OFFICE OF THE COMMISSIONER (APPEALS) CENTRAL GST & EXCISE,

[illegible] Rd. [illegible] Civil Lines, Ludhiana,

[illegible] Bank Complex, [illegible],

Ludhiana - 141001

Telephone No. [illegible] 2570934, 35

Email: [illegible]

ORDER-IN-APPEAL No.:

Appeal / File No.	Date of Order	Date
70/2016/DVB/2017	[illegible]	28.02.2017

[illegible]

BTV-EXCUS-000-APP-148-2018-19

Date of Order	15.10.2018	Date of Hearing	22.06.2018

Passed by Shri P. K. Mishra, Commissioner, CGST & Central Excise, Ludhiana

[illegible]

1. [illegible]
Address of the Appellant / Respondent

M/s Gaj Alloys Pvt. Ltd., Unit No. SIDC-310, SIDC Ramalwa Tal. Ghaziba, at Samastpur Dist. Samastpur

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

3. [illegible]
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of C.E. (A) / Section 86 of the Finance Act, 1994 to the appellate

4. [illegible]
The appeal to the Customs, Excise & Service Tax Appellate Tribunal under Section 35B of C.E. (A) / Section 86 of the Finance Act, 1994 to the appellate

(iii) [illegible]
The West regional bench of Customs, Excise & Service Tax Appellate Tribunal (WEZSTAT) at [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 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs.5000/-, 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 Asstt. 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/-.

(iv) [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/-.

(v) [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.

(vi) [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

For 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.

(C) केवल सरकार की क्षमतावान समझदा
Revision application by Government of India:
[illegible] Government [illegible] ₹10,000/- [illegible]
A revision application lies to the Central Government in the Government of India, [illegible] Deep Bhawan, Parliament Street, New Delhi [illegible] Rule 29 in the case of [illegible] copy of the [illegible] sub-section (1) of Section 35EE of the

(D) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] of goods, where the [illegible] or in a factory or in a warehouse [illegible] the [illegible] or in a 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

(E) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] copy of order passed by [illegible] Appellate Tribunal [illegible] Appeals) [illegible] Rule 3 [illegible]

(F) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] Appellate Tribunal [illegible] Rule 3 [illegible]

(G) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] Appellate Tribunal [illegible] Rule 3 [illegible]

(H) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] Appellate Tribunal [illegible] Rule 3 [illegible]

(I) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] Appellate Tribunal [illegible] Rule 3 [illegible]

(J) [illegible] ₹10,000/- [illegible] ₹1,00,000/- [illegible] ₹5,00,000/- [illegible]
In case of [illegible] Appellate Tribunal [illegible] Rule 3 [illegible]

:Order-In-Appeal:

The present appeal has been filed by M/s. Raj Alloys Pvt.Ltd. Plot No.1618-1620,Ramanbaw Taluka Dholka, Distt. Surendranagar (hereinafter to be referred as "the Appellant") against Order-in-Original No. 68/Demand/2018-19 dated 29.06.2017 (hereinafter to be referred as the "impugned order") passed by Assistant Commissioner Central Excise, Division Surendranagar (hereinafter to be referred as the "Adjudicating authority").

2. Briefly stated the facts of the case are that the Appellant are registered manufacturer manufacturing various excisable goods falling under First Schedule to the Central Excise Tariff Act,1985 and are availing the benefit of Cenvat Credit of duty paid on input/capital goods and that of service tax as well. On calling reasons to furnish the detailed information regarding availment and utilisation of Cenvat Credit of service tax paid on outward GTA of goods, the Appellant provided the details of credit of Service Tax availed on outward transport service for delivery of the goods to their buyers.

2.1. On scrutiny of these details provided by the Appellant it was noticed that the Appellant have availed credit of Service tax in respect of invoices as well as for outward transportation of the goods for the period from 2012-2013 to 2016-17.As credit for outward transportation beyond the place of removal is not available to the Appellant a Show Cause notice dated 19.01.2017 demanding the service tax of Rs.40,18,094/- under Section 74 of Cenvat Credit Rules 2004(herein after to be referred as CCR,2004) along with Interest under Rule 14 and penalty under Section 15 of CCR,2004was issued to the Appellant. The adjudicating authority confirmed the above demand along with interest and penalty vide impugned order Show Cause Notice dated 19.01.2017.

3. Aggrieved by the impugned order the Appellant have filed the present appeal. I find that the impugned order is dated 29.06.2017 and the Appellant have filed the Appeal on 29.08.2017 which is 17 days beyond the prescribed time limit as prescribed under Section 85 of Finance Act,1994. The Appellant vide their letter dated 18.09.2017 have requested for condonation of delay of 17 days which occurred due to non availability of their authorised person who looks after the litigation work relating to Central Excise and Service Tax.

4. The personal hearing in the matter was fixed on 29.01.2018 and on 27.02.2018 but neither the Appellant nor their Authorised representative appeared for hearing. The Appellant vide their letter dated 26.02.2018 requested to extend the date of personal hearing up to the month of Mar 2018. Accordingly another date of personal hearing was granted on 12.03.2018.

4.1. The Appellant vide their letter dated 12.03.2018 informed that as they have already submitted the facts of the case and grounds of appeal in appeal memorandum

and that they do not want to add anything further hence they do not want any personal hearing in the matter and the same may be decided on the facts and merits of the case.

4.2. As the request for condonation of delay seems genuine I condone the delay of 17 days as per power vested upon me vide Section 85(3) of Finance Act,1994. Hence there is no inordinate delay in filing the Appeal and the same has to be considered as filed in time.

4.3. Having condoned the delay I proceed to decide the case on merits. I have carefully gone through the Show Cause Notice dated 19.01.2017, impugned order, grounds of appeal along with case laws as submitted by the Appellant.

4.4. I observe that the Assessee have filed this appeal on the following grounds:-

> 1.that the Jurisdictional Range Superintendent has given a summons of service tax from the period 2011-12 to 2015-16 totalling Rs.48,16,917/- without even providing the basis on which alleged service tax has been calculated. In figures of demand of service tax is nothing but details provided by the Appellant also it be treated as Exhibit 'A'.
>
> 2. that the adjudicating authority totally overlooked the fact that the audit for the period 2011-12 to 2015-16 has already been conducted and no observation/objection was raised by the Audit team (Visit for the period 2011-12 to 2013-14 attached herewith as Exhibit 'B')
>
> 3. that the Adjudicating authority at para 20 of the OIO stated that the Appellant have not submitted any books of account, Contract, LR. or any other document by which it could be examined and established that the clearances were on FOR basis. In this regard it is submitted that since the audit for the period 2011-12 to 2015-16 has already been conducted and nothing objectionable regarding availment and utilization of Service tax credit on outward GTA has been taken by the Audit team and no reversal/procedural para was taken by the Audit team. Therefore, there was no further need to submit any documentary evidence regarding the same.
>
> Pursuant to said audit, we claim that clearances were made on FOR basis we herewith submit sample copies of invoices in which it is clearly mentioned at sale on FOR basis alongwith copies of LR's submitted as EXHIBIT 'C'.
>
> Adjudicating authority vide Para No 27 and 28 of the said OIO quoted Circular No 97/8/2007 ST dated 23.08.2007 address the issues in Service Tax including those relating to availment and utilization of Cenvat Credit. Para 8 Circular no 97/8/2007 deals with the issue Up to what stage a manufacturer consignor can take credit on the service tax paid on goods transported by road? Commenting on the said issue, Board has clarified that this issue has been examined in great detail by the CESTAT in the case of M/s Gujarat Ambuja Cements Ltd. V. CCE, Ludhiana 2005 (181) E.L.T. 22 (Tri.-LB). Similarly reference of judgement in the case of M/s. Ultratech Cement Ltd. V. CCE, Bhavnagar 2007 TIOL 429 CESTAT AHM, is also made in the said circular. Case wise brief review in both the aforesaid judgements explain the scope of 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 transportation of goods up to the place of removal and not beyond that for this find that there is above clarification would be that the scope of outward transportation is comprised the movement of the goods only upto the place of removal. Further also find clarification that for a manufacturer / consignor, the

eligibility and refund of service tax paid on the taxable service namely renewal of exclusive goods vends deposit on the plea of unjust enrichment as per definition given under section 11B of the Central Excise Act, 1944 applicable to Central Excise Rules, 2004 by virtue of rule 14 of CENVAT Credit Rules, 2004, is attracted in the instant case where the appellant/assessee in their claim that the sale has taken place at the destination port because in terms of the said agreement the ownership of goods and the property in goods and the property in goods remained with the seller at the point of delivery of the goods in acceptable condition to the purchaser at the destination port and therefore no such flow of damage to the goods during transit to destination and that the freight charges were an integral part of the price of the goods duly evidenced thereby to not that it is clarified under the said rule that <u>the 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</u> for 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". In other words the burden is on the appellant to establish that the transfer of the property in goods occurred at the place removal. Appellant has already given above that we are submitting herewith documents to prove the same.

Further Circular dated 30.10.2014 at para no. 5 said as under:

It may be noted that there are many such bilateral sales agreements where property in goods is transferred from the seller to the buyer in the sale of Goods Act, 1930 which has been referred at paragraph 10 of the above said circular (Case [5], [6] reproduced below for ready reference):-

"10. Now we are to consider the facts of the present case as to from and when did the transfer of possession of the goods to the buyer occur so as to pass the property in the goods, as per the terms of the contract of the parties as shown by the expression or intent of the parties as alleged by the assessee. In this connection it is necessary to refer to certain provisions of the Sale of Goods Act, 1930 namely Section 19 of the said Act of Goods (in particular sub-section (1) thereof) for the use of words or expressions given the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Intention of parties is to be ascertained with reference to the terms of the contract, the conduct of the parties and the circumstances of the case. Under a different statutory regime, the rules contained in Section 19 to 22 are persuasive for ascertaining the intention of 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. Subsection (2) of Section 20 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 named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of

[illegible] the document is more or less ordinarily understood the goods to the purchaser."

From the above only thing to establish is that there should be an intention either of the buyer or seller that the delivery of the goods should be taken place at door step of the buyer and also there is assent or order of the party for the same. Further such assent may be expressed or implied and may be given either before or after the appropriation is made.

In the present case table is on the basis and it can very well be seen from the invoice submitted herewith that there is an intention of the buyer and verbal assent was that delivery of goods should be taken place at the door step of the buyer. Further Lorry Receipt is also submitted herewith to prove that delivery has actually taken place at the door step of the buyer.

6. Further it has been held by the Appellate authority that for taking the credit conditions of both the basic Central Excise Law and Service Tax should be satisfied simultaneously.

In this regard Appellant humbly submit that the above said decision cannot be applied but the Appellant have satisfied all the conditions stipulated and credit can very well be allowed.

8. The Ld Adjudicating authority relied on the case law of Hon'ble High Court of Gujarat in [illegible] submitted by the revenue but I find that the same is not applicable in the present case.

In this regard it is to state that the said case law has recently been distinguished by the Hon'ble High Court of Gujarat in the case of Commissioner of Central Excise & Service Tax Surat-I Vs United Phosphorus Ltd reported at 2018(4) S.T.R. 762 (Tri.-Ahd.) and Ors. as under.

"11. We must, however, record our inability to accept the expression "from the place of removal" occurring in the opening part of the definition with words "to the place of removal" used in inclusive part of the definition. Counsel for the assessee 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 could be subsequently cleared, such service is covered in the expression "outward transportation up to the place of removal" since such place other than factory can only be the place of removal. We do appreciate that the circumstance of the case of the application of the definition between transportation up to the place of removal. We are unable to see whether this could be the circumstance for assigning the expression to the definition.

22. So that our way 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."

7. In support of our submissions we only quote the following judgements.

- 2008 (12) S.T.R. 481 (Tri.-Ahmd.) CCE Ahmedabad Vs Core Health Care Systems Cenvat Credit of Service Tax-Held in favour of Assessee.
- 2013(29)S.T.R.557 (Tri.-Ahmd)-Kondo Fabrics Pvt Ltd Vs C.C.E.
- 2013 (32)S.T.R. 276 (Tri.-Ahmd.)-Daman Polytex Pvt Ltd Vs CCE-Vapi

> 2010(250) E.L.T. 372 (Tri.-Chan.)-Maharaja Re Development ... Ltd.Vs CCE.

5. The case at hand is to decide whether the Cenvat credit availed on the outward Goods Transport Agency service beyond the place of removal by the Appellant is available to them or otherwise and the interest along with penal action as proposed under Rule 15(2) of CCR,2004 read with Section 11AC of Central Excise Act 1944, is sustainable in the eye of law or otherwise.

5.1. I observe that the appellant in their written submission argued that the Adjudicating authority at para 20 of the impugned order held that the Appellant have not submitted any copies of invoice, Contract, LR or any other document by which it can be examined and established that the clearances were on FOR basis. The Appellant further submitted that since the audit for the period 2011-12 to 2013-14 has already been conducted and nothing objectionable regarding availment and utilization of Cenvat Credit on outward GTA has been taken by the Audit team and no revenue /procedural para was issued by the Audit team hence there is no further need to submit any documentary evidence regarding the same.

5.2. The Appellant further submitted that the clearances were made on FOR basis and that they submit sample copies of invoices in which it is clearly mentioned that sale is on FOR basis also copies of L.R. is submitted as EXHIBIT 'C'. But I find that the Appellant have not submitted any copies of invoice, LR or any other document proof by which it can be established that the goods supplied to their buyers are on Free on Road (FOR) basis.

5.3. The contention of the Appellant that since Audit has been conducted for the period from 2011-12 to 2013-14 there is no further need to submit any documentary evidence regarding the same is baseless and void out the backing of any legal force. The Department is duty bound to carry out as many pre-emptive moves as it could to safeguard the Government revenue. The Appellant cannot deny the submission/production of required documents during scrutiny/investigation of the case.

6. I find that the crux of the issue is to examine whether the relevant transportation of goods fall within the definition of 'input service' as defined by Rule 2(l) of CCR,2004 and the input service tax credit of such outward GTA service is available to the Appellant or otherwise.

6.1. The relevant portion of the amended definition of 'input Service' w.e.f. April-2011 is as follows:

> "(l) "input service" means any service,
>
> (i) used by a provider of taxable service for providing an output service; or
>
> (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,

and includes services used in relation to 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, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excludes-

(A) specified in sub-clauses (p), (zn), (zzl), (zzm), (zzq), (zzzh) and clause (zzzza) of clause (105) of section 65 of the Finance Act (hereinafter referred as specified services), in so far as they are used for- (a) construction of a building or a civil structure or a part thereof; or (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) specified in sub-clauses (d), (o), (zo) and (zzzzj) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;"; for clause (l), the following shall be substituted with effect from the 1st day of March, 2011.

6.2. As per above definition of input service it is used and utilised for providing an output service by a provider of taxable service and in the case of a manufacturer it is used by a manufacturer whether directly or indirectly in or in relation to the manufacture of final products and also used in the clearance of final products upto the place of removal. In this scenario the inward transportation is input service for the appellant through which raw material/inputs/capital goods are brought inside the factory premises and the Credit of service tax paid on inward transportation is available to the Appellant. In case the finished goods are cleared from the depot of the Appellant then the Cenvat credit of outward transportation upto the depot which is the place of removal is available to the Appellant.

6.3. In the case I observe that at places more than one the Appellant have stated that they are clearing the goods on FOR basis and the cost of transportation upto the place of removal is included in the value of the goods. In this aspect I find that the contention of the Appellant is without any documentary evidence and force of law. Firstly the Appellant could not provide copy of any agreement through which it can be ascertained that these goods are inclusive of the transportation charges upto the place of delivery. Also the Appellant could not produce the copies of such invoices which could substantiate their claim.

6.4. In this context the term 'place of removal' attains vital significance in deciding the eligibility of outward transportation service as 'input service'. The term 'place of removal' was initially not defined under CCR 2004 but the term 'place of removal' has been inserted vide Notification No.21/2014 CE (NT) dated 11.07.2014 under Rule 2(qa) of CCR 2004.However in view of Rule2(t) of CCR 2004,the said term defined

under Section 4(3) (c) of Central Excise Act 1944 is to be considered for examining the issue at hand.

6.5. 'Place of removal' is the place or premises from where the excisable goods, after their clearance from the place of production, are cleared on sale and the transfer of property in goods is transferred from supplier to the buyer. Thus, 'place of removal', in a given case becomes a crucial determinative factor for the purpose of valuation. In the present context, if it is found that the Appellant and their buyer in their contract itself has agreed to supply the goods at the point of delivery and the transportation charges are inclusive in the value of goods and the same is reflected in the invoices then it can be inferred that the goods supplied by the Appellant are on F.O.R. basis.

6.6. On the other hand, if Appellant do not have any written agreement and the prices of the goods are not inclusive of the transportation charges then the outward transportation service cannot be considered as 'input service' used in or in relation to the manufacture of the goods and the Cenvat credit availed on the strength of these documents is not available to the appellant. Generally speaking all the sales are made at the factory gate. Some buyers arrange for the transportation of the goods as well as for transit insurance themselves but some require the seller to arrange for transportation and transit insurance, in latter case the assessee recovers the freight charges and 'insurance charges' from the buyers. Again, in the context of the present case, what is to be determined is as to whether the 'place of removal' was the factory gate of the Appellant or it was the premises of the purchaser at the time of delivery of those goods.

6.7. I further find that Circular No.988/12/2014-CX dated 20.10.2014 has very aptly defined the place of removal which is detrimental in deciding the 'outward transportation' as 'input service' or otherwise.

> 2: The second issue raised is regarding determination of place of removal. In this regard there are two circulars of the Board namely 37B order no 59/1/2003 dt 3-3-2003 and circular no 97/8/2007 dt 23.08.2007. The relevant paragraphs of these two circulars are reproduced below for ease of reference -
>
> (i) Circular dt 3-3-2003. "Thus, it would be essential in each case of removal of excisable goods to determine the point of 'Sale'. [illegible] the terms (or conditions) of contract of the sale. 6. [illegible]"
>
> (ii) Circular dt 23-8-2007. ..... 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."
>
> 3. The operative part of the both circulars cited above are in the same direction and are understood. They consistently 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 in property of 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

Hon'ble Tribunal in case of Associated Stone Ind. (I) Pvt. Ltd. Commissioner of Central Excise, New Delhi [2005 (182) ELT 131 (Tri. Del.)]. This principle was upheld by the Hon'ble Supreme Court in case of M/s. Gurmeet Lal Kapur v. CCE, New Delhi [2014 (304) ELT 3 (SC)].

6 I have also come to notice of the Board, wherein the facts of the claim of the manufacturer regarding freight charges on which the GTA has charged the place of removal was decided without ascertaining the place where transfer of property in goods had taken place. This has led to confusion for the Boards circular and is also contrary to the legal position as discussed.

9. It may be noted that there are many valid decisions regarding the place when property in goods is transferred from the buyer in the matter of the Sale of Goods Act, 1930 which has been referred and brought in the Constitutional Bench Decision by Hon'ble Supreme Court in case of Hindustan

"37. We are also to consider the issue of the present case as to 'did not taken' at the transfer of possession of the goods to the buyer or the transfer of the property to the goods passed to the buyer. In the factory gate as claimed by the appellant or in the place of the buyer as allowed by the assessee? In this connection we have to refer to the provisions of the Sale of Goods Act, 1930. Section 19 of the Sale of Goods Act 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. Such intention of the parties are to be ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case. Other rules for ascertaining intention of the parties as to time at which the property in the goods is to pass to the buyer are laid down in Section 20 to 24 of the Act. Section 20 provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Section 23 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 passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made. Subsection (2) of Section 23 provides that where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

7. It is noticeable that the place of removal gets to be ascertained in term of provisions of Central Excise Act, 1944 read with provisions of the rule of Service Tax, i.e. Payment of Transport charges on which Service Tax is charged of inclusion or exclusion of the value and the relevant considerations to ascertain the place of removal. The place where sale has taken place or when the property in goods passed from the seller to the buyer is the relevant consideration to determine the place of removal.

6.6. On careful reading of above Circular following points emerge:

1. The operative part of the instructions in both the Board circulars namely 37B Order No 55/1/2003 dt 3-6-2003 and Circular No 97/8/2007 dt 23.8.2007 give similar directions. 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 in property of goods takes place from the seller to the buyer. This can be ascertained as per the provisions of the Sale of Goods Act, 1930

2. 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 payment 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."

3. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale", As this will depend on the terms /or conditions of contract of the sale.

6.8. Keeping above legal aspect in mind that the outward transportation service can be defined as 'input service and credit can be availed only upto the place of removal of the goods, that is factory gate, in the present case and not beyond the place of removal As per Para 8.2 of Board Circular Dated 23.08.2007 it has been very clearly set out that the manufacturer or consignor can take credit of outward transportation service upto the

place of delivery and retain ownership of the goods till the point of sale if such provision exists in the sale/purchase agreement and invoices have been prepared accordingly.

7. I find that the Appellant have relied upon case law of CCE Ahmedabad Vs Elite Bar Bin Systems in which credit of outward transportation was allowed to the assessee. But I find that the facts and circumstances of the present case are different from the case relied upon by the Appellant. In the case under reference the appeal was filed by the Revenue against the decision of the Commissioner (Appeals) who has held that credit of Service tax paid for outward freight for the export of goods and air ticket service charges are admissible. In this case there is no transportation of export goods nor is there any Cenvat credit of service tax paid on air tickets. Hence the case law relied upon by the Appellant is not applicable in this case.

7.1. I find that the Appellant have also relied upon case law of Kanoi Kaanos Pvt. Ltd. Vs CCE. The issue involved in this case is whether the appellants are entitled to take credit of Service Tax paid on outward transportation of their final products from the factory. Larger Bench in case of M/s ABB Ltd. v. CCE - 2009 (15) S.T.R. 20 (Tribunal-LB) = 2009 (52) RLT 665 (CESTAT-LB) has held that outward transportation of the goods from the place of removal is input service and the same is covered by wide definition relating to the business. In this case also the facts and circumstances of the present case are different from the case relied upon by the Appellant. As the wet aspect of outward transportation upto the factory which is place of removal as per Section 4(3)(c) of Central Excise Act 1944 is available to the assessee. But in the present case the Appellant is seeking Cenvat credit on the outward transportation which is for the transportation of the goods beyond the place of removal.

7.2. The Appellant have also relied upon case law of Mahindra Sar Transportation Pvt Ltd Vs CCE. This appeal involved two issues. The first issue was whether the Cenvat credit taken and availed for outward transportation is admissible or not and the second issue was whether the Cenvat credit on return goods availed by the appellants is recoverable and whether the appellant is able to penalty or not. In this case also the facts and circumstances of the present case are different from the case relied upon by the Appellant. As Cenvat credit of outward transportation upto the factory gate which is place of removal as per Section 4(3) (c) of Central Excise Act, 1944 is available to the assessee. But in the present case the Appellant is seeking Cenvat credit on the outward transportation which is for the transportation of the goods beyond the place of removal. The Tribunal allowed these appeals on the basis of ABB Ltd Vs. CCE reported as 2009 (15) S.T.R. 20 (Tribunal-LB) – 2009 (52) RLT 665 (CESTAT-Larger Bench) which has been set aside by Hon'ble High Court of Calcutta in the case of CCE,Kolkata-IV Vs. Vesuvious India Ltd.

7.3. The Appellant also relied upon the case law of M/s Damon Polyfab Vs CCE,VAPI. I find that issue involved in this case was whether the appellants are entitled to take credit on Service Tax paid on outward transportation of their final products from

their factory to the Customer's premises. As the issue stood settled by the Larger Bench decision in the case of ABB Limited v. CCE, reported as 2009 (15) S.T.R. 22 (Tribunal-LB) – 2009 (92) RLT 635 (CESTAT Larger Bench), has held that outward transportation of the goods from the place of removal is input service as the same is covered by words "activities relating to business". But in this case the period involved was before amendment vide Notification No. 10/2008-C.E. (N.T.), dated 1-3-2008 admittedly effective from 1-4-2008. After amendment vide said notification the credit of outward transportation beyond the place of removal is not available to the assessee. In Tribunal allowed these appeals on the basis of ABB Limited v. CCE, reported as 2009 (15) S.T.R. 22 (Tribunal-LB) = 2009 (92) RLT 635 (CESTAT-Larger Bench) which has been set aside by Hon'ble High Court at Calcutta in the case of CCE, Kolkata IV Vs Vesuvious India Ltd.

7.4. I do not agree with the findings of Adjudicating authority that the Appellant were required to demonstrate the terms and conditions of contract or agreement of the sale to substantiate their claim that the goods were supplied on FOR basis and the sale and transfer of property in goods has taken place at other than factory gate and that the sale was according to the agreement/contract reached with the buyers. But despite the opportunity provided to the Appellant the Appellant did not provide any documentary evidence by which it could be established that the sale was as per agreement reached with the buyers and outward transportation in their case amounts to input service.

8. From the para supra it appears that the Appellant has want to insisted the adjudicating/Appellate authorities by stating time and again that the supply of goods is as per the sales contract/agreement and at the same time do not want to produce the copies of L.R./invoices which can show that there is an agreement with the buyer to supply/deliver the goods upto the premises of the buyer and that the value of such transportation has already been included in the value of goods i.e. sale price.

8.1. I find that the Appellant could not furnish the copies of agreement/contract, signed with their buyer, before Adjudicating authority. Also while submitting the grounds of appeal and written submission though the Appellant have mentioned that they are submitting the copies of L.R. as Exhibit 'C' to substantiate their claim that they have supplied the goods on F.O.R. basis, but I do not find any copies of L.R. or invoice which can prove that the goods supplied upto the place of delivery are as per contract and that accordingly the Cenvat Credit on outward transportation beyond the factory gate is admissible to them.

8.2. In this context I rely upon the case law of Commissioner Of Central Excise, Pune-III Versus Vesuvius India Ltd. in which the issue pertaining to entitlement and eligibility of Cenvat Credit on outward transportation beyond the place of removal has been settled. In these Appeals the issue have revolved around the interpretation that has to be given to input service which is defined in Rule 2(l) of the Cenvat Credit Rules, 2004. As all these appeals related to a period prior to 1-4-2008 and the aforesaid Rule was amended w.e.f. 1-4-2008 the Hon'ble Apex Court dealt with the unamended Rule.

8.3. The Hon'ble Supreme Court while dismissing the Appeal filed by the department for the period related to prior to the amendment of Rule 2(l) of the Cenvat Credit Rules, 2004 at para 11 of the Judgment held as under:-

> [illegible] appeal from the [illegible] which has been carried out by the rule making authority vide [illegible] Notification No. 102/2008-C.E. (N.T.) dated 1.8.2008 whereby the definition of 'input service' has been amended. As per the amended definition, the Cenvat credit is available only upto the place of removal whereas as per the unamended definition the Cenvat credit was available upto the place of export. In the present case, the [illegible] has been held by the Hon'ble Tribunal in the following manner:
>
> "[illegible] the appellant has sought to avail the credit on the services received by them for the period prior to the subsequent amendment by Notification 102/2008-C.E. (N.T.) dated 1.8.2008 whereby the said definition was amended. Therefore, the appellant is entitled for the credit on the services received by them for the period prior to the amendment dated 1.8.2008 and the same cannot be denied to the appellant merely by virtue of the amendment."

8.4. In the above judgment it has been made amply clear that after the amendment dated 1.4.2006, vide Notification No. 10/2006-C.E. (N.T.), dated 1.3.2006 the Cenvat credit on outward transportation is available only upto the 'place of removal' which could be either factory gate or Depot or Godown. The Cenvat Credit for outward transportation service beyond the place of removal cannot be termed as 'input service' under Rule 2(l) of the Cenvat Credit Rules, 2004 accordingly the Cenvat credit taken on the service is not available to the assessee.

8.5. As the Appellant willfully suppressed the facts of wrongful availment and utilization of Cenvat Credit I am of the opinion that the extended period is rightly invokable in this case. The interest and penalty as proposed under Show Cause Notice is also liable upon the Appellant.

9. Keeping in mind the foregoing discussion and authoritative judicial pronouncements, I am of the view that the Appeal filed by the Appellant is devoid of merits and is unlikely to succeed.

10. In view of the above discussion and findings I reject the appeal filed by the Appellant and uphold the impugned order in toto.

(Dhirendra Vasave)
Commissioner (Appeals)
Commissioner
GST & Central Excise, Kutch
Gandhidham

To

M/s. Gaj Alloys Pvt Ltd
Plot No.306 /1/1,
GIDC,Bamanbore
Taluka -Chotila,
Distt-Surendranagar.

Copy to:-
1. The Chief Commissioner, CGST & C.Ex, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, CGST & C.Ex, Bhavnagar.
3. Assistant Commissioner, Central Excise Division Surendranagar.
4. The Superintendent, Central Excise A.R.-III, Surendranagar.
5. Guard File.