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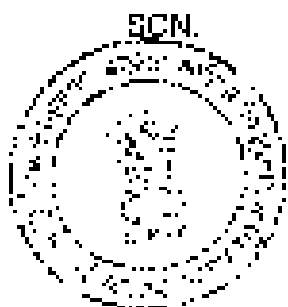
:: ORDER-IN-APPEAL ::

M/s. Gujarat NRE Coke Ltd (Steel Division), Village Lunava, Tal Bhachau, Kutch (hereinafter referred to as 'Appellant') has filed the present appeal against Order-In-Original No. 17/JC/2018-19 dated 28.11.2018 (hereinafter referred to as 'the impugned order'), passed by the Joint Commissioner, CGST, HQ., Gandhidham (hereinafter referred to as 'the adjudicating authority').

2. The facts of the case in brief, are that audit revealed that the appellant had availed Cenvat credit of Service Tax paid on outward transportation services used for transportation of their finished goods during the period from 2010-11 to 2014-15. A SCN was issued to the appellant on 24.07.2015 for recovery of cenvat credit of service tax to the tune of Rs. 72,51,137/- along with interest under Rule 34 of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'the CCR, 2004') read with Section 11AB and Section 11AA of the Central Excise Act, 1944 respectively and to impose penalty under Rule 16 of CCR, 2004 read with Section 11AC of the Central Excise Act, 1944. The adjudicating authority adjudicated the show cause notices vide impugned order wherein he confirmed demand of Rs. 72,51,137/- under Rule 14 of the CCR, 2004 read with Section 11A(1) of the Act, ordered recovery of interest under Rule 14 of the CCR, 2004 read with Section 11AA of the Act and also imposed penalty of Rs. 72,51,137/- under Rule 16 of CCR, 2004 read with Section 11AC of CEA, 1944.

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

(i) The impugned order passed by the adjudicating authority is illegal being based on the misleading and misinterpretation of relevant statutory provisions of definition of input service under Rule 2(i) of the CCR, 2004, being contrary to the settled principles of law and binding instructions of the Board. The adjudicating authority has discarded the Circular No. 97/8/2007-CX dated 23.08.2007 on the basis of his reading of the definition of 'input service' that the main part of the definition as well as inclusive part of the definition of 'input service' only as 'upto the place of removal'. The facts that the goods were cleared on FCR destination basis; that the transfer of ownership/property in goods in terms of definition of 'sale' as per Section 2 of the Act read with relevant provisions of the Sale of Goods Act, 1930 occurred at the customer's destination. The appellant submitted copy of customer order, invoice and lorry receipt of the sample transactions evidencing transfer of ownership, freight term, and payment of duty for the different period in support of their claim to the adjudicating authority along with reply to



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(ii) The buyer's premises have to be considered as 'place of removal' and not the 'factory gate' in terms of definition of 'place of removal' as per clause (c) of Section 4(3) of the Act as clarified by CBEC's Circular dated 23.08.2007 & Circular No. 188/12/2014-CX dated 20.10.2014. The conditions prescribed by Board vide the said Circulars stands fully complied with by the appellant. It is a settled legal position that clarification/instructions issued by the Board are binding on the departmental authorities. The same is also clarified in CBEC Circular No. 1085/4/2018-CX dated 08th June, 2018 issued vide F.No. 116/24/2018-CX-3.

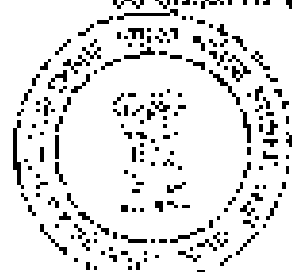
(iii) The outward transportation of the final products is a post-manufacturing activity or not is irrelevant and immaterial as the same has no bearing at all on the admissibility of central credit. The adjudicating authority has clearly mis directed himself in facts and also in law while recording that outward transportation of a final product is a post-manufacturing activity and hence, central credit is not admissible. Similarly, the observation of the adjudicating authority that the ownership of the goods is not the relevant criteria for determining the liability to pay which is as at the time and place of removal and therefore, may not be relevant to determine whether certain service can be treated as input service or not, is without basis and contrary to the aforesaid clarifications issued by Board as well as settled vide judicial pronouncements.

(iv) The impugned order is not restrictive in law or merits, they are not liable to make payment of any interest under Section 14(A) of the Act read with Rule 14 of the CCR, 2004 nor they are liable to any penal action under Rule 15(1) of the CCR, 2004.

(v) The issue involved relates to interpretation of statutory provisions and therefore, it is neither justified nor permissible in law to impose penalty on appellants even if it is assumed without admitting that they are not entitled for central credit of service tax paid on the relevant service under consideration. As appellant has acted on the basis of CBEC's Circular dated 23.08.2007 and various judicial pronouncements and on their bonafide belief that the admissibility of central credit on the said service as the conditions prescribed vide the said Circular stand complied with by them. The appellant in this regard, relies on following case-laws:-

- Associated Slips Ltd Vs CCE New Delhi(2002) (143 FT 7319 Td Del)
- M/s. Emeralds JCB Ltd Vs. CCE New Delhi(2002) (1481 FT 31 (SC))
- M/s. Ultrafast Cement Ltd Vs CCE, Kutch - 37/11098/2015-DD

4. Personal hearing in the matter was attended to by Shri Pradyot K Chaturvedi, General Manager Commercial, and Shri Anil Agarwal, AGM Commercial, who reiterated Grounds of Appeal and submitted copy of circular no. 1085/4/2018-CX dated 08.06.2018 and copy of judgement of M/s. Ultrafast Cement Ltd. Vs CCE, Kutch -



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ST/1098/2015 DB for consideration: that their appeal may be decided on the basis of above facts and legal position.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and submissions made by the appellant. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority disallowing Cenvat credit of service tax paid on outward transportation charges is correct, proper and legal or otherwise.

6. I find that the Appellant had availed Cenvat credit of service tax paid on outward GTA service during the period from 2010-11 to 2014-15. The adjudicating authority disallowed said Cenvat credit of service tax on the ground that outward GTA service was availed by the Appellant for transportation of their finished goods from their factory to customer's premises i.e. beyond place of removal, and hence not covered under definition of "input service" in terms of Rule 2(i) of CCR, 2004. The Appellant has contended that entire sale was on FCR basis and hence, Cenvat of Service Tax paid on transportation from factory to buyer's premises ought to have been allowed in view of the judgement in the case of *M/s. Ultrafast Cement Ltd. Vs. CCE, Kutch* ST/1098/2015-DB, which laid down general principles as to what constitutes place of removal considering the point of sale where the ownership and risk passes on from the seller to the buyer; that the term "Place of removal" defined in the CCR, 2004 envisages a location even beyond factory gate or even depot or any premises other than that of the manufacturer, to be considered as place of removal.

7. I find that definition of "input service" as provided under Rule 2(i) of Cenvat Credit Rules, 2004 reads as under:-

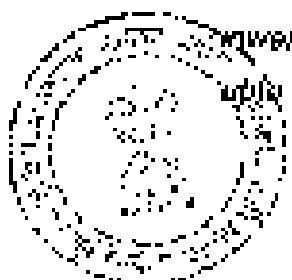
If "input service" means any service:-

- (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 include service used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, contracting 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)

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7. From above, it is observed 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 inclusion of outward transportation upto the place of removal. It is, therefore, evident that as per main clause - the service should be used by the manufacturer which has direct or indirect relation with the manufacture of final products and clearance of final products upto the place of removal and the inclusive clause restricts the outward transportation upto the place of removal. The place of removal has been defined under Section 4 of the Act. As per Section 4(3)(c) of the Act, "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 of 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.

8. I find that the issue is no more tax integral and stands decided by the Hon'ble Supreme Court vide judgment dated 01.02.2018 passed in the case of Ultratech Cement Ltd reported as 2018 (9) G.S.T.L. 307 (S.C.), wherein it has been held that,

4. As mentioned above, the assessee is involved in packing and clearing of cement. It is supposed to pay the service tax on the aforesaid services. At the same time, it is entitled to avail the benefit of Input Credit in respect of any input service tax paid. In the instant case, input service tax was also paid on the outward transportation of the goods from factory to the customer's premises of which the assessee claimed the credit. The question is as to whether it can be treated as 'input service'.

5. 'Input service' is defined in Rule 2(i) of the Rules, 2004 which reads as under:

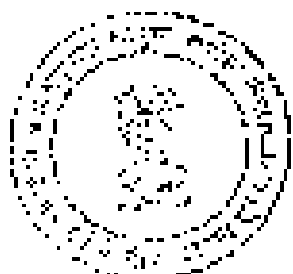
"(i) 'Input service' means any service:-

(a) 'Input service' means any service -

- (i) Used by a provider of taxable service for providing an output services, 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 modernization, renovation or repairs of a factory premises or premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, such as acquiring, building, furnishing, recruitment and quality control, purchase and renting, insurance, warehousing, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."

(Enphatic supplied)

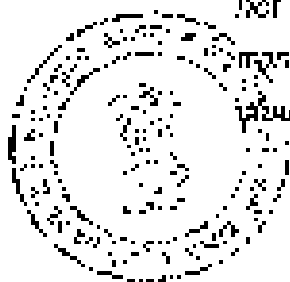


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6. It is an admitted position that the instant case does not fall in sub-clause (y) but the issue is to be decided on the application of sub-clause (z). Reading of the aforesaid provision makes it clear that those services are included which are used 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'.

7. It may be relevant to point out here that the original definition of 'input service' contained in Rule 2(j) of the Rules, 2004 used the expression 'from the place of removal'. As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal to the warehouse or customer's place etc.' was eligible for Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (Commissioner of Central Excise Bikaner v. M/s. Vaswadarla Cements Ltd.) vide judgment dated January 17, 2017. However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and dues to the credit of input tax paid gets closed at that place. This credit cannot travel therefrom. It becomes clear from the above 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 customer's premises, is not covered within the ambit of Rule 2(j) of Rules, 2004. Whereas the word 'from' is the indicator of starting point, the expression 'upto' signifies the terminating point, putting an end to the transport journey. We, therefore, find that the Adjudicating Authority was right in interpreting Rule 2(j) in the following manner:

1. The input service has been defined to mean any service used by the manufacturer whether directly or indirectly and also includes, inter alia, services used in relation to inward transportation of inputs or export goods and outward transportation upto the place of removal. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport services shall



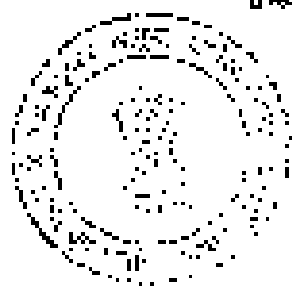
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cannot go beyond what is said in the clause of removal. The two clauses, the one dealing with general provisions and other dealing with a specific item, are not to be read disjunctively as one being about conflict to defeat the latter scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions.

15. Credit availability is as regards to inputs. The credit covers duty paid on input materials as well as on paid up services used in or in relation to the manufacture of the final product. The final products manufactured by the assessee in this factory premises and once the final products are fully manufactured and cleared from the factory premises, the question of utilization of service does not arise as such services cannot be considered as used in relation to the manufacture of the final product. Therefore, extending the credit beyond the point of removal of the final product in payment of duty would be contrary to the scheme of Central Credit clause. The main clause in its definition states that the services in regard to which credit of tax is sought should be used in or in relation to clearance of the final products from the place of removal. The definition of input services should be read as a whole and should not be fragmented in order to avail negligible credit. Once the circumstances have taken place, the question of granting input service stage credit does not arise. Transportation is an entirely different activity from manufacture and the position remains settled by the judgment of Honorable Supreme Court in the cases of Bombay Tyre International 1953 (14) ELT = 2002-TIOU-374-SC-CX-LB, Indian Oxygen Ltd. 1982 (36) ELT 725 SC = 2002-TIOU-54-SC-CX and Baroda Electric Meter 1937 (94) ELT 13 SC = 2002-TIOU-68-SC-CX-LB. The post removal transport of manufactured goods is not an input for the manufacturer. Similarly, in the case of M/s. Oratech Cements Ltd. v. CCE, Bhatnagar 2007 (6) STR 354 (10) = 2007-TIOU-129-CFSTAT-AHM. It was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of relevant provisions clearly, correctly and in accordance with the legal provisions.

R. The aforesaid order of the Assessing Authority was upheld by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 23, 2007 had clarified the definition of 'place of removal' and the three conditions contained therein stood satisfied insofar as the case of the respondent is concerned, i.e. (i) regarding ownership of the goods till the delivery of the goods at the purchaser's door step; (ii) seller



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bearing the risk of loss or damage to the goods during transit to the destination and, (iii) freight charges to be integral part of the price of the goods. This approach of the Commissioner (Appeals) has been approved by the CESTAT as well as by the High Court. This was the main argument advanced by the learned counsel for the respondent supporting the judgment of the High Court.

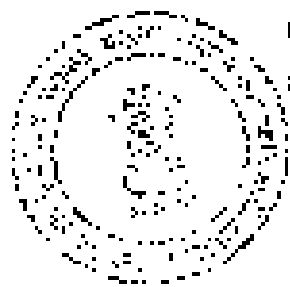
2. We are afraid that the aforesaid approach of the Courts below is clearly untenable for the following reasons:

10. In the first instance, it needs to be kept in mind that Board's Circular dated August 23, 2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition. Relevant portion of the said circular is as under.

ISSUE: Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?

COMMENTS: This issue has been examined in great detail by the CESTAT in the case of M/s. Gujarat Ambuja Cements Ltd. vs. CCE Ludhiana [2007 (E) STR 249 T-1-D] = 2007-TIOL-420-CESTAT-AHM. In this case, CESTAT has made the following observations:-

the post-esse transport of manufactured goods is not an input for the manufacturer/consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the law's scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions'. Similarly, in the case of M/s. Ultratech Cements Ltd. vs. CCE Bhanuagar - 2007-TIOL-429-CESTAT-AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input. The above observations and views explain the scope of the



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relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer / consignor can take credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

8.2 In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in CENVAT Credit Rules. In terms of sub-rule (6) of rule 2 of the said rules if any words or expressions are used in the CENVAT Credit Rules, 2004 and are not defined therein, but are defined in the Central Excise Act, 1944 or the Finance Act, 1954, they shall have the same meaning for the CENVAT Credit Rules as assigned to them in those Acts. The phrase 'place of removal' is defined under section 4 of the Central Excise Act, 1944. It states that,

"place of removal" means-

- (i) a factory or any other place or premises of production or manufacture of the excisable goods ;
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be stored without payment of duty ;
- (iii) a depot, 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;

from where such goods are removed."

It is, therefore, clear that for a manufacturer / consignor, the eligibility to avail credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer / consignor may claim that the sale has taken place at the destination point because in terms of the sale contract / agreement (i) the ownership of goods and the custody in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service

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tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.

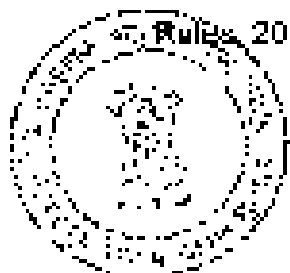
11. As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cemen. Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(i) of Rules, 2004. The three conditions which were mentioned explaining the 'place of removal as defined under Section 4 of the Act. There is no quarrel upto this stage. However, the important aspect of the matter is that Cenvat Credit is permissible in respect of 'input services' and the Circular relates to the unamended regime. Therefore, it cannot be applied after amendment in the definition of 'input service' which brought about a total change. Now, the definition of 'place of removal' and the conditions which are to be satisfied have to be in the context of 'upto' the place of removal. It is the amendment which has made the entire difference. That aspect is not dealt with in the said Board's circular, nor it could be.

12. Secondly, if such a circular is made applicable even in respect of post amendment cases, it would be violative of Rule 2(i) of Rules, 2004 and such a situation cannot be countenanced.

13. The upshot of the aforesaid discussion would be to hold that Cenvat Credit on goods transport agency services availed for transport of goods from place of removal to buyer's premises was not admissible to the respondent. Accordingly, this appeal is allowed, judgment of the High Court is set aside and the Order-in-Original dated August 22, 2011 of the Assessing Officer is restored."

(Emphasis supplied)

8.1 Further, vide CBEC vide Circular No. 1085/4/2018 CX dated 08/08/2018, it has been decided that circular no. 868/12/2014 CX dated 20.10.2014 shall stand rescinded from the date of issue of the above circular. Further, clause (c) of para 8.1 and para 8.2 of the circular no. 0706/2007-CX dated 23.08.2007 are also omitted from the date of issue of the above circular and also clarified the 'place of removal' under section 4 of the Central Excise Act, 1944, the Cenvat Credit Rules, 2004 and the Cenvat Credit Rules, 2017 wherein it has been clarified that,



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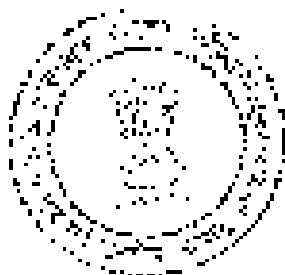
5. GENVAT Credit on GTA Service etc. : The other issue decided by Hon'ble Supreme Court in relation to place of removal is in case of CCF & ST v. Ultra Tech Cement Ltd. dated 13-09-13 in Civil Appeal No. 11251 of 2013 on the issue of GENVAT Credit on Goods Transport Agency Service availed for transport 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 GENVAT Credit on Goods Transport Agency service availed for 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 the definition of 'input service' under Rule 2(i) of the GENVAT Credit Rules, 2004, effective from 1-3-2008, the service is treated as input service only 'up to the place of removal.'

8.2 In view of above law settled by the Hon'ble Supreme Court, Genvat Credit on GTA service availed by the appellant for outward transportation of goods from place of removal to buyer's premises is not admissible w.e.f. 01.04.2008. The period involved in this case is from April-2015 to June-2017 and hence, Genvat credit of Service Tax paid on GTA for outward transportation of goods cannot be allowed.

9. I have also examined CFSTAT. Ahmedabad's order passed in the case of M/s. Ultratech Cement Ltd. Vs CCE, Kutch - S/111308/2015-DB and other case laws relied upon by the Appellant. I find that case laws are not relevant and has to be held per incuriam in the light of judgment of the Hon'ble Apex Court in the case of M/s. Ultratech Cement Ltd. supra since judgement of the Apex Court prevails over any decision/orders passed by the subordinate courts/Tribunals.

10. Regarding penalty imposed under Rule 15 of CCR, 2004, I find that the Appellant wrongly availed and utilized Genvat credit of service tax paid on outward GTA service used for transportation of their finished goods from their factory to buyers premises, which is not admissible as discussed supra. The Appellant, thus, contravened the provisions of Genvat Credit Rules, 2004 and therefore, the Appellant has been rightly held liable for penalty under Rule 15 of CCR, 2004. I, therefore, upheld penalty of Rs 72,51,137/- imposed in the Impugned order.

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



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12. अपीलकर्ता द्वारा दल की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeals filed by the appellant shall disposed off in above terms.

आचार्यजी
सचिव
लक्ष्मण शेट
अपील विभाग


(Gopi Nath)
Commissioner (Appeals)

By H.P.A.D.

To
M/s Gujarat NRE Doko Ltd (Steel Division),
Village Lunava Tal Bhachau,
Kutch

Copy to:

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

