O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE [illegible]

[illegible] Ring Road

[illegible] 360 001

Tele Fax No. 0281 – 2477952/2441142 [illegible] commrappl [illegible]@gmail.com

[illegible]

क	[illegible] Appeal No. : V2/[illegible]/BVR/2017	[illegible] O.I.O. No. : [illegible]/2016-17	दिनांक Date : [illegible].2017

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

BHV-EXCUS-000-APP-021-TO-028-2018-19

आदेश का दिनांक / Date of Order:	13.04.2018	जारी करने की तारीख / Date of issue:	16.04.2018

कुमार संतोष, आयुक्त (अपील्स), राजकोट [illegible]

Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग [illegible]

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax [illegible]

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता (Name & Address of the Appellants & Respondent) :

M/s. Madhu Silica Pvt. Ltd. (Unit-II), Plot No. 53/55 & 56/0, GIDC, Chitra, Vartej, Bhavnagar- 364004

[illegible]

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

(A) [illegible]

[illegible]

(i) [illegible]

[illegible]

(ii) [illegible]

[illegible]

(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 [illegible]

(B) [illegible]

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, [illegible] Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against [illegible]

[illegible]

[illegible] Central Excise [illegible] Commissioner [illegible] Central Excise Service Tax [illegible]

[illegible]

[illegible] the subject to a ceiling of Rs. 10 Crores. [illegible]

[illegible]

Revision application to Government of India

[illegible]

[illegible] Form No. EA-8 [illegible] Section 35EE of CEA [illegible]

[illegible] Rupees One Lakh [illegible]

[illegible]

[illegible] contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

[illegible] the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s. Madhu Silica Pvt. Ltd. (SEZ-I), Plot No. 53, 55 & 56/D, GIDC Chitra, Bhavnagar (hereinafter referred to as 'Appellant') has filed appeals against Orders-in-Original No. 18 to 25/Deputy/Demand/2018-19 dated 31.05.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, City Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant provided detailed information regarding availment and utilization of Cenvat credit of Service Tax paid on outward transportation of goods on being asked by the Range Superintendent. The scrutiny of information revealed that the appellant during the period availed Cenvat credit of service tax paid on outward transportation of the finished goods beyond the place of removal as under :-

Sr. No.	Show Cause Notice No.	SCN date	Amount Rs.	Period Involved
1.	V/18-20/D/2010-11	01.10.2010	1,09,886/-	Sept-09 to Jul-10
2.	DEx/AR-I/SCN-74-II-GTA-Aug-Oct-10/2010-11	29.12.2010	31,933/-	Aug-10 to Oct-10
3.	AR-I/Dem/Madhu Silica-DJ-II/11-12	26.09.2011	37,052/-	Nov-10 to Mar-11
4.	AR-I/Dem/Madhu Silica-DJ-II/11-12	28.12.2011	97,853/-	Apr-11 to Sep-11
5.	V/15-18/D/10-11	21.07.2010	4,07,366/-	July-09 to Mar-10
6.	V/15-40/Demand-Madhu-Silica/2010-11	02.02.2011	2,57,959/-	Apr-10 to Oct-10
7.	V/15-47/Demand-Madhu-Silica/2010-11	23.03.2011	1,60,303/-	Nov-10 to Mar-11
8.	V/15-82/Demand-Madhu-Silica/2011-12	23.11.2012	3,03,938/-	Apr-11 to Sep-11

2.1 Show Cause Notices were issued to the appellant for recovery of wrongly availed Cenvat credit along with interest under Rule 14 of the Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR") read with Section 11A of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'). The demands of wrongly availed Cenvat credit were confirmed along with interest and penalty also imposed under Rule 15(1) of the Rules read with Section 11AC(1) of the Act by the lower adjudicating authority vide impugned order.

3. Being aggrieved with the impugned order, the appellant preferred the present appeals on the grounds that judgment of the Hon'ble High Court of Kolkata in the case of CCE Vs. Vesuvius India Ltd. reported as 2016(43) STR 25 (Kol) discussed by the lower adjudicating authority in the impugned orders is not applicable inasmuch the said judgment is dated 28.11.2013 whereas on CESTAT,

Ahmedabad 03.01.2011 in the case of United Phosphorus Ltd. reported as 2016 (46) STR 662 (Tri.-Ahmd) at Para 4 held as under :-

"4. Heard learned AR. The main issue involved in the present appeal, as framed by the first appellate authority at Para 10 of Order-in-Appeal dated [illegible], is whether during the period January 2005 to September 2008 the Cenvat credit of Service Tax on the freight charges of outward transportation from the place of removal is admissible to the respondent or not. First appellate authority has allowed the credit in view of CESTAT Larger Bench judgment in the case of ABB Limited & Others (supra), which was subsequently confirmed by Karnataka High Court in Commissioner of Central Excise & Service Tax, Bangalore v. M/s. ABB Limited, Vadodara [illegible] = 2011 (23) S.T.R. 97 (Kar.)]. Deliberating on this issue, jurisdictional High Court of Gujarat in the case of Commissioner of Central Excise and Customs v. M/s. Parth Poly Wooven Pvt. Limited & Others, vide order dated [illegible] in Tax Appeal Nos. 419, 321, 322, 430, 432, 433, [illegible] 1750 & 10780 of 2010 held that Cenvat credit admissibility with respect to outward freight from the place of removal is covered within the definition of Rule 2(l) of the Cenvat Credit Rules, 2004. Relevant paras 21, 22 and 23 are reproduced below :-

"21. We must, however, for our curiosity reconcile the expression "from the place of removal" occurring in the earlier part of the definition with words "up to the place of removal" used in inclusive part of the definition. Counsel for the assessees submitted that when a manufacturer transports his finished products from the factory without clearance to any other place, such as godown, warehouse etc. from where it would be ultimately removed, such service is covered in the expression "outward transportation up to the place of removal" since such place other than factory gate would be the place of removal. We do appreciate that this could be one of the areas of application of the expression "outward transportation up to the place of removal". We are unable to see whether this could be the sole reason for using such expression by the Legislature.

22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturer for transportation of finished goods from the place of removal up to the premises of the purchaser is covered within the definition of "input service" provided in Rule 2(l) of the Cenvat Credit Rules, 2004.

23. We answer the question accordingly in favour of the assessee and against the Revenue."

3.1 The Appellant relied upon a judgment of the Hon'ble High Court of Karnataka in the case of Ultratech Cement Ltd. reported as 2016 (44) STR 727 (Kar); that the decisions cited by them before the lower adjudicating authority have been discarded by him without proper appreciation; that the lower adjudicating authority has also not considered the orders of the jurisdictional Commissioner (Appeals), Rajkot given vide Order-in-Appeal No. BHV-EXCUS-000-APP-046-2015-16 dated 26.11.2015 and Order-in-Appeal No. BHV-EXCUS-000-APP-047-2015-16 dated 26.11.2015.

3.2 The Appellant contended that imposition of penalty on them is not proper since the issue was debatable and it involved interpretation of law and as per settled legal position penalty is not imposable when the question of interpretation of law is involved and relied upon the following case laws in this regard:-

(i)	Ambuja Cements Ltd.	2009 (14) STR 3 (P&H);
(ii)	KSB Pumps Ltd.	2011 (24) STR 642 (Bom.);
(iii)	CCE Vs. ABB Ltd.	2011 (23) STR 97 (Kar.);
(iv)	CCE Vs. Parth Poly Wooven P. Ltd.	2012 (25) STR 4 (Guj.);
(v)	Ultratech Cement Ltd.	2014 (35) STR 751 (Tri. Del);
(vi)	Ultratech Cement Ltd.	2014 (307) ELT 3 (Chhattisgarh);
(vii)	Birla Corporation Ltd.	2016 (45) STR 183 (Tri- All).

4. Personal hearing in the matter was attended by Shri R. R. Dave, Consultant on behalf of the Appellant wherein he reiterated the grounds of Appeal and submitted that Rule 10 of the Place of Provisions of Services Rules, 2012 says that in case of Goods Transport Agency service, location of person liable to pay service tax shall be the place of providing services; that in their cases, place of their warehouse wherefrom the goods are transported shall be place of removal; that Cenvat Credit of Service Tax on Goods Transport Agency upto buyer's premises is available to them as per judgment of the Hon'ble High Court of Gujarat in Tax Appeal No. 2 of 2016 in the case of CCE, Vadodara Vs. Gujarat Guardian Ltd. and a copy of that judgment was given; that in view of above, their all appeals need to be allowed. No one appeared from the Department despite personal hearing notices issued to the Commissionerate.

4.1 The appellant also submitted PH written submission and contended that as per Rule 10 of the Place of Provisions of Services Rules, 2012, should be destination of the goods and therefore, services of outward transportation continue till door step of buyers' under definition of input services as provided under Rule 2(l) of the Rules.

FINDINGS :-

5. I have carefully gone through the facts of the case, impugned order, grounds of appeal and submissions made by Appellant. The issue to be decided in the present appeals is that whether the impugned order passed by the adjudicating authority disallowing Cenvat credit of Service Tax paid on Outward transportation is correct, legal and proper or otherwise.

6. I find that definition of "input service" as provided under Rule 2(l) of Cenvat Credit Rules, 2004 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 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, 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;".

6.1 From the 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 also 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.

7. I find that the issue is no more *res integra* and the Hon'ble Supreme Court vide judgment dated 01.02.2018 in the case of Ultratech Cement Ltd reported as 2018-TIOL-43-SC-CX has held as under :

"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 Cenvat 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 customers 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(l) of the Rules, 2004 which reads as under:

"2(l) "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 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, 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;"

6. *It is an admitted position that the instant case does not fall in sub clause (i) and the issue is to be decided on the application of sub-clause (ii). 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(l) 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 Cenvat Credit. This aspect finally decided in Civil Appeal No. 1736 of 2014 (Commissioner of Central Excise, Belgaum v. M/s. Ramdurga Cements 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 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 upto to the extent credit of input tax paid gets closed 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 customer's premises, is not covered within the ambit of Rule 2(l)(i) of Rules, 2004. Whereas the word 'from' is the indicative 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(l) in the following manner:

> *"... The input service has been defined to mean any service used by the manufacturer whether directly or indirectly and also includes, interalia, services used in relation to inward transportation of inputs or capital goods and outward transportation upto the place of removal. The two clauses in the definition of 'input services' have come 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 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 laws' scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions.*
>
> *15. Credit availability is to be viewed by inputs. The credit covers duty paid on input materials as well as tax paid on services used in or in relation to the manufacture of the 'final product'. The final products, manufactured by the assessee in their 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 on account of duty would be contrary to the scheme of Cenvat Credit Rules. The main clause in the definition states that the service in regard to which credit of tax is sought, should be used by 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 ineligible credit. Once the clearances have taken place, the question of granting input service stage credit does not arise. Transportation is an entirely different activity from manufacture and this position remains settled by the judgment of Honorable Supreme*

Court in the case of Bombay Tyre International 1983 (14) ELT – 2002-TIOL-374-SC-CX-LB, Indian Oxygen Ltd. 1989 (36) ELT 772 SC = 2002-TIOL-88-SC-CX and Ambuja Cements 1997 (94) ELT 13 SC = 2002 TIOL 96 SC CX LB. The post removal transport of manufactured goods is not an input for the manufacturer. Similarly, in the case of M/s. Ultratech Cements Ltd. v. CCE, Bhatinda 2007 (8) STR 344 (Tri. – 2007-TIOL-429-CESTAT-All), 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."

d. *The aforesaid order of the Adjudicating Authority was upheld by the Commissioner (Appeals) principally on the ground that the Board in its Circular dated August 29, 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. a) regarding ownership of the goods till the delivery of the goods at the purchaser's door step; b) seller bearing the risk of or loss or damage to the goods during transit to the destination and; c) 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.*

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

(a) *In the first instance, it needs to be kept in mind that Board's Circular dated August 29, 2007 was issued to clarify/explain 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, Lucknow [2007 (6) STR 279 (Tri.-All.) = 2007-TIOL-429-CESTAT-All]. In this case, CESTAT has made the following observations:-

"The post sale 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 distinctively so as to bring about conflict to defeat the laws 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 Bhavnagar – 2008 (10) STR 475 (CESTAT-All), 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 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.

9.2 *In this connection, the phrase 'place of removal' needs determination duly 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 (t) of rule 2 of the said rules, if any words or expressions are used in the CENVAT Credit Rules, 2004 or in the Act, but not defined therein but are defined in*

the Central Excise Act, 1944 or the Finance Act, 1994, 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 property 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 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 Cement Ltd. and M/s. Ultratech Cement Ltd. Those judgments, obviously, dealt with unamended Rule 2(l) 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 service' 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 this 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(l) 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 service 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. In view of above legal position held by the Hon'ble Supreme Court, Cenvat Credit on GTA service availed by the appellant for outward transportation of

[illegible]

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, 2009 to September, 2011 and hence, Cenvat credit of Service Tax paid on OTA for outward transportation of goods cannot be allowed.

9. I find that the reliance placed upon the judgment of Hon'ble High Court of Gujarat in the case of M/s. Gujarat Gaurdian Ltd. supra is not relevant and has to be considered to be judgment passed per incuriam in the light of judgment of the Hon'ble Apex Court in the case of M/s. Ultratech Cement Ltd. supra. The argument of the Appellant regarding applicability of Rule 10 of the Place of Provisions of Services Rules, 2012 has also no relevance to the present case as the Hon'ble Supreme Court has delivered clear verdict that Cenvat credit of service tax paid on outward transportation of the goods is admissible upto the place of removal and not beyond and in this case, the place of removal is the factory gate of the appellant.

9.1 Regarding penalty imposed under Rule 15(1) of the Rules read with Section 11AC(1)(c) of the Act, I find that there is no case of suppression of fact with intent to evade payment of duty or fraudulently availment of Cenvat credit by the appellant as disputed Cenvat credit has been shown by them in their statutory returns filed with the Department. In my considered view, the issue involved in this case is of interpretation of the place of removal. 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. Vatsa Rajasthan Ventex Ltd. reported as 2015 (315) ELT 625 (SC) wherein in similar set of facts of the case penalty has been set aside holding as under :

> *"4. We may state here that the period involved is November 1996 to June 2001. Notice was issued in this behalf, as stated above, on 25-11-2002. The valuation of the excisable goods was to be in terms of Section 4 of the Central Excise Act, 1944. The said Section was amended w.e.f. the year 2000 which amendment came into effect on 1.7.2000. The legal position relating to valuation under the erstwhile Scheme which would prevail in view of the unamended provision as well as amended provision came up for consideration before this Court in Commissioner of Central Excise, Jaipur II v. Hyde Synthetic (India Ltd.) - 2011 (270) E.L.T. 322 (S.C.). This Court took the view, after analysing the provision of Section 4 which prevailed prior to the amendment, that the assessee would be entitled to claim abatement towards sales tax from the assessable value and sales tax component collected by the assessee namely VAT would not amount to sale price. This Court also held that this position changed after the amendment to Section 4 with effect from 1.7.2000 and in working the transaction value, the amount of VAT which was retained by the assessee, will be included as per the aforesaid decision, the assessee/respondent herein will not be liable to pay any excise duty on the sales tax amount which was retained under the Incentive Scheme up to 30th June, 2000.*

However, this component of value for which was returned by the customs after 1.7.2000 shall be includible in assessable value of the transaction value and duty thereon.

5. Insofar as the question of extended period of limitation is concerned, we have gone through the order of the Commissioner and are of the opinion that he has rightly held that the extended period of limitation as per the proviso of Section 11A(1) of the Central Excise Act, 1944 would be applicable in the given circumstances.

6. However, we are of the opinion that in a case like the present one, where the legal provision and interpretation of examination Section 4 and the exemption after the amendment in the said provision with effect from 1.7.2000 was in a fluid state, it would not be appropriate to levy the penalty.

7. In the aforesaid circumstances the present appeals are allowed in part by maintaining the Commissioner's Order-in-Original passed on 19.6.2003 insofar as it relates to the period from 1.3.2000 to 30.6.2000 but the penalty is set aside. However, there shall be no order as to costs."

[emphasis supplied]

10. In view of above, I reject the appeals on allowing the cenvat credit, but allow appeals for setting aside penalty imposed.

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

10.1 The appeals filed by the appellant are disposed off in above terms

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.
To.

M/s. Madhu Silica Pvt. Ltd. Unit , Plot No. 53,55 & 56/A – B, 183, 184 & 187, GIDC, Chitra. Bhavnagar.	मेसर्स्स मधु सिलिका प्राइवेट लिमिटेड, प्लॉट-II, GIDC, Chitra, भावनगर – ३६४ ००१.

Copy for information and necessary action to :-

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information.
2) The Commissioner, GST & Central Excise, Bhavnagar.
3) The Assistant Commissioner, GST & Central Excise, City Division, Bhavnagar.
4) Guard File.