[illegible] (अपील्स) [illegible]
[illegible] PRINCIPAL COMMISSIONER (APPEALS) [illegible] CENTRAL EXCISE
[illegible] GST [illegible]
[illegible] Race Course Ring Road
राजकोट / Rajkot – 360 001
Tele/Fax No. [illegible] Email: [illegible]@gmail.com

रजिस्टर्ड डाक ए.डी. द्वारा :-

क	[illegible] [illegible]/2018-19	[illegible] 22-10-2018	[illegible] 25-10-2018

ग [illegible]

KCH-EXCUS-000-APP-049-2019

[illegible] Order Date	31.03.2019	[illegible] Date of Issue	02.04.2019

[illegible]
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, [illegible] / Gandhidham :

ङ [illegible] Name & Address of the Appellant & Respondent :-
M/s Anchor Electricals Pvt. Ltd., Survey No. 285,285,286, Bhuj Bhachau Road, Village: Lakhond., Tal: Bhuj- Kutch-370105.

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
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) [illegible]
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) [illegible]
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at [illegible] [illegible]

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]

:: ORDER IN APPEAL ::

M/s. Anchor Electricals Private Limited (formerly known as Anchor Daewoo Industries Limited, Unit-II, Electric Division), Survey No. 234 to 236, Bhuj Bhachau Road, Village – Lakhond, Taluka Bhuj, Kachchh-Gujarat (hereinafter referred to as "appellant") filed present appeal against Order-in-Original No. 24/JC/2017-18 dated 25.1.2018 (hereinafter referred to as "impugned order") passed by the Joint Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as "the adjudicating authority").

2. The brief facts of the appeal are that the appellant has applied on 11.5.2009 for differential refund for FY 2008-09 in terms of Para 2.2 of Notification No. 39/2001-CE dated 31.7.2001 and pending their application, they took suo moto credit of Rs. 65,78,775/- in their PLA in April 2010; that the appellant reversed Rs. 1,78,741/- of Education Cess in June 2015 but not reversed credit of Rs. 64,00,034/- of duty of excise. Show Cause Notice No. V/AR-I/Bhuj/Commr/156/2015-16 dated 29.2.2016 was issued to the appellant demanding recovery of suo moto credit of Rs. 64,00,034/- under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the Act") read with Notification No. 39/2001-CE dated 31.7.2001, along with interest under Section 11AA of the Act and for imposition of penalty under Section 11AC of the Act read with Rule 25 of Central Excise Rules, 2002 (hereinafter referred to as "Rules"). The impugned order confirmed recovery of credit of Rs. 64,00,034/- taken by the appellant suo moto along with interest and imposed penalty of Rs. 64,00,034/- under Section 11AC of the Act read with Rule 25 of the Rules.

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

(i) The appellant has filed an application for differential refund of FY 2008-09 on 11.5.2009 under Para 2C(d) of the said Notification and Para 2C(e) of the said Notification provides that the amount correctly refundable needs to be determined by the jurisdictional Assistant/Deputy Commissioner of Central Excise and to be intimated to the manufacturer by 15th day of next month to the month in which the statement under clause (d) has been submitted, which was not done by the jurisdictional officer; that conjoint reading of clause 2C(e) and clause 2C(g) of the said Notification emerges that the demand for irregular refund has to be made within one year from 20th of the next month during which irregular credit was taken in respect of the clearances during the previous month; that the impugned SCN was issued on 29.2.2016 i.e. after 7 years; that no SCN can be issued by the department after 7 years since there is no provision for that purpose; that even the extended period is to be invoked, SCN is required to be issued within 5 years from the date of knowledge of the department; hence, the demand notice is bad in law and hit by bar of limitation. Thus, the appellant relied on decision in

the case of Parle Products Pvt. Ltd. reported as 2009 (237) ELT 579 (Tri. - Ahmd.) in support of their contention.

(ii) Without prejudice to the above, the appellant submitted that they applied for re-credit of duty in their PLA since Para 2C of the said Notification required the appellant to take the re-credit first and then file the application with jurisdictional AC/DC who may determine the eligible amount and if there is excess availment, the assessee is required to reverse the said amount within 5 days from the date of intimation. The appellant has submitted the application for re-credit of eligible differential amount in terms of Para 2.2 of the said Notification on 11.5.2009 with the jurisdictional AC, however, the application was pending with him for determining the correct refundable amount as re-credit. It is not open for the department to raise the demand without determining the correct refundable amount after considerable period had been passed and therefore, the allegation made in the impugned SCN that the appellant had availed suo-moto credit without waiting for disposal of the re-credit application is invalid, illegal and against the provisions of Notification No. 39/2001-CE dated 31.7.2001.

(iii) It is submitted that central excise duty paid in cash was exempted under the Notification No. 39/2001-CE dated 31.7.2001. The Notification provided two alternative procedures to claim the exemption as stipulated in Para 2B and Para 2C of the Notification. The appellant had availed the option of re-credit of amount as provided in Para 2C of the said Notification which shall be applicable for the whole financial year and the benefit of exemption shall be granted either by way of refund as provided in Para 2B or Para 2C of the said Notification.

(iv) Since demand of duty is not sustainable in the eyes of law therefore, no interest can be demanded and no penalty is imposable under Section 11AC of the Act. The appellant did not indulge in fraud, wilful mis-statement or suppression of facts etc. for evasion of central excise duty but had availed re-credit of the differential amount for FY 2008-09 and also filed the statement of re-credit with the department on 11.5.2009. Therefore, it is invalid to state that there is any suppression of facts on the part of the appellant.

4. The Assistant Commissioner, CGST Division, Bhuj, vide his letter F.No. V/CEX/AR-I/Bhuj/SCN/Anchor Electricals/13-14 dated 25.3.2019 submitted para-wise comments on grounds of appeal filed by the appellant stating that the issue involved in the present case is suo-moto re-credit of central excise duty which was equal to their claim for differential refund filed on annual basis; that the issue involved in the matter of M/s. SAL Steels Limited & others is altogether a different and independent matter where the amended Notification No. 16/2008-CE dated 27.3.2008 and Notification No. 53/2008-CE dated 10.6.2008 have been challenged principally on the ground that the amendments are antithesis to promissory estoppel; that the SLP No. 25194-25201/2010

[illegible]

filed by the department against the Hon'ble Gujarat High Court's order dated 10.6.2010 in the case of SAL Steels Limited & others reported as 2010 (260) ELT 185 (Guj.) is pending decision; that the Hon'ble Supreme Court vide order dated 10.1.2012 stayed the operation of the impugned judgment till further orders subject to the condition that the department would release 50% amount due in terms of the impugned judgment to those respondent parties who furnish solvent surety to the satisfaction of the jurisdictional Commissioner within time limit prescribed; that the appellant does not hold the capacity of a respondent party under SLP No. 28184-28201/2010; that the appellant relied upon decision of Pane Products Pvt. Ltd. reported as 2008 (227) ELT 575 (Tri. – Ahmd.) to contend that the demand is hit by bar of limitation; however, SLP (C) No. 12280/2011 filed by the department against the said order before the Hon'ble Supreme Court is pending; that hence, the relied upon decision cannot be said to have attained finality so long as the issue is *sub judice*; that the contents of Para C and Para D of the appeal memorandum are misleading and stays far from truth; that Para 2B of the Notification No. 39/2001-CE dated 31.7.2001 provides the mechanism of monthly cash refund of the amount as worked out under Para 2 of the said Notification; that Para 2C of the said Notification provides an optional facility to the manufacturer to take re-credit of such monthly refundable amount subject to conditions as prescribed therein; that he referred and reproduced Para 2.2 of the said Notification which aimed at recoupment of annual difference in refund amount and submitted that differential refund shall be refunded to the manufacturer subject to condition that the total refund made to him during the year, including the refund of differential amount does not exceed the total duty payable on value addition whether at the rate specified in the Table or at the special rate fixed under Para 2.1 of the said Notification; that no facility of re-credit has been extended to the appellant while providing for payment of annual differential amount in terms of Para 2.2 of the said Notification which outlines the mechanism of refund only; that the re-credit facility extended under Para 2C of the said Notification was only in respect of monthly and regular refund as per Para 2 of the said Notification and therefore, the *suo-moto* credit taken by the appellant is irregular and in contravention of the said Notification; that the demand for interest and penalty would also survive certainly when the original demand for recovery of duty of excise sustains.

5. Personal hearing in the matter was attended by Shri Rahul Gajera, Advocate who reiterated the grounds of appeal and also submitted written submissions along with case laws to submit that they are eligible to take credit *suo-moto* as their application dated 11.5.2006 was not decided till April, 2010 and even today and hence, SCN is premature; that Para 2.2 of Notification No. 39/2001-CE dated 31.7.2001 has been struck down by the Hon'ble Gujarat High Court in the case of SAL Steels Ltd. reported as 2010 (260) ELT 185 (Guj.) (Para 116 to 120) as amended by Notifications 16/2008-CE dated 27.3.2008 and 33/2008-CE dated 10.6.2008 and hence, original Notification 39/2001

OF prevails as on date; that there is no stay of the Hon'ble Apex Court against the order of the Hon'ble Gujarat High Court and hence the judgment dated 15.1.2010 is binding on all; that in another similar case of Eurie Products Pvt. Ltd. reported as 2008 (232) ELT 578 (Tri. – Ahmd.) it has been held that Notification condition has been violated by the department since an application has been made by the assessee; that they have made application on 11.6.2009 whereas SCN has been issued on 29.9.2010 and hence demand for earlier period is time barred; that the above order of CESTAT has been upheld by the Hon'ble Gujarat High Court reported as 2011 (270) STR 129 (Guj.); that even on merit Para 2.2 is not restricting to avail for refund of differential on annual account, more so, when application is pending with the department for almost a year; this is a never say that refund can be taken by way of re-credit; that this para only states mechanism of refund; that penalty under Rule 25 does not cover this case and SCN also does not spell out as to which clause of Rule 25 has been invoked; that Section 11AC of the Central Excise Act, 1944 does not survive; that there is no suppression of facts on their part as they had applied in May, 2009 i.e. within one month of ending of FY 2008-09 on 31.3.2009; that now does Rule 25 of the Rules survive?

FINDINGS:

8. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal and the written submissions made during personal hearing. The issue to be decided in the present case is as to whether confirmation of demand of recredit of central excise duty sub-mainly taken by the appellant under Notification No. 30/2004-CE dated 31.7.2004 is sustainable or not.

7. I find that the appellant had commenced commercial production of the excisable goods on 1.3.2009 and since then, while they were availing the benefit of the exemption Notification, that the appellant opted option of credit of amount in account current as provided in Para 2C of the said Notification and have been submitting statement of the total duty payable as well as the duty paid by utilization of CENVAT credit and the credit taken in account current on each category of goods manufactured and cleared under the said Notification and specified in the said Table at Para 2 of the said Notification and there is no dispute over the same. I would like to re-produce the relevant text of the Notification No. 39/2001-CE dated 31.7.2001, as prevailed during the disputed period, which reads as under :-

> In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (2) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in the Annexure appended to this notification and cleared from a unit located in

Kutch district of Gujarat from so much of the duty of excise or the additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001.

Provided that in the case of a unit having an original value of investment in plant and machinery installed in the factory below rupees twenty crore on the date of commencement of commercial production in that unit, the exemption contained herein shall apply only for the first clearances up to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production, in each year.

2. The duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excisable goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the Chapter of the said First Schedule as are given in the corresponding entry in column (2) of the said Table, when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory, at the rates specified in the corresponding entry in column (4) of the said Table.

TABLE

S. No.	Chapter of the First Schedule	Description of goods	Rate	Description of inputs for manufacture of goods in column (3)
(1)	(2)	(3)	(4)	(5)
1.	29	All goods	29	Any goods
2.	30	All goods	56	Any goods
3.	33	All goods	45	Any goods
4.	34	All goods	38	Any goods
5.	38	All goods	34	Any goods
6.	39	All goods	26	Any goods
7.	40	Tyres, tubes and flaps	41	Any goods
8.	72 or 73	All goods	39	Any goods other than iron ore
9.	74	All goods	15	Any goods
10.	76	All goods	36	Any goods
11.	85	Electric motors and generators, electric generating sets and parts thereof	31	Any goods
12.	25	Cement or cement clinker	75	Limestone and gypsum
13.	17 or 35	Modified starch/glucose	75	Maize
14.	18	Cocoa butter or powder	75	Cocoa beans
15.	72 or 73	Iron and steel products	75	Iron ore
16.	Any chapter	Goods other than those mentioned above in S. Nos. 1 to 15	36	Any goods

Provided that where the duty payable on value addition exceeds the duty paid by the manufacturer on the said excisable goods, other than the amount paid by utilization of CENVAT credit during the month, the duty payable on value addition shall be deemed to be equal to the duty so paid other than by CENVAT credit.

2A. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this

notification shall be subject to the condition that the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

2B. The exemption contained in this notification shall be given effect to in the following manner, namely:-

(a) the manufacturer shall submit a statement of the total duty paid and that paid by utilization of CENVAT credit, on each category of goods specified in the said Table and cleared under this notification, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 5th of the next month in which the duty has been paid;

(b) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification as may be deemed necessary, shall refund the duty payable or value addition, computed in the manner as specified in paragraph 2 to the manufacturer by the 15th of the month following the one in which the statement as per clause (a) above has been submitted.

2C. Notwithstanding anything contained in sub-paragraph 2B above,

(a) the manufacturer may take credit of the amount calculated in the manner specified in paragraph 2 in his account current maintained in terms of the Excise Manual of Supplementary Instructions issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilized by the manufacturer for payment of duty, in the manner specified under rule 5 of the Central Excise Rules, 2004 in subsequent months, and such payment shall be deemed to be payment in cash;

(b) the credit of the refund amount may be taken by the manufacturer in his account current by the 7th of the month following the month under consideration;

(c) a manufacturer who intends to avail the option under clause (a) shall exercise his option in writing for availing such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option and shall not be withdrawn during the remaining part of the financial year;

(d) the manufacturer shall submit a statement of the total duty payable as well as the duty paid by utilization of CENVAT credit or otherwise and the credit taken as per clause (a), on each category of goods manufactured and cleared under the notification and specified in the said Table, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 5th of the month in which the credit has been so taken;

(e) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall determine the amount correctly refundable to the manufacturer and intimate to the manufacturer by the 15th day of the next month to the month in which the statement under clause (d) has been submitted. In case the credit taken by the manufacturer is in excess of the amount determined, the manufacturer shall, within five days from the receipt of the intimation, reverse the said excess credit from the account current maintained by him. In case, the credit taken by the manufacturer is less than the amount of refund

determined. The manufacturer shall be eligible to take credit of the balance amount;

(f) In case the manufacturer fails to comply with the provisions of clauses (a) to (e), he shall forfeit the option to take credit of the amount calculated in the manner specified in sub paragraph 2 in his account current on his own as provided for in clauses (a) to (e);

(g) The amount of the credit availed irregularly or availed in excess of the amount determined correctly admissible under clause (e) and not reversed by the manufacturer within the period specified therein, shall be recoverable as if it is a recovery of duty of excise erroneously refunded. In case such irregular or excess credit is utilized for payment of excise duty on clearances of excisable goods, the said goods shall be considered to have been cleared without payment of duty to the extent of utilization of such irregular or excess credit.

Explanation – For the purposes of this paragraph, duty paid by utilization of the amount credited in the account current, shall be taken as payment of duty by way other than utilization of CENVAT credit under the CENVAT Credit Rules, 2004.

(Emphasis supplied)

7.1 In view of above, I find that Notification No. 56/2002-CE dated 31.7.2006, as amended, provides that the manufacturer of the excisable goods may avail exemption from central excise duty if central excise duty is paid through account current in each month, by way of refund as provided in Para 22 or by way of re-credit as provided in Para 20 of the Notification by taking into consideration the percentage of value addition as prescribed in Para 2 of the Notification. I find that the appellant had availed benefit of re-credit of duty amount paid through account current as provided in Para 20 of the Notification No. 39/2001-CE dated 31.7.2001 as amended. However, the appellant on 11.5.2009 filed refund claim of differential amount of central excise duty refundable to them for the entire FY 2008-09 which had not been decided by the jurisdictional Assistant Commissioner. I further find that the appellant, after issue of Order dated 15.3.2010 by the Hon'ble Gujarat High Court in the case of GAL Steels Limited reported as 2010 (220) ELT 155 (Guj.), took suo-motu re-credit in April, 2010 being differential central excise duty for FY 2008-09 pending their refund claim. I find that Notification No. 56/2002-CE dated 31.7.2001 is self-contained which provided for exemption of central excise duty paid through account current by way of refund/re-credit with the conditions and manner as specified therein. I also find that the appellant has opted for re-credit of amount under Para 20 of the said Notification, according to which the appellant themselves were required to determine the amount to credit their account current and then submit the requisite documents/information to the department which the appellant did on monthly basis as provided in the Notification.

7.2 I find that the appellant took re-credit of differential amount in April, 2010 on the basis of the Hon'ble Gujarat High Court's decision in the case of GAL Steels Limited whereas the said decision of the Hon'ble Gujarat High Court has not attained finality

since the department has filed Special Leave Petition against the said order dated 14.0?.2010 and the Hon'ble Supreme Court vide Order dated 13.1.2012 has stayed the operation of the Hon'ble Gujarat High Court's order. Therefore the arguments of the appellant for suo-motu re-credit cannot be accepted and I hold that the appellant was not entitled to take suo-motu credit in April 2010 in respect of differential central excise duty paid on the goods cleared in FY 2008-09 as the same was not in accordance with the said Notification which prevailed at the material time and also not tenable as per the Central Excise Law.

7.9 Taking into consideration the above factual position, I find that the appellant's act of taking suo-motu credit of differential amount on the basis of decision of the Gujarat High Court given in a case of another party and also had not attained finality cannot be considered as claim of exemption under Notification No. 39/2001-CE dated 31.7.2001 since the appellant had taken credit of refund in account current for the amount admissible to them at the end of each month as per the said Notification and determination of eligible re-credit amount was never challenged by them. Hence, I find that the impugned order confirming recovery of re-credited amount of Rs. 54,00,034/- along with interest is correct, legal & proper.

8. The appellant has contended that the demand is time barred since SCN was issued on 23.2.2016 for recovery of suo-motu credit taken by them in April, 2010. I find that the appellant had never informed the department that they had taken suo-motu credit of differential amount of Central excise duty and the department came to know only when the audit was conducted. I also find that Para 2.2(1) and Para 2.2(2) inserted vide Notification No. 33/2008-CE dated 10.6.2008 provides that differential amount to be refunded to the manufacturer subject to condition that the total refund made to him during the year, including the refund of differential amount did not exceed the total duty payable on the value addition whether at the rate specified in the Table or at the special rate fixed under Para 2.1 of the said Notification and that differential amount fixed on annual basis was to be granted by way of refund only. Hence, I find that there were no provisions in Notification No. 39/2001-CE dated 31.7.2001 or in Central Excise Law to take suo-motu credit of differential amount on annual basis. Therefore, appellant's claim that Para 2C of the Notification allowed to take re-credit suo-motu is not correct looking to the facts and circumstances of the present case, more so when, the appellant had taken credit of central excise paid through account current at the end of each month, as provided in Notification No. 39/2001-CE dated 31.7.2001, as amended, and these facts have not been disputed at all. I further find that this is not a case of non-payment/short-payment of central excise duty or recovery of central excise duty erroneously refunded and therefore, provisions of Section 11A of the Act is not applicable in the present case. Hence, I find that SCN has rightly been issued for recovery of suo-motu credit taken

irregularity by the appellant when it came to the knowledge of the department at the time of audit of the records of the appellant.

9. The impugned order has correctly imposed penalty of Rs. 54,00,034/- under Section 11AC of the Act read with Rule 25 of the Rules, 2002. I find that the ingredients of Section 11AC of the Act and Rule 25 of the Rules do exist in the present case as the appellant never informed this fact to the department. Hence, the penalty imposed under Section 11AC of Act read with Rule 25 of the Rules is correct, legal and proper and I uphold penalty of Rs. 54,00,034/- imposed on the appellant.

10. In view of above, I uphold the impugned order and reject this appeal.

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

11. The appeal filed by the appellant is disposed off in above terms.

सत्यापित

अधीक्षक (अपील्स)

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By Speed Post

To,

M/s. Anchor Electricals Private Limited,
(formerly known as Anchor Daewoo Industries Limited, Unit – Electro Division),
Survey No. 234 to 236
Bhuj Bhachau Road
Village – Lakhond, Taluka-Bhuj,
Kachchh-Gujarat

मेसर्स एंकर इलेक्ट्रिकल्स प्राइवेट लिमिटेड,
(पूर्व में एंकर डेवू इंडस्ट्रीज लिमिटेड, यूनिट – इलेक्ट्रो डिवीजन),
सर्वे नं. 234 से 236,
भुज – भचाऊ रोड,
ग्राम – लाखोंद, तालुका – भुज,
कच्छ – गुजरात

प्रति:

(1) मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।

(2) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल, भुज को आवश्यक कार्यवाही हेतु।

(4) गार्ड फ़ाइल।