NATION TAX MARKET

सीमाशुल्क (अपील) का आयुक्त,केन्द्रीय उत्पाद शुल्क एवं सेवा कर अपील प्राधिकरण
O/O COMMISSIONER(APPEALS), CENTRAL EXCISE & SERVICE TAX

दर्शिनी टावर, पहली मंजिल, जी.एस.टी. भवन / 1st Floor, Darshini Tower, GST Bhavan,

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फॉर्म नं. ४ / Form No. 4

क्रम संख्या / Sr. No.	अपील / मूल आदेश संख्या / Appeal / Order-in-Original No.	दिनांक / Date
1	Appeal / 28/(53/Rkt)/2017	20.03.2017
2	V2/153/RAJ/2017	20.03.2017

1	अपील आदेश संख्या (Order-in-Appeal No.)	
	BHV-EXCUS-000-APP-010-TO-007-2017-18	
	आदेश का दिनांक / Date of Order	02.04.2018
	जारी करने की तारीख / Date of Issue	12.04.2018

Passed by Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.

परिदेखण हेतु आवेदन / Brief facts of the case

In pursuance to Review Memorandum No. 20/2017-CX dated 17.10.2017 read with Review Order No. 09/2017 dated 17.10.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of Appeals filed under Section 35 of Central Excise Act, 1944 and Section 86 of Finance Act, 1994.

2	अपील आदेश से व्यथित व्यक्ति का नाम एवं पता / Name & Address of the Appellant & Respondent
	M/s Exotic Dairy Wheels P. Ltd., 8/36, 'B', Plot No. 3601/8,Bedi Port, Jamnagar.

कोई व्यक्ति इस आदेश से व्यथित महसूस करता है तो वह इस आदेश के प्रति यहां लिखित पते पर अपील कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following manner.

(A)	वित्त अधिनियम,1994 की धारा 86 के अंतर्गत एवं वित्त (संख्या-2) अधिनियम 2015 की धारा 37 के अंतर्गत नियत सेवा कर के संबंध में। Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 86(1) of the F.A, 1994 / Under Section 35 of the Finance Act, 2015 in the cases relating to
(i)	सीमा शुल्क, केन्द्रीय उत्पाद शुल्क या सेवा कर के निर्धारण से संबंधित कोई आदेश जहां शुल्क अथवा शुल्क अथवा दण्ड विवाद में है। 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)	सेनवैट क्रेडिट नियमों के अंतर्गत सेनवैट क्रेडिट के गलत लिए गए या उपयोग किए गए मामलों के संबंध में जहां सेनवैट क्रेडिट की राशि रुपये 5 लाख या उससे कम है, रुपये 5 लाख या उससे ज्यादा है या जहां जुर्माना लगाया है।
(iii)	In the case where amount of CENVAT credit involved is Rs. 5 lakhs or less, Rs. 5 lakhs or more but not exceeding Rs. 50 lakhs, Rs. 50 lakhs or more, in the form of penalty alone or penalty is imposed.

The Assistant Commissioner of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) 4th Floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) above.

(iii) [illegible]

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.5,000/-, 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) [illegible]

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/-.

(ii) [illegible]

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.

(C) [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

(ii) 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.

(i) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस मामले में पुनरीक्षण वित्त (संख्या-2) अधिनियम, 1994 की धारा 35EE के तहत वित्तमंत्री के अधीनस्थ सचिव, वित्त मंत्रालय, वित्तीय सेवाएं विभाग, जीवन बीमा, भवन, संसद मार्ग, नई दिल्ली-110001 को निम्न जगह पर किया जाना चाहिए ;
A revision application lies to the Under Secretary to the Govt. of India, Revision Application Unit (i), Ministry of Finance, Department of Economic Affairs, Insurance Wing, Jeevan Bharati Building, Connaught Circus, New Delhi-110 001 under Section 35EE of the C.E. Act, 1944 in respect of the following case governed by first proviso to sub-section (1) of Section 35B ibid.

(ii) यदि माल के किसी नुकसान के मामले में जब ऐसा नुकसान किसी माल के किसी कारखाने से दूसरे गृह के गोदाम के दौरान या किसी अन्य कारखाने या किसी गोदाम या दूसरे कारखाने में या फिर किसी अन्य गोदाम में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी गोदाम में माल के भण्डारण के दौरान होता है।
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.

(iii) भारत के बाहर (नेपाल या भूटान को निर्यात या भारत के सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं नमक अधिनियम, 1944 के तहत परिभाषित भारत के सीमा शुल्क से मुक्त किसी क्षेत्र में निर्यात की गई वस्तुओं के मामले में।
In case of rebate of duty of excise on goods exported to any country or territory outside India or on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iv) यदि उपरोक्त भुगतान का अनुरोध सेनवैट क्रेडिट नियमों का शासन, सेनवैट का भुगतान करने के लिए किया गया है।
In case of refund of duty of excise on goods exported to Nepal or Bhutan without payment of duty.

(v) वित्तीय अधिनियम (संख्या-2) अधिनियम, 1998 की धारा 109 को लागू करते हुए वित्तीय (संख्या-2) अधिनियम, 1998 की धारा 110 के तहत दिए गए निर्णय या आदेश, जो सेवा कर अपीलीय अधिकारी द्वारा पारित किया गया हो।
Order of the Commissioner (Appeals) as specified in Section 110 of the Finance (No.2) Act, 1998 under the provisions of this Act or the rules made there under and order of the Commissioner (Appeals) as specified in Section 109 of the Finance (No.2) Act, 1998.

(vi) वित्तीय अधिनियम, 1994 की धारा 35EE के तहत वित्तीय (संख्या-2) अधिनियम, 1998 की धारा 109 के प्रावधान के अनुसार, सेवा कर के संबंध में अपील के लिए उपरोक्त (i) के अनुसार जगह पर 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 three months from the date on which the order sought to be appealed is communicated and shall be accompanied by a copy 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 Accounts.

(vii) पुनरीक्षण आवेदन के साथ निम्नलिखित शुल्क का भुगतान किया जाए।
एवं केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत निर्धारित फार्म संख्या EA-8 में दो प्रतियों में प्रस्तुत करनी होगी तथा इसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी एक प्रति तथा इसके साथ 1000/- रुपए का मूल्यांकन शुल्क चालान भी संलग्न करना होगा।
The revision application should be accompanied by a fee of Rs. 1000/- where the amount involved in Rupees One Lac or less and Rs. 5000/- where the amount involved is more than One Lac.

(viii) यदि इस आदेश के एक से अधिक अपीलों के संबंध में एक ही अपील या विभिन्न अपीलें, जिनमें अपील की गई हो, एक ही व्यक्ति द्वारा की गई हो तो फिर जहां पर लागू शुल्क की राशि के संबंध में इस प्रकार की अपीलों में अपील अधिकारियों के एक से अधिक आदेश पारित किए गए हैं ; तो इस प्रकार के प्रत्येक आदेश के संबंध में शुल्क का भुगतान किया जाना चाहिए। इस प्रकार से भुगतान किया गया शुल्क, जिस पर कि इस अधिनियम के प्रावधान लागू होते हैं, उसके संबंध में अपील प्राधिकारी के समक्ष अपील की जाती है।
In case of appeals other than as mentioned above in sub-para (i) arising out of the same order, relating to the amount of fee payable under the provisions of the Act, one appeal in respect of each such order should be filed.

(ix) वित्तीय अधिनियम, 1994 की धारा 35F के अंतर्गत निर्धारित शुल्क का भुगतान, जिस स्थान पर सेवा कर अधिनियम, 1994 के तहत अपील की जाती है, उस स्थान पर स्थित किसी भी राष्ट्रीयकृत बैंक के माध्यम से किया जाना 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. 0.50 as per Schedule-I in terms of the Court Fee Act, 1970, as amended.

(x) उपरोक्त मामले, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 के तहत वर्ष में तीन बार न्यायाधिकरण के समक्ष सीमाशुल्क, उत्पाद शुल्क और सेवा कर अपील प्राधिकरण के पूर्व की तरह प्रस्तुत किया जाना है ;
Appeals to be filed before the Tribunal in the manner prescribed under the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(xi) उच्च अपीलीय प्राधिकारी के समक्ष अपील करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, वित्तीय अधिनियम, 1994 की संबंधित धाराओं का संदर्भ लिया जाए।
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the relevant sections of the Finance Act, 1994.

ORDER IN APPEAL

M/s. Pardeshi Wovens Pvt. Ltd. Plot No. 167, GIDC-II, Sachin, Surat (hereinafter referred to as 'the appellant') has filed two appeals against the OIO No. 01/ADJ/DC/2016 dated 27.01.2016 & OIO No. 05 to 06/ADJ/DC/2016 dated 29.01.2016 (hereinafter referred to as 'the impugned orders') passed by the Superintendent, Central Excise (Div-I), Surat (hereinafter referred to as 'the adjudicating authority'). Being an identical issue involving common facts, both the said appeals are being taken up for disposal by this single order.

2. Briefly stated, the facts are that on scrutiny of the ST-3 returns filed for the period from 07.02.2012 to 30.10.2015 and as revealed in the appellant's letter dated

- During the period from February, 2011 to July, 2011 & August, 2014 to July, 2015 the appellant had wrongly availed CENVAT credit of Rs.2,01,068/- & Rs.32,742/- on services as per the invoices mentioned in the show cause notices;
- Such services, being used for transportation of finished goods beyond the place of removal, are not covered in the definition of 'input service', as defined under Rule 2(l) of CENVAT Credit Rules, 2004;
- Such transportation of the products is a post manufacturing activity;
- Such ineligible credit is required to be recovered under Notification No. 13/2006-CE(NT) dated 13.03.2006 by adding the words "clearance of final products from the place of removal" have been replaced by the words "clearance of final products upto the place of removal";
- The clearance is at factory gate so 'Place of removal' as defined under section 4(3)(c) of the Central Excise Act, 1944;
- Accordingly, the cenvat credit reversal of Rs.2,33,810/- is required to be allowed to the appellant;
- As the charges incurred from the place of removal up to the customer's premises do not form part of the assessable value of excisable goods;
- Since sale has taken place only at the destination point as per terms of the sale contract/agreement, the credit of the service tax paid on the transportation up to such place of sale would be admissible, if it can be established to the said party of such credit that the same was a part of property in goods occurred at said place.

The above said SCNs, therefore, proposed demanded CENVAT credit wrongly availed and utilized along with interest and for imposition of penalty on the appellant.

3. The Adjudicating authority, vide the impugned order, confirmed the demand of wrongly availed CENVAT credit along with interest and imposed penalty thereon the appellant.

4. Feeling aggrieved, the appellant filed the present appeals on the following grounds:-

- The transactions are on FOR basis and therefore in view of the settled law, the transactions can very well be said not been completed as the customer's premises. The Hon'ble Supreme Court as well as the Hon'ble Appellate Tribunals have set forth the law that if the transactions are on FOR basis, the place of delivery could be the place at the customer's premises, which the appellant is by way of producing lorry receipts, export accounts, customer's purchase invoices etc. that the transactions were on FOR basis and therefore the credit is clearly admissible;

- Earlier Limited SCN dated 16.12.2014 was adjudicated vide O.O dated 27.07.2015 and appealed but after considering the facts and the relevant documents, matter was remanded for verification to allow the credit if the transactions are found to be on FOB basis. Meanwhile another SCN was also issued to the appellant on the identical issue, but the same was also adjudicated & confirmed by the Commissioner (Appeals).

- In case of M/s. Applied Auto Industries Pvt. Ltd., where the Hon'ble Tribunal, Ahmedabad held that if the transaction are on FOB basis, the input service as paid on outward transportation is available even after the amendment in the definition of the word 'input service' after 01.04.2011.

- The department had full knowledge of the fact of settlement of sale, therefore the proviso to Section 11A(1) is not attracted and consequently the demand is barred by limitation.

5. The appeals were filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Order No. 03/2017-Service Tax dated 11.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Dept. of Revenue, CBEC, Service Tax Wing, on the basis of Board's Circular No. 206/6/2017-Service Tax dated 27.10.2017.

6. Personal hearing was granted to the appellant on 22.05.2018, wherein Shri Parvez Malik, Advocate appeared on behalf of the appellant and reiterated the same arguments and his appeal memorandums. He also submitted that the credit of service tax paid was on input service in view of the various decisions and the clarification issued by Tax Dept., and that the issue under consideration was disputable and the Hon'ble Board as well as the judicial authority were in favour of the assessee and therefore it could not be said that there was an intention to evade payment of duty. He also relied the following decisions.

- ITC Ltd Vs. CCE, Bangalore-II, reported in 2017 (51) STR 104 (Tri.-Bang.),

  CCE, Ahmedabad Vs. Paksons Ltd., as reported in 2011 (252) ELT 316 (Tri. Ahmd.),

  Mahindra Complete Ser. Vs. Addl. CCE, Bangalore, as reported in 2015 (40) S.T.R. 142 (Tri.-Bang.)

7. I have carefully gone through the facts of case, the grounds mentioned in the appeals and the submissions made by the appellant. I have to decide in the present appeals whether the appellant is eligible for the CENVAT Credit of the service tax paid on outward transportation of goods or not, therein.

8. I find that the definition of 'input service' as provided under Rule 2(l) of the CCR, 2004 means any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture and clearance of final products up to the place of removal, and outward transportation upto the place of removal. From the aforesaid definition, I find that the service should be used by the manufacturer which has direct or indirect relation with the manufacture or clearance of the products upto the place of removal and also the definition clearly restricts the outward transportation upto the place of removal.

9. I also find that the place of removal has been defined under Explanation (c) to Section 4 (3) of the Central Excise Act, 1944, according to which "Place of Removal" means a factory or any other place or premises of production or manufacture of the excisable goods, a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, 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.

10 It is submitted that Board vide Circular No. 8/8/2007-ST dated 23.10.2007 has clarified the issue relating to admissibility of the CENVAT Credit in respect of service tax paid on the goods transported by road. The relevant clause in Para 8(i) of said circular reads as under:

> *"However there may be situations where the consignment/invoice/documents may not have been received by the destination prior to the event of the sale. In such cases the place of delivery of goods to the recipient in the event of the sale would be ascertained on the basis of the date given by the seller from the time of sale or dispatch of the goods from the factory as the case may be. In case the buyer desires to take delivery of the goods at some other place during the course of transit, the sale will be treated as a stock transfer and not a sale. In such cases, the credit of the service 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 It is further that the aforesaid Circular was modified by the Board vide Circular No. 999/1/2011-TRU dated 20.10.2011 issued from F.No.137/59/2011-TRU. The relevant portion of the same reads as under:

> *"3) The operative part of the instruction in each the circulars given under the reply are reproduced. They commonly state that the place where sale takes place is the place of removal. The place where sale has taken place is the place where the transfer of property in goods takes place from the seller to the buyer. This can be decided as per the provisions of the Sale of Goods Act, 1930 as held by courts. Tribunal in case of Associated Stones Ltd vs Commissioner of Central Excise, New Delhi [2001 (132) E.L.T. 111 (Tri.-Del.)]. This principle was upheld by the Hon'ble Supreme Court in case of M/s. Escorts Construction Equipment Ltd. [2007 (209) E.L.T. 5 (S.C.)].*
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> *4) Instances have come to notice of the Board where in the case of the claims of the manufacturer-exporters, freight charges or who bore the risk of insurance, the place of removal was decided without considering the place where transfer of property in goods has taken place. This is in contravention from the Board's circular and is also contrary to the legal position of the subject.*
>
> *5) It may be noted that there are very well laid rules regarding the time when property in goods is transferred from the buyer to the seller in the Sale of Goods Act, 1930 which has been referred in paragraph 2 of the aforesaid reply letter (para 3 reproduced below) for ease of reference:*
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> > *"24. Where we are to consider the effect of the contract made in the case where the question of possession of the goods or the proper mode of delivery of the goods pass from the seller to the buyer, it is of the greatest importance to ascertain whether the delivery or the payment is to precede and is necessary to refer to certain provisions of the Sale of Goods Act, 1930. Section 19 of the Sale of Goods Act, 1930 provides that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Unless a different intention appears, the rules contained in sections 20 to 24 are prima facie rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 20 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made. But section 23, or section 24 further provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether*

> *raised by the buyer or not) for the purposes of transmission to the buyer and does not reserve the right of disposal. It is immaterial at how many destinations the goods or the consignment.*"

51 It is reiterated that the place of removal needs to be ascertained to serve as provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of freight, insurance or realization charges or delay in payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. *The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.*"

52 In view of the above, I find that the position taken by the Adjudicating Authority in respect of the place of delivery at the buyer's premises is correct and the appellant failed to establish that the sale and the transfer of property in goods occurred at said place. This issue is decided as per the provisions of Section 19 of Sale of Goods Act, 1930 which envisages as under:

> *"Property passes when intended to pass*
>
> *(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*
>
> *(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.*
>
> *(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.*"

53 In this regard, I find that though the respondent has produced a copy of contract, invoices, lorry receipts, ledger account, declaration of the transporter to the effect that the transactions were on F.O.R. basis, yet such returns of transaction by the transporter as well as these documents produced by the appellant does not conclusively prove the fact of "where the sale has taken place or when the property in goods passed from the seller to the buyer". I also agree with the adjudicating authority that "F.O.R. (Free on Road)" is a term used in commercial parlance which not only means that the consignor agrees to arrange for transportation of goods to the destination point and hence, can be viewed as a term of delivery, whereby it can not be viewed as a relevant one to prove for or to rule out validity of CENVAT credit on inward transportation. I also find that the appellant has merely stated that an arrangement of transportation is made by on behalf of the customers and paid accordingly charges to the transporter. But, it does not mean that the sale has taken place or the property in goods pass from the seller to the buyer, at the destination i.e. buyer's place.

54 In this regard, the appellant has argued that the adjudicating authority has erred in confining the scope on this ground that the documentary evidences submitted do not fulfil the submission does not prove beyond doubt that the transactions are on FOR basis and the observation in Para 33 (Para 20 of the Order-in-Appeal) is also improper and bad in law and is liable to be set aside. However, the appellant has failed to explain as to how the findings of the adjudicating authority are bad in law.

55 I also find that the burden to prove the place of removal is that of the appellant and according to para 4 of the show cause notices dated 26.05.2009 & 28.10.2014, the appellant was required to give evidences or conditions of the contract of the sale to establish that the sale has taken place at property in goods passed to the respondent or its buyer / customers at such other place other than factory gate. In this regard, though the appellant has produced copy of agreement with some of the customers and claimed that agreements in respect of such of the customers are executed to avoid any liability of customs duty. However, the

adjudicating authority that this is not the case where some practical problems were faced by the purchaser to explain their stand, that in many cases, the goods have been supplied based on oral instructions, that on perusal of some purchase orders, place of delivery of the goods is mentioned. In view of the above, I do not find it to hold that the appellant has failed to discharge burden to claim eligibility of CENVAT credit. Accordingly, I do not find any merit in both the appeals.

16. I fully agree with the appellant's view, raised in grounds of appeal that while determining the place of removal, the payment of transportation, inclusion of transportation charges in sale price of the same in case of depot sales are not the relevant considerations. Further, in the CENVAT Credit Rules, 2004, as amended, it is a mandatory requirement for the appellant to prove that the sale has taken place at property of goods passed from the appellant to its buyers/customers at their other place other than factory gate, which the appellant has failed as discussed in foregoing Para.

17. Regarding the judgments relied upon by the appellant, I find that the issue involved in the said judgments is not similar to the facts of the present case. In the said judgments, the buyer's place, they are not applicable in the present case.

18. In view of the above, I also find that since the credit is held to be inadmissible, the penalty is also recoverable from the appellant. In this regard, the appellant argued that the issue under consideration was disputed. Hon'ble Tribunal's Bench as well as the Board's circular was in favour of the appellant and therefore it could not be said that there was an attempt to evade payment of duty. I do not agree with the contention of the appellant in as much as on going through my aforesaid findings, it is clear that the place of removal cannot be treated as buyer's place. Hence, the appellant has violated the conditions of the provisions of Central Excise Act, 1944 and rules framed there under. The appellant has failed to comply with the requirement as shown in both the aforesaid circulars dated 29.10.2004 & 20.10.2014, i.e. discussed in foregoing Paras. Accordingly, the appellant is liable for penalty under rule 15 of CENVAT Credit Rules, 2004.

19. In view of the above, I disallow both the appeals filed by the appellant and uphold the impugned orders.

20. The appeals filed by the appellant stands disposed off in above terms.

(Dr. Balaji Singh)
Additional Commissioner (Appeals)

Date: 30.11.2018

By RPAD.

To,
M/s. Parth Pole Products Pvt. Ltd.,
Survey No. 1197/2, GIDC,
Sanand-382 170, Ahmedabad.

Copy to:
1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST & Central Excise, Bhavnagar.
3. The Commissioner (Appeals), CGST, Rajkot.
4. The Assistant/Deputy/Assistant Commissioner, CGST & Central Excise, Bhavnagar.
5. The Additional/Joint Commissioner, (System), CGST, Rajkot.
6. Guard File.