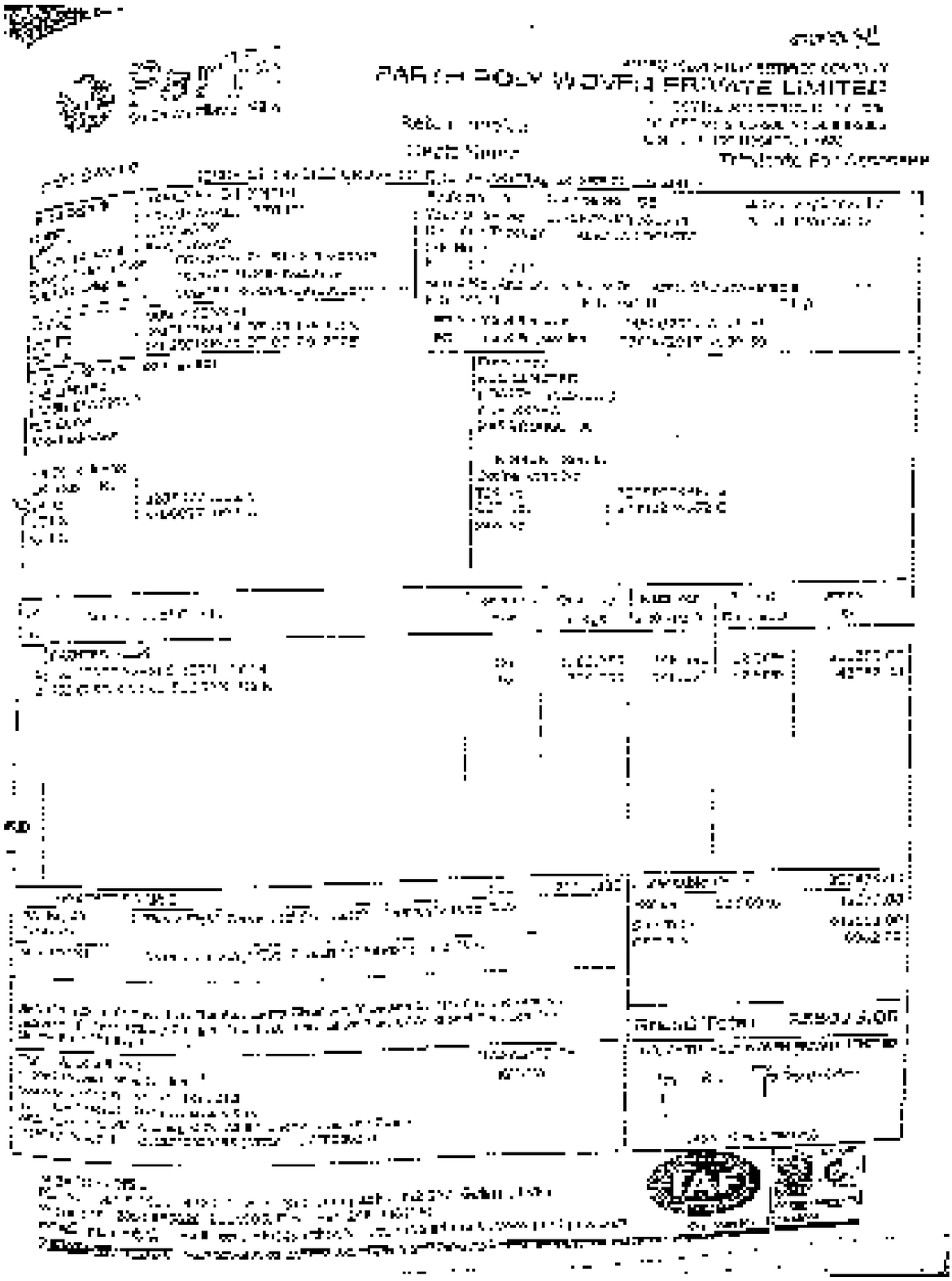
9. The appellant has contended that they are clearing their excisable goods on payment of Central excise duty at the factory gate on FOR basis, that they are also availing freight from buyers but freight is being borne by them as the purchase orders from M/s. KSE Ltd. submitted with Appeal Memoranda very clearly say delivery at Kolkata's (Kolkata). I find that denial of credit of service tax paid on outward transportation is admissible only in cases where the ownership of goods and risk of goods in transit remains with the seller of goods and goods are cleared by buyer on delivery and till such time of delivery seller alone remains the owner of goods retaining right of access. Thus, the admissibility or denial of credit of service tax paid on outward transportation depends upon the condition of sale. Therefore, it is utmost important to examine conditions of sale of the goods mentioned in Purchase Orders and/or Central Excise invoices to ascertain the place of removal of the finished goods from where the goods were sold, whether it is factory gate of the appellant or whether the place of their customers. The

appellant has submitted sample copies of purchase orders and copies of service invoices along with Appeal. We would like to replace the stamped copy of Purchase Order No. 17-18/KKF/0017 dated 18.4.2017 issued by KSF Limited and Service Invoice No. 80 Dated 25.4.2017 issued by the appellant's compliance to the said purchase order, as under :-

(A) Purchase Order No. 17-18/KKF/0004 dated 3.1.2017 issued by KSF Limited



(c) Invoice No. 3 dated 28.1.2017 issued by the appellant to M/s. KSE Ltd.



6.1 From the above purchase order and its corresponding Central Excise invoice for removal of the said products cleared by the appellant, I find that the contract of sale of goods was on F.O.B. basis since there is no mention of risk of goods in transit with the seller (the appellant). If goods are delivered by buyer on delivery and combination mail / such mode of delivery, seller does not retained the ownership of goods retaining right of disposal of these goods. On the contrary, it has been mentioned in the Central Excise invoice that "Goods are deliverable on purchaser's risk" meaning thereby that the appellant is not responsible for risk of goods in transit. Hence, I find that mere inclusion of freight charges in the price of the cleared goods is not the relevant factor for ascertaining the eligibility of

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service credit on outward transportation (STA) as held by the Hon'ble Supreme Court in the case of M/s Ultratech Cement Ltd. (supra) and Commissioner of Central Excise, Belgaum Vs. M/s Ultratech Cement Ltd. (supra) as the appellant had included the value of the outward transportation charges in the assessable value inclusive of freight, when the appellant has recovered the contract price from their buyers meaning thereby that the appellant has included element of freight charges from buyers. Thus, I find that the plea of the appellant is legally not sustainable as the appellant has not produced sufficient documentary evidence to establish that the sale of goods had taken place at the destination point i.e. the ownership of goods and the property in the goods remained with the appellant till the delivery of the goods to the purchaser at his door step; (ii) the appellant had risk of transportation of the goods during transit i.e. destination point; and (iii) the sale and the transfer of property in goods occurred at the destination place and hence, they have not proved that the place of removal was the post factory point i.e. factory gate. In view of the considered view that the sale of goods is concluded and the ownership of goods is transferred at the factory gate of the manufacturer in terms of Section 20 of the Sale of Goods Act, 1930. Hence, the taxable value should be the price at removal. In the instant case. Accordingly, I find that in view of the facts and circumstances of the case, the appellant is not eligible for availment of cenvat credit or refund on the paid on outward transportation charges which has been received beyond place of removal.

8.2 My views are supported by the recent judgment of the Hon'ble Apex Court in the case of M/s Ultratech Cement Ltd. reported as 2018 (9) GSTL 337 (SC) wherein it has been held as under:

> 7. It may be relevant to point out here that the original definition of input service contained in Rule 2(l) of the Rules, 2004 used the expression 'upto the place of removal'. As per the said definition, services used by the manufacturer of clearance of final products from the place of removal to the warehouse or customer's premises was available to Cenvat Credit. It is clarified by the Circular No. 97/8/2007-ST dated 23.08.2007 (Commissioner of Central Excise, Belgaum v. M/s Ultratech Cement Ltd.) vide Judgment dated January 17, 2018. However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the aforesaid expression has been replaced by the word upto. Thus, it is clear that the place of removal that service is received as input service. This amendment has changed the entire scenario. The benefit of it was not to be given beyond the place of removal. Now, as it is the place of removal and does not matter whether the goods are sold at that place. This credit cannot travel thereafter. It becomes clear from the bare reading of this amended Rule, which applies to the period in question that the Goods Transport Agency service used for the purpose of outward transportation of goods, i.e. from the factory to buyer's premises is not covered within the

sub-clause (zzzh) of Rule 2(1) of Rules 2004. Whereas the word 'from' is the inception of starting point, the expression 'upto' signifies the terminating point during which the transaction is going on.

(Emphasis supplied)

6. The relevant definition of 'input service' as provided under Rule 2(l) of Cenvat Credit Rules, 2004, as amended vide Notification No. 10/2008-CE (NT) dated 1.3.2008 made effective from 7.4.2008 reads as under:

> "(l) 'input service' means any service -
>
> (i) used by a provider of taxable service for providing an output service or
>
> (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,
>
> and includes services used in relation to setting up, modernization, renovation or repair 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, activities relating to business, 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;"

(Emphasis supplied)

6.1 From the above it is evident that 'input service' means any service used by the manufacturer, whether directly or indirectly in or in relation to manufacture of final products and clearance of final products upto the place of removal, with the inclusive clause mentions the outward transportation upto the place of removal. As per the provisions of Section 4(3)(c) of Central Excise Act, 1944 'place of removal' means a factory or any other place or premises of production or manufacture of excisable goods, a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty or a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold.

6.2. The adjudicating authority observed that Cenvat credit is admissible to them on outward transportation of their final products as clarified by CBEC vide Circular dated 4.8.2010 and that Order-in-Original No. 17(3)/Ahd-V/Ref-CX dated 6.6.2013 was confirmed as under:

> 2. In order to bring clarity on the issue it has been decided that Circular No. 58/2/2004-CX dated 20.10.2004 shall stand rescinded from the date of issue of this circular. Further clauses (c) of para 4.1 and para 6.2 of the Circular No. 97/8/2007-CX dated 23-8-2007 are also omitted from the date of issue of this circular.

5 *General Principle* : As regards the place of removal, in general the principle laid down by Hon'ble Supreme Court in the case of CCE v. Hyper Industries Ltd. - 2015 (324) E.L.T. 377 (S.C.) by learned Apex Court in this case has applied the principle and held that exports CCE (general) in the extended scope of service is required to be determined with reference to point of sale with the condition that place of removal (premises) is to be reckoned with reference to the end use of the input service. The observation of Hon'ble Court at para 15 in the regard is extracted, as reproduced below

"15 It will thus be seen where the price at which goods are normally sold by the assessee is different for different places of removal, then such price shall be deemed to be the value thereof. Sub-clause (b) is very important and makes it clear that a depot, the premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are places of removal, whether or not such depot, premises etc. are registered. The fact that the premises of the consignment agent or the manufacturer are obviously places which are 'desirable to the manufacturer. Even the expression 'any other place or premises' refers only to a manufacturer's place or premises and such place or premises is to be one where excisable goods have to be sold". These are key words of the sub-section. The place or premises from where excisable goods can be sold can only be manufacturer's premises or premises desirable to the manufacturer. If we were to accept contention of the revenue that goods can have to be cleared only if they would have been sold, which would then necessarily have reference to buyer's premises."

4 *Exceptions:*

i) The principle referred to in para 3 above would have to undergo exceptions. One such exception to case of CCE v. Hyper Industries Ltd. is identical to the judgment in the case of CCE, Bhubaneshwar v. Orissa Cement Ltd. - 2015 (322) E.L.T. 364 (S.C.) and CCE v. M/s. Ravalgaon Sugar Farm Ltd. 2015 (319) E.L.T. 3 (S.C.). To summarise, in the case of FOB contracts such as M/s. Escorts Ltd. and M/s. Ravalgaon Industries where the ownership risk in transit, remained with the seller till goods are accepted by buyer on delivery, seller alone remained the owner of goods relating to such cases, penalty has been extended by the Apex Court on the basis of facts of the cases.

ii) Clearance for export of goods by a manufacturer shall remain as per dicta in terms of Circular No. 998/2/2015-CX., dated 25-2-2015 as the judgments cited above did not deal with case of export of goods. In these cases clearances to port, buyer's premises outside India.

5 CENVAT Credit on GTA Services etc. : The other issue pertaining to be dealt by Hon'ble Supreme Court in relation to place of removal is in case of CCE & ST v. Ultra Tech Cement Ltd., dated 1-2-2018 in Civil Appeal No. 7128 of 2015 on the issue of CENVAT Credit on Goods Transport Agency Service availed for transport of goods from the place of removal to the buyer's premises. The Apex Court has allowed the appeal filed by the Revenue and held that CENVAT Credit on Goods Transport Agency service availed by transport of goods from the place of removal to buyer's premises was not admissible for the relevant period. The Apex Court has observed that after amendment of in the definition of 'input service' under Rule 2(l) of the CENVAT Credit Rules, 2004, effective from 1-4-2008, the service is limited as 'input service only up to the place of removal'.

6. *Facts to be verified:* It is to be clarified by him to the notice with the facts the various judgments of Hon'ble Supreme Court which may be relied for

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is a jurisdiction in various cases based on facts and circumstances of each of the case. Each case has accordingly be decided.

(emphasis supplied)

5.3 From the aforesaid CBEC Circular it is clarified that that Circular No. 98/1/2002-ST dated 20.11.2014 rescinds from the date of issue of the circular and that clause (c) of rule 4(1) and para 8.2 of the Circular No. 97/8/2007-ST, dated 23-4-2007 omitted from the date of issue of the circular. The 'place of removal' is required to be determined with reference to 'point at which' with the condition that place of removal is to be referred with a Buyer in the process of the transaction. The above credit is allowable only in case where the contract, i.e. in transit contained with the export goods are accepted by buyer at delivery and at such time of delivery, seller is the remained the owner of goods carrying right of disposal which can be determined from the facts and circumstances of each of the case and that cases are to be decided accordingly.

5.4 In the present case as stated above the appellant has not produced any documentary evidence showing that the contracts for sale of the finished goods were on FOR basis i.e. the ownership, risk in transit remained with the appellant if goods are accepted by buyer on delivery and till such time of delivery appellant alone remained the owner of goods retaining right of disposal, the appellant is not entitled for the cenvat credit and the denial of cenvat in this case is the rightly given by the respondent. Hence I find that the appellant is not entitled for cenvat credit of service tax paid on outward transportation charges and the impugned order confirming demand of cenvat credit is also proper and correct since the demand of wrongly availed Cenvat credit is apparently of record automatically follows.

6 Regarding penalty imposed under Rule 15 of CCR, 2004 read with Section 11AC of the Act, I find that the non payment of the service tax and wrongly availment of cenvat credit by the appellant was discovered when the appellant was asked by them in the statutory returns filed with the department. In my considered view the issue could not be said to be a matter relating to the issue of limitation. I therefore, do not see any reason to uphold penalty imposed upon the appellant and hence penalty imposed is set aside. I rely on the judgment of the Hon'ble Supreme Court in the case of CCE, Jaipur vs. Shiv Raj Rajasthan Agrotor Ltd. reported as 2015 (39) ELT 326 (SC) wherein in similar set of facts of the case penalty was held not to be maintainable as under. -

> 7. We may also note that the period involved is November 1998 to July 2001. Show cause notice in this behalf, as noted above, was issued on 23.11.2001. The deletion of the excisable goods has its basis in terms of Section 4 of the Central Excise Act, 1944 and said Section was amended with effect from 2000 which amendment came in to effect on 1.7.2000. The legal position relating to denial of sales tax incentives Scheme which would prevail in view of the aforesaid provision as well as amended provision came up for consideration before this Court in Commissioner of Central Excise, Jaipur-II v. Super Synthetic (India) Ltd. - 2014 (304) ELT 273 (SC). This Court took the view after analysing the provision of Section 4 which provided prior to the amendment, that the assessee would be entitled to claim deduction towards

cases tax from the assessee's point of view is the same net income which is retained by the assessee namely 70% under tax invoice. In this case, the Court has held that the purpose of bringing, amendment in Section 7 with effect from 1.7.2017 was to provide that the same net income which the amount of GST would be retained by the assessee will be the case. As per the aforesaid decision, the assessee's legal right is not to be taken to pay only actual duty on the assessee's output which was promised under the incentive scheme up to 30th June 2030. However, this income part of sales tax which was collected by the assessee after 1.7.2017 is not to be taken in arriving at the transaction value and sales tax is to be paid thereon.

6. Insofar as the interpretation of exemption notification of Petitioner is concerned, we have gone through the order of the Commissioner and are of the opinion that he has rightly held that the assessee cannot claim relief as per the proviso of Section 11A(1) of the Central Excise Act, 1944 would be applicable in the given circumstances.

8. However, we are of the opinion that in a case like the present one, where the legislation and interpretation of provisions of Section 7 and Explanation after the amendment in the said provision with effect from 1.7.2017 was to be finally seen, it would not be appropriate to levy the penalty.

(Emphasis supplied)

11. In view of above, Petitioner is not entitled to avail credit of service tax even on invoices transportation charges as it has been properly of income under Rule 5(2), of CCR, 2004.

12. [illegible]

13. The impugned Show Cause Notice and the consequent Order in Original cannot

[illegible]
(सुषमा रावत)
Joint Secretary (Judicial)

By Speed Post

To,
M/s. [illegible]
Plot No. [illegible]
G.I.D.C., Sabarkan
Sabarkantha

[illegible]

प्रति,

(1) श्री [illegible], आयुक्त, केन्द्रीय उत्पाद शुल्क एवं सेवाकर आयुक्तालय, [illegible] को सूचनार्थ।

(2) अपर आयुक्त, केन्द्रीय उत्पाद शुल्क एवं सेवाकर आयुक्तालय, [illegible] को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क एवं सेवाकर, [illegible] को आवश्यक कार्यवाही हेतु।

(4) [illegible] केन्द्रीय उत्पाद शुल्क एवं सेवाकर [illegible] को [illegible] कार्यवाही हेतु।

(5) [illegible]