[illegible]
OFFICE OF THE COMMISSIONER (APPEALS), CGST & CENTRAL EXCISE,

[illegible] Race Course Ring Road,

[illegible]

Tele Fax No. [illegible]

Email: [illegible]

[illegible]

क	[illegible] / Appeal / File No.	[illegible] O.I.O. No.	[illegible] / Date
	V2/201 & 202/BVR/2017	65/[illegible]/Demand/2016-17	30.05.2017

ख [illegible] (Order-In-Appeal No.):

BHV-EXCUS-000-APP-153-TO-154-2018-19

[illegible] / Date of Order:	27.06.2018	[illegible] / Date of issue:	02.07.2018

Passed by Shri [illegible], Commissioner, CGST & Central Excise, Kutch(Gandhidham)

[illegible]

In pursuance to Board's Notification No. [illegible] dated [illegible] read with Board's Order No. [illegible] dated [illegible], Shri [illegible], Commissioner, CGST & Central Excise, Kutch (Gandhidham) 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 85 of the Finance Act, 1994.

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham / Bhavnagar :

घ [illegible] / Name & Address of the Appellants & Respondent :-

1. M/s RKS Industries P. Ltd. Survey No. [illegible], [illegible] Road Taluka Sihor, Dist : Bhavnagar

2. Shri [illegible] Bansal, Director of M/s RKS Industries P. Ltd.

[illegible]

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

(A) [illegible]

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, [illegible] Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above.

(iii) [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form [illegible] as prescribed under Rule [illegible] [illegible] shall be accompanied against [illegible] which at least should be accompanied by [illegible] Rs.5,000/- [illegible] Rs.10,000/- where amount of duty / demand / interest / penalty / refund is upto [illegible] Lac [illegible] 50 Lac and above [illegible] 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 [illegible] 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.

(iii) [illegible]

[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.

(A) भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India:

(1) केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली 110001 को की जानी चाहिए।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भंडागार या अन्य कारखाने में या फिर किसी एक भंडागार से दूसरे भंडागार में माल ले जाते हुए मार्ग में, या किसी भंडागार या भंडार में चाहे वह किसी कारखाने में या किसी भंडागार में हो माल की प्रक्रिया के दौरान हुई हो।

In case of any loss of goods, where the loss occur 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.

(ii) भारत के बाहर किसी राष्ट्र या प्रदेश को निर्यात किये गये माल पर या माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या प्रदेश को निर्यात की गई है।

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया हो।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अंतिम उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए हैं।

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(1) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में जो कि केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के भीतर की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो-दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न 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 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies 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 Account.

(2) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो 1000/- का भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। In case, if the order covers various numbers of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(4) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना 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. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(5) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(6) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं।

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER -IN –APPEAL::

BRIEF FACTS AND GROUNDS OF APPEAL

1.1 The subject appeals have been preferred by M/s. RSK Industries Pvt. Ltd., Survey No. 171, Gokanghali Road, Tal. Sihor, Dist. Bhavnagar (hereinafter referred to as "the Appellant 1") and Shri. Rakesh Bansal, Director of M/s. RSK Industries Pvt. Ltd., Survey No. 171, Gokanghali Road, Ta. Sihor, Dist. Bhavnagar (hereinafter referred to as "the Appellant 2"); against the Order in Original No. 08/Excise/Demand/2016-17, dtd 30.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise Division Surendranagar (hereinafter referred to as "the Adjudicating authority"). The Appellant 1 are holding Central Excise Registration No. AAECR7069LEM001 and they are engaged in manufacturing of various excisable goods viz. MS Ingot/Billets, TMT Bars, Round Bars, Square Bars, Flat etc. They are also availing the benefits of Cenvat credit as provided in the Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR, 2004").

1.2. During the audit of the records of the Appellant 1, it was noticed that the Appellant 1 had wrongly availed the Cenvat Credit on Angles, Channels, Beam, MS Bars, Plywood, Cement and Nuts, Bolts etc. during the period from 16.01.2011 to 19.05.2013, declaring the same as "inputs" in manufacture of M.S. Ingots/Billets. Further the audit also noticed that the Appellant 1 had removed their finished goods without payment of duty. Therefore a search operation was carried out at the factory premises as well as at the office premises of Appellant 1, situated at Sihor and Bhavnagar respectively on 08.01.2016 and relevant documents were seized under Panchnamas dtd. 08.01.2016.

1.3. Subsequent to this, a Statement of Appellant 2 was recorded on 08.01.2016, wherein he inter alia stated that he is Director of the Appellant 1 company and looked after entire day to day work of the Appellant 1 including purchase of raw material, Sales of finished goods and all financial transactions; that he was shown Daily Stock Register maintained up to 07.01.2016 wherein the finished stock of M.S. Billets was shown as 527.470 MT, whereas on physical verification, the actual stock of M.S. Billets was found only 550 MT. He therefore agreed with the shortage and stated that there may be some calculation mistake after manufacturing of Billets and as such the shortage was noticed; that he was shown Form-IV register maintained up to 07.01.2016 wherein the stock of M.S. Scrap (RM)/plate was found 948.310 MT, whereas on physical verification, the actual stock of M.S. Scrap (RM)/plate etc. was found only 900 MT; that he also agreed with the shortage and stated that in the manufacturing process of Round/TMT Bars etc., that while issuing plates in the manufacturing process, they do not weigh the plates and calculations are always on estimate basis; therefore the shortage of raw material might have occurred and there may be extra burning loss. That found shortage of raw material of 48.310 MT of MS Scrap; that they were ready to reverse the Cenvat Credit on shortage of raw material and also ready to pay the Central Excise duty on the shortage of 17.470 MT M.S. Billets to co-operate the department.

1.4. Further, during the investigation it was found that the Appellant 1 had wrongly availed Cenvat Credit of Rs. 11,27,221/- on MS Angle, Channels, Beams, MS Flat Bars and Pipes of Iron & Steel products etc. which they had used in

construction of platform/foundation for installation of Concast plant and platform of Rolling Mill.

1.5. Accordingly, Appellant 1 had intimated vide letter dated 11.01.2013 that they had reversed the Cenvat Credit of Rs. 12.33 Lacs, as per the following details:

Voucher No	Amount reversed of Cenvat Credit	Particulars
538, dtd.30.11.2010	11,07,452	Cenvat credit availed on MS Angle, Channels etc.
563 dtd.09.01.2011	56,060	Shortage of 17.470 MTs of MS Billets
	1,20,000	Shortage of 42.310 MT of MS Scrap (RM)/Pig
TOTAL	12,83,198	

1.6. Whereas further Statement of the Appellant 2 was recorded on 05.02.2013, wherein he inter alia stated that they have availed Cenvat Credit on Angles, Channels, Beams, MS Flat Bars & Pipes of Iron & Steel and admitted that MS Bars cut into small pieces and put in the mould tube to pull Billets and used in fabrication of Billets in Concast. For Billets manufacturing and Pieces of Iron & Steel Scraps generated in Alang from Ship Breaking were used in manufacture of Ingots/Billets by melting in the furnace while others Scraps that he produced copy of invoices related to Plywood, Nuts and Bolts, Cement used in the factory premises in construction of shed of plant/foundation for installation of Concast plant and rolling mill, on which they had availed the Cenvat Credit and stated that they had used Plywood in making of Panel Room for Concast machine; that they were not aware about the provisions of Central Excise Law and agreed to reverse the Cenvat Credit availed by them to co-operate the department.

1.7. Subsequent to the above, a show cause notice dtd.30.07.2015 was issued to the Appellant 1, wherein it was required to show cause as to why:

(a) Central Excise Duty/CENVAT of Rs.12,82,598/- which was not paid or short paid or not reversed amount of Cenvat credit or non-payment of duty should not be recovered under proviso to sub-section (1) of section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the CEA 1944") read with Rule 14 of the CCR, 2004;

(b) Interest at the appropriate rate should not be recovered under the Provisions of Section 11AA of the said Act, and

(c) Penalty should not be imposed under the provisions of Section 11AC of the said Act.

A show cause notice dtd.09.02.2016 was also issued to the Appellant 2, wherein it was required to show cause as to why penalty should not be imposed upon Appellant 2 under Rule 26 of the Central Excise Rules 2002 (herein after refer to as "the CER, 2002").

1.8. The Appellant 1 and the Appellant 2 both filed their written reply dtd.10.02.2017 in reply to the SCN dtd.09.02.2016, explaining that

(a) The Appellant 1 and the Appellant 2 were not aware about the provisions of the CCR, 2004 in respect of the availment of Cenvat Credit on the MS Angles, Channels, etc.,

(b) They had reversed/paid the amount of Rs.12,83,188/- immediately on 09.01.2015, prior to issue of SCN dtd.09.02.2016;

(c) The shortage of 17.470 MT of MS Billets was ascertained only on the approximate basis and not on the basis of physical weighment. Therefore, the so called shortage was not genuine one;

(d) The above shortages were forcefully got admitted by the Central Excise Officer,

(e) The department had failed to establish the illicit receipt of raw material to sustain the shortage of the said 17.470 MT of finished products i.e. MS Billets,

(f) The daily stock account of the final products is always being maintained on approximate basis by such industries engaged in manufacturing of the Iron & Steel products, like the Unit of the Appellant 1. Therefore, the so called shortages found by the department was not genuine and accordingly submitted that the department had wrongly and without authority of law had proposed to demand to the extent of Rs. 55,888/-, which was however, subsequently paid by the Appellant 1 under protest;

(g) The raw materials of Iron & Steel products are always being taken in to use on approximate basis. The method of weighing of such raw materials which was lying in balance as 343.310 MT (from the raw material register maintained up to 07.01.2015). The stock of raw material was in huge quantity. Therefore, the department has failed to establish on record how they have found shortage of 43.310 MT of raw material. Therefore, the allegation of the so called shortage was not genuine one looking to the practice being followed by such manufacturer of Iron & Steel products like the Appellant. However, the Appellant 1 paid the proposed demand of Rs. 1,23,125/- with regard to the shortage of the said raw material;

(h) Such goods (though falling under the purview of Rule 2(a)(A)(iii) of the CCR, 2004), which have not been defined clearly as capital goods will be eligible as 'Input'. The definition of "Input" excludes "Capital Goods". Only those goods defined as "Capital Goods" under the CCR, 2004 will be excluded. Other Capital Goods, if used within the factory, should be eligible for the Cenvat credit benefits as "Inputs". In the present case, the Appellant 2 had specifically stated that wood and pipes of

for 96 Steel products had been used as input or in relation to manufacturing of the final products.

With the submission mainly on the aforesaid aspects, the Appellant 1 and Appellant 2 requested to quash the proceedings initiated by the SCN dtd.05.02.2016. The same arguments were also made during the personal hearing held on 10.02.2017.

1.9. The Adjudicating authority vide the impugned order confirmed the Central Excise duty/wrongly availed Cenvat Credit totally amounting to Rs. 13,02,838/-under Section 11A(10) of the CEA, 1944 read with Rule 14(1)(ii) of the CCR, 2001 along with liability of interest as applicable rate thereon in terms of Section 11A of the CEA, 1944, as well as imposed penalty of Rs. 13,02,838/- upon the Appellant 1 under Section 11AC(1)(c) of the CEA, 1944 and also imposed penalty of Rs. 13,02,838/- upon Appellant 2 under Rule 26(1) of the CCR, 2002.

1.10 Being aggrieved by the impugned order, the Appellant 1 and Appellant 2 had filed the present appeals mainly contending the following common grounds.

(a) The impugned order has been passed on assumptions and presumptions, so far as the shortage in stock of finished products and raw materials are concerned;

(b) The Appellant 1 had started manufacturing of M.S. Ingots by use of the Capital Goods viz. "Furnace" with effect from 07.12.2010. Before 07.12.2010, the Appellant 1 had purchased and used the goods including Cement, which were used in construction of shed and used in other setting up of the civil constructions. Whereas, the disputed Cenvatable goods were purchased/procured by the Appellant under various Central Excise Invoices pertaining to the period after the date of 07.12.2010.

(c) The Appellant 1 has installed another "Concast Unit" for manufacturing of M.S. Billets in the month of November, 2011. The said "Concast Unit" has been completely erected by using the said disputed goods. The Appellant 2 had clearly stated in his statement dated 05.02.2016 that the invoices relating to erection of Concast Unit for smooth manufacturing of M.S. Billets and also used in making platform for Hot Re-Rolling Unit, which was started from the month of January, 2013 for manufacturing of TMT Bars, Round Bars etc. The M.S. Plates were used for making 'Platform' for smooth processing of Hot Re-Rolled products from one to another Rolling Stands to get the required angle of finished goods i.e. TMT Bars/Round Bars etc. Therefore, the Appellant 1 has clearly established that the said goods had been used as "Capital Goods" which had been made from the disputed goods within the factory premises read with the provisions of Notification No. 67/95-CE.

(d) For erecting "Concast Unit", the disputed items are mandatorily required, so as to make smooth manufacturing process for manufacturing of M.S. Billets. The Nuts and Bolts were

used in fitting of the said 'Concast Unit'. Therefore, the adjudicating authority had wrongly confirmed the demand of Cenvat Credit.

(e) The Explanation-2 of Rule 2(k) pertaining to the definition of "Input" provides that "Input" includes the goods used in manufacture of Capital Goods, which are further used in the factory of the manufacturer but shall not include Cement, Angles, Channels, CTD Bars or TMT Bars and other items used for construction of factory shed, building or laying of foundation or making of structures for support of Capital Goods. In the present case, the disputed goods had finally been as "Input" and subsequently used in getting required sizes of parts and accessories of plant and machinery i.e. part and accessories of Furnace Unit, Concast Unit and Re Rolling Unit. Therefore, the disputed items were not covered in exclusion provided in the said Explanation-2. Appellant 1 has not attempted to any how justify the act of omission and commission committed by them as held in para 13 of the impugned order. The adjudicating authority has wrongly interpreted the provisions of Rule 2(k) and Rule 2(a) of the CCR, 2004. No such corroborative evidences have been placed on record to prove that the disputed goods has been used for construction of factory shed, building or laying of foundation or making structures for support of Capital Goods. Therefore, the findings of the adjudicating authority given at para 13 of the impugned order that "the goods on which Credit has been availed by the Noticee can neither be categorised as "inputs" nor the "Capital Goods" are not true and correct. It is fact that the disputed goods had been used within the factory of the production. As per the definition of "Capital Goods" and the "Input", such goods either "Capital Goods" or "Input", which are "used in the factory of the manufacturer of the final products (for Capital Goods)" and "used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final products or not (so far as 'Input' is concerned)". The Department has not denied that the disputed goods were not used in the factory of manufacture of the final products". Therefore the adjudicating authority had wrongly and without proper interpretation of the definition of "Capital Goods" and definition of "Input" has confirmed that demand of wrong availment of Cenvat Credit of Rs. 11,37,485/-.

(f) The findings given at para 14 of the impugned order are not true and correct. The adjudicating authority has misinterpreted the statement dated 09.01.2013 of the Appellant 2. Due to lack of technical knowledge, he has stated that the disputed goods were used in construction of platform/foundation for installation of Concast Plant and platform of Rolling Mill. In fact the disputed goods has been used in erecting of the Concast Unit and used in making platform of Rolling Mill. Without proper erection of the Concast Plant, the Concast Plant is not usable for manufacturing of M.S. Billets. As well, without making platform by using the disputed goods, the process of manufacturing of TMT Bars is not possible for smooth running of the Rod Re-Rolling Plant, which consisting more than one "Re Rolling Stands" through which the required final products viz. TMT Bars etc. is

manufactured. To explain the intention behind the statement dated 06.01.2016 given by the Appellant 2, he executed an "Affidavit" on 22.05.2017 and submitted the same copy of the Affidavit for properly placing the intention of the statement given by the Appellant 2.

(g) The question of executing the Affidavit has been decided by the Appellant 1 and Appellant 2 on the ground that the department had without any material evidence had concluded that the disputed goods were used in building and shed at the factory without physical verification of the plant and machineries already installed therein. Since, the disputed goods had actually been used for the above mentioned purpose the Appellant 1 and Appellant 2 had not thought over to obtain a Certificate from the Chartered Engineer. However, the Appellant 1 had enclosed the copies of some Photographs of the above Furnace Unit, Concast Unit and Re-Rolling Unit. Ongoing through those Photographs, it is getting clearly established that the Appellant 1 had correctly and legally availed the Cenvat Credit and therefore, the disputed Cenvat Credit of Rs. 17,07,488/- has been wrongly reversed from the Cenvat Credit Account.

(h) The Appellant 1 and the Appellant 2 place their reliance on the following case laws:

(1) 2012 (344) E.L.T. 884 (Tri. - All.)

MEENU PAPER MILLS PVT. LTD. Vs COMMISSIONER OF C. EX., CUS. & S.T., MEERUT-

(2) 2017 (346) E.L.T. 388 (Tri.-Del.)

ADITYA CEMENT Vs COMMISSIONER OF CENTRAL EXCISE JAIPUR-II

(i) The Panchnama dated 08.01.2016 drawn within the factory premises of the Appellant 1 does not seem to be genuine so far as the shortage of final products viz; Billets of 17.470 MT and shortage of 43.330 MT of raw materials are concerned.

(j) The stock of final products as 587.470 MT as on 08.01.2016 mentioned in the daily product register had not been perused before the Independent Panchas. Directly it was concluded that the Panchas had concluded the stock of the said product was found 550 MT. This is not genuine at all. It is not possible to weigh the said finished goods from 11:45 hours of 08.01.2016 to 02:00 hours of 09.01.2016. Even too, no such experience of the said Panchas had been discussed as regards to their being engaged in dealing with the Iron & Steel products. Both the Panchas were engaged in transportation business. The Central Excise Officer had arrived the so called shortage of the finished goods at their own only and not on the basis of the physical weighment of the finished goods laying in stock at the time of visit of the factory of the Appellant 1 on 08.01.2016. The method of weighment of the said finished goods had not been disclosed in the Panchnama, which itself is a statutory Document/Instrument to prove the shortage of the

said goods. The Panchnama has been drawn only for harassing the genuine assessee.

(k) Even if there would be shortage of the finished goods, as alleged in the notice, the department would have investigated the case from which raw material, the said goods has been clandestinely manufactured. The adjudicating authority has failed to establish the receipt of the raw material illicitly to establish the shortage of the said goods. The charge of removal of the said goods illicitly has not been proved by corroborative evidences. The means of transportation of the said goods had not been taken on record to sustain the illicit removal of the said goods. The adjudicating authority has also failed to prove how the sale proceeds had taken place with regard to the allegation of removal of the stated shortage of the final product. The duty calculated at Rs. 55,688/- was also not genuine and correct. The adjudicating authority wrongly accepted the said duty of Rs. 55,688/-, which was not stated by the investigation officer. Being an adjudicating authority, he should have required to give his clear cut findings with regard to the determination of duty under Section 11 A(4) of the CEA, 1944.

(l) The adjudicating authority has failed to consider the submissions made by the Appellant 1 and the Appellant 2. The raw material of the Iron & Steel products is always being taken in use on approximate basis. Further, the production of the final product is also being accounted for on approximate basis. This practice being followed by all such industry, which fact is well known to the department. The shortage of the raw material had been considered by the department without making physical weighment of the finished goods. Therefore, the adjudicating authority has wrongly and without authority of law has confirmed the demand of Rs. 55,688/- pertaining to the shortage of so called 17.470 MT of M.S. Billets.

(m) Similarly, the said Panchnama is not proper and genuine so far as the so called shortage of 43.310 MT of waste and scraps of Iron & Steel products. The stock of M.S. Scrap/Plate as on 08.01.2016 was 343.310 MT in the raw material register but not mentioned in the Panchnama itself. Directly the shortage of raw materials had been shown as 43.310 MT without making physical weighment of the raw material. Accordingly, in the case of shortage in raw material the adjudicating authority has wrongly confirmed the wrong availment of Cenvat Credit of Rs. 1,20,020/- on so called shortage of 43.310 MT of the raw materials without disclosing the corroborative evidences viz. Central Excise Invoices under which the so called shortage of the raw material was received in to the factory premises.

(n) For the above submissions, the Appellant 1 and the Appellant 2 placed further reliance on the following case laws

(1) 2015 (317) ELT 583 (Tri. Ahmd.)

Commissioner of Central Excise, Surat-II vs Gujarat Cylinder (P) Ltd.

(2) 2017 (347) ELT 368 (Tri. Del.)

Saurabh Rolling Mills Pvt. Ltd. Vs Commissioner of Central Excise & Service Tax, Raipur,

(3) 2016 (343) ELT 248 (Tri. Del.)

Commissioner of Central Excise & Service Tax, Raipur Vs. P. D. Industries Pvt. Ltd.,

(4) 2016 (341) ELT 425 (Tri. Del.)

Commissioner of Central Excise, Raipur Vs ACB Metals (P) Ltd.,

(5) 2018 (344) RLT 561 (Tri. Chan.)

Unique International Ltd. Vs Commissioner of Central Excise, Chandigarh,

(6) 2018 (340) E.L.T. 660 (Tri. Del.)

Raika Ispat Udyog Pvt. Ltd. Vs Commissioner of Central Excise, Raipur

(7) 2014 (314) ELT 529 (Tri. Del.)

Unique International Ltd. Vs Commissioner of Central Excise, Chandigarh,

(8) 2014 (312) ELT 556 (Tri. Del.)

Commissioner of Central Excise, Meerut-I Vs Shri Balaji Isuc. Pvt. Ltd

(c) Since it has been proved that Appellant 1 is not required to pay the confirmed duty demand, the Appellant 1 are also not liable for a penalization as proposed under Section 11AC(1)(c) of the Act. The issue of demand of wrong availment of Cenvat Credit was falling under the purview of the CCR, 2001, wherein the penal provision has been provided under Rule 15 of the CCR, 2004. Therefore, the impugned order is not proper and legal, as the penalty has been imposed on the Appellant 1 beyond the merit of the case so far as the issue of wrong availment of Cenvat Credit is concerned. Under the circumstances, the Appellant 1 were not liable for a penalty as imposed by the adjudicating authority.

(d) Similarly, the penalty imposed on the Appellant 2 under Rule 26(1) is also not proper and legal so far as the issue of wrong availment of Cenvat Credit is concerned. The Appellant 2 was also not involved in any manner as provided under Rule 26(1) of the CER, 2002, under which the penalty had been imposed upon him. There is no charge of confiscation of the disputed goods in the show cause notice. Therefore, the penalty imposed upon the Appellant 2 is also not sustainable.

(e) At para 4(ii) of the said show cause notice, the wrong availment of Cenvat Credit was mentioned as Rs. 11,27,221/-. But no calculation sheet of working out the demand of duty has been provided to sustain the total demand of Rs. 12,02,538/-. Therefore, the impugned order is not proper and legal as the same

has been passed without determining the duty amount under the so called provisions Section 11A (4) of the CEA, 1944.

(r) The part confirmed demand of Rs. 55,060/- was pertaining to the so called shortage of finished goods viz; M.S. Billets of 17.170 MT. Whereas, this duty has been confirmed by the adjudicating authority under Rule 14(1)(iii) of the CCR, 2004 which is not proper and legal.

(s) In support of their contention, the Appellant 1 and the Appellant 2 placed the reliance on the following case law:

(1) 2014 (311) ELT 354 (Tri. Ahd.)

M/s. Gir Aluminium Pvt. Ltd. v CCE Vadodara

(2) The recent judgment of the CESTAT, Ahmedabad vide Order No. A/11033-11034/2016, dtd. 17.07.2016 on the Appeal filed by M/s Dajang Castings Pvt. Ltd., Shri Amit R. Bhasin v/s CCE and Service Tax, Ahmedabad-II

(3) 2015 (324) E.L.T. 401 (Mad.)

Adani Enterprises Ltd. v/s. Union of India

1.11. Accordingly, the Appellant 1 and the Appellant 2 were granted opportunity of hearing on 28.02.2018, which was attended by Shri N. K. Mara, Consultant and Authorised Representative of the Appellant 1 and Appellant 2. During hearing, he reiterated the grounds in appeal.

1.12 Copy of the appeal memo was provided to the Assistant Commissioner of C. Ex Division, Bhavnagar vide letter dtd.09.08.2017 and they were also informed about the hearing schedule, but nothing has been received from them.

2.0. FINDINGS:

2.1. I have carefully gone through the appeal papers placed before me and the submissions made by the Appellant 1 and the Appellant 2 during the proceedings, which took place before me.

2.2. Since the Appellant 1 has already made reversal of Rs.12,05,788/- against the confirmed demand of Rs.7,93,938/- they have complied with the provisions of Section 35F of the CEA, 1944 by considering the said amount as more than the 7.5% of the confirmed duty demand towards the prescribed amount of pre-deposit as provided vide Section 35F of the CEA, 1944. The Appellant 2 has also made pre-deposit of Rs.97,720/- vide Challan CIN No. 30012200220520170029 dtd.22.06.2017, which is 7.5% of the amount of penalty of Rs.13,03,938/- imposed on him in the impugned order. Thus, this can be considered as a substantial compliance to Section 35F of the CEA, 1944.

2.3. In support of their contention, the Appellant 1 and the Appellant 2 have produced a copy of the affidavit affirmed by Appellant 2 on 22.09.2017. Prima facie, I notice that the Appellant 1 and the Appellant 2 had not made the said evidence available before the adjudicating authority, who passed his order on 30.03.2017. Thus, there was no retraction of statement dtd.30.01.2016 given by the Appellant 2 and there were no averments or arguments made by the Appellant 1 and Appellant 2 before the adjudicating authority to challenge the validity of demand itself in the context of wrongly

given statement. The said copy of affidavit dtd.22.05.2017 is apparently being raised by the Appellant 1 and Appellant 2 before me for the first time, which is required to be restricted by me in terms of the provisions of Rule 5(1) of the Central Excise (Appeals) Rules, 2001. I do not find any reason under which the Appellant 1 and the Appellant 2 were prevented from making proper representation at the time of adjudication. The affidavit executed by Appellant 2 after delivery of O-O dtd 30.03.2017 is nothing but an afterthought. This itself is enough to make out a case of rejecting the said evidence which do not fall within the exceptions as provided in Rule 5(1) of the Central Excise (Appeals) Rules, 2001 and not to allow the Appellants to present their case and averments at this stage and in terms of Rule 5(2) ibid. I, therefore, disallow the Appellant 1 and the Appellant 2 to make their submission in this respect on the basis of their attempt to bring additional evidence during appeal proceedings before me.

2.4. Now, I find that the points for determination in the present appeal in terms of Section 35A (4) of the Central Excise Act, 1944, are the following:

(a) Whether the usage of M.S. Angles, Channels, Beam, M.S. Bars, etc. were actually used by the Appellant 1 in construction of Platform/Foundation for installation of Concast plant and platform of Rolling Mill, which may allow the same to be defined as "inputs" within the meaning of the provisions of the CCR, 2004?

(b) Whether the Appellant 1 were entitled for availment of the Cenvat credit in purview of the CCR, 2004?

(c) Was the shortages as alleged in the SCN is on the basis of proper verification of stock of inputs/raw materials and finished goods took place at the factory of the Appellant 1 on 08.01.2016 and whether such shortages were sufficient for demand of duty and reversal of Cenvat credit ?

(d) What should be the amount of demand to be confirmed? Under which provisions of the Act such demand may be confirmed? Is there any case for levy of interest under Section 11AA of the Act and Rule 14(1)(ii) of the CCR, 2004 on such confirmed demand? Is there any case for imposing penalty on the Appellant 1 under Section 11AC (1)(c) of the Act and on Appellant 2 under Rule 26(1) of the CER, 2002 ? What should be the quantum of such penalty?

(e) What should be the order, which is just and proper, in the context of the grounds of appeal, submission made by the Appellant during hearing as well as by way of additional submission and merits of the case before me?

2.5. As regards point (a) and (b), I find that it is a case of the department that the angles, channels, beam etc. were used in construction of platform/foundation of Concast plant and platform of rolling mill and taking into consideration the provisions of CCR, 2004, such items can not be classified as "inputs" and not as "Capital Goods" in terms of the provisions of the CCR, 2004, hence following the ratio of the decision provided by the Larger Bench of CESTAT in the case of M/s. Vandana Global Ltd. [2010 (253) ELT 440 (Tri.-LB)] and CESTAT, New Delhi in the case of M/s. U.P. State Sugar Corporation Ltd. [2007 (210) ELT 369 (Tri.-Del.)], it was held that the availment of Cenvat credit of Rs.11,07,469/- was not legally correct and for that the same were required to be recovered from the Appellant 1. Against this, it is a case of the Appellant 1 and Appellant 2 that the invoices based on which the Cenvat credit was taken were pertaining to the period after 07.12.2013 when the Appellant 1 had started commercial production, hence it was beyond any imagination that the relevant goods were used in

erection of Conveyor Unit as well as making platform for smooth processing of products. Since the provisions of Rule 2(k) of the CCR, 2004 were permitting the definition of "input" to include the goods used in manufacturing of Capital Goods, which are further used in the factory of manufacturer but shall not include Cement, Angles, Channels, GTC Bars or TMT Bars and other items used for construction of factory shed, building or laying of foundation or making of structure for support of Capital Goods. The Appellant 1 and Appellant 2 had retracted the version of Statement given by Appellant 2 on 05.01.2016 by way of placing a copy of affidavit dtd 22.05.2017 affirmed by the Appellant 2 to bring strength to their argument that for installation of furnace unit, Conveyor unit and Hot re-rolling unit, such items i.e. MS Angles, Channels etc. were used within the factory premises; and that at the time of recording of statement, the Appellant 2 was not aware about the provisions of the CCR, 2004, hence with the lack of knowledge, he had wrongly stated that the disputed items were used in construction of shed of plant. To demonstrate the credibility of the arguments being made by the Appellant 1 and Appellant 2, they provided the photocopies of the 12 photographs showing the installation of Conveyor Unit, where the disputed goods were used as Capital Goods.

2.6. While going through the case records, prima facie, I see the weightage in the arguments advanced for confirming the demand of Rs.11,07,466/- on account of wrongly availment of Cenvat credit on MS Angles, Channels etc. in the context of given case law pronounced by the Larger Bench of CESTAT in the case of M/s. Vandana Global Ltd. [2010 (258) ELT 440 (Tri. LB)] and CESTAT, New Delhi in the case of M/s. U.P. State Sugar Corporation Ltd. [2007 (210) ELT 398 (Tri.-Del.)]. The CBEC has also issued instructions vide F. No. 267/11/2010 CX.8, dtd. 03.07.2010. At the same time, the Appellant1 and Appellant 2 have not provided any concrete evidence to substantiate their arguments. Photocopy of an affidavit, which has been affirmed on 22.05.2017, was already been rejected by me, hence there appears no specific and evident case made out by the Appellant 1 and Appellant 2 in their favour. I, however, notice from the OIO that the adjudicating authority has for confirming the demand in this respect has given extra stress on the case law and not discussed in full the factual details relating to specific use of the goods. The Appellant 1 and the Appellant 2 have provided photocopies of the 12 photographs, but merely based on the photographs, it is not possible to derive any specific conclusion in this matter, that too when the goods have already been consumed and relevancy of the given photocopies of the 12 photographs in the present context and present case matter are not established. Further, I notice that at Para 4 (ii) of the SCN and at Para 4(v) of the OIO, there is reference of wrong availment of Cenvat credit of Rs.11,27,221/- on this account and in Para 3.2 and Para 4(v) of the SCN and at Para 5.0 and Para 6.1 of the OIO, the amount of wrongly availed Cenvat credit is shown to be Rs.11,07,466/-. Further, as per the Annexure prepared in respect of invoices against which the Cenvat credit was wrongly availed and on which the signature of the Appellant 2 was obtained while recording statement on 05.02.2016 vide Question 6 and Answer to the same, the amount of Cenvat credit is Rs.11,27,221/- (BED Rs.10,76,967/- + EC Rs.37,497/- SHEC Rs.10,757/-). There is no attempt on the part of the adjudicating authority to clarify the anomaly in figures of wrongly availed Cenvat credit, more particularly when the said Statement dtd 05.02.2016 has been considered as relied upon document in the SCN. Further to this, looking to the version of the Appellant 1 and Appellant 2 that the disputed goods were used by them for erection/installation of Furnace Unit, Conveyor Unit and Hot Re-Rolling Unit, I find that there is apparent need for checking and re-verifying the factual position in respect of each of the materials, based on whose invoices the Cenvat credit was availed by the Appellant 1 to check its actual nexus

with the manufacturing of Capital Goods or any such usage, which may make such goods as eligible for availing benefits of Cenvat credit under the provisions of the CCR, 2004. I believe that the deficiency in the impugned order exist in at the stage of adjudicating authority can not be cured or set right by the subsequent authority and will have to be corrected by the adjudicating authority only. Therefore, in answer to point (a) and (b), I find it appropriate not to answer the same at this stage, but to remand the matter back to the adjudicating authority to re-determine the case of the eligibility of the Appellant 1 for availing Cenvat credit with the provisions of the CCR, 2004. I also direct the Appellant 1 and Appellant 2 to produce necessary evidence, work sheet and their written submission before the adjudicating authority within one month from the date of receipt of this order. The adjudicating authority may, if find necessary, carry out the joint verification at the factory premises to establish the nexus of the goods with relevant usage. Such joint verification, if found necessary by the adjudicating authority, has to be completed within 15 days from the date of the submission of further written submission by the Appellant and result of such joint verification be made available to the Appellant 1 within 15 days from the date of conducting such verification, so that the Appellant 1 may make further representation / submission accordingly on the basis of such joint verification within 15 days from the date of receipt of the result of joint verification. The adjudicating authority may then after re-determine the case of the Appellant 1 and the Appellant 2 after giving them reasonable opportunity of hearing and pass a speaking order after following the principles of natural justice.

2.7 As regards point (c), the Appellant 1 and Appellant 2 have raised averments that the process of weighment was not conducted properly and that there was merely assumption as regards shortages as alleged in the SCN. It is a case of the Appellants that the adjudicating authority has not considered their submission in this respect and wrongly confirmed the demand in this respect. In this regard, I find that the demand of Rs.55,288/- pertains to the duty payable on the finished goods, which was found short and demand of Rs.7,20,628/- pertains to the shortage noticed in the stock of the inputs/raw materials. The argument of the Appellants that the allegation of shortage is based on the assumed weightage and not actual weightage, it has also been argued that there are no corroborating evidence provided in the SCN to relate the shortage with clandestine clearance or any such illegal transaction. I find that there is no comment in the Impugned Order to answer such pleas of the Appellants. Now, since the matter is being remanded for the major portion of the demand pertaining to the allegation of wrong availment of Cenvat credit on account of M/S Anglee, Chanle's etc., I find that the end of justice may be met with, if the matter is remanded back to the adjudicating authority to re-determine the decision on the issue of shortage of inputs/raw materials and finished goods along with aforementioned issue of wrong availment of Cenvat credit on account of M/S Anglee, Chanle's etc. I also direct the Appellant 1 and Appellant 2 to produce necessary evidence, work sheet and their written submission in respect of the issue of shortages of raw materials/inputs and finished goods before the adjudicating authority within one month from the date of receipt of this order. The adjudicating authority may then after re-determine the case of the Appellant 1 and the Appellant 2 after giving them reasonable opportunity of hearing and pass a speaking order after following the principles of natural justice.

2.8 As regards point (d), now since the matter is remanded back on the aforesaid points (a), (b) and (c), there remains no case left with me to decide on this point (d) also. It is argument of the Appellants that the proper principles of law were not taken care of while adjudicating the matter. Therefore, without expressing any opinion in this respect, in the fitness of the entire things, I consider it proper to remit the matter back to the adjudicating authority to re-determine this issue also after

following the principles of natural justice and after affording reasonable opportunity of making further submission and hearing to the Appellants.

2.9. In the context of the above, while dealing with point (c), I find that the ends of justice may be met with upon passing order for setting aside the impugned OIO dtd.30.03.2017 and remanding matter back to the adjudicating authority for re-determination of the liability of the Appellant 1 and Appellant 2 and I do so.

2.10. In above terms I dispose both the appeals filed by the Appellant 1 and the Appellant 2 by way of allowing both the appeals filed by the Appellants and setting aside the impugned Order with direction to the adjudicating authority by remanding the matter back by re-adjudication in above terms.

(P. A. Vasava)
Commissioner (Appeals)
Commissioner
CGST & Central Excise,
Kutch (Gandhidham)

F. No. V2/201-202/BVR/2017 Date: 27.03.2018

By R.P.A.D.

To,
M/s. RSK Industries Pvt. Ltd.,
Survey No. 171, Gahanghali Road,
Ta. Shihor, Dist. Bhavnagar
Shri Rakesh Bansal Director of M/s. RSK Industries Pvt. Ltd Survey No. 171,
Gahanghali Road
Tal Shihor Dist. Bhavnagar

Copy to:
Shri N. K. Mani,
Consultant and Authorised Representative,
M/s. RSK Industries Pvt. Ltd.,
Survey No. 171, Gahanghali Road,
Tal. Shihor, Dist. Bhavnagar

Copy to:
1. The Chief Commissioner, CGST & C. Ex., Ahmedabad Zone Ahmedabad.
2. The Commissioner, CGST & C. Ex. Bhavnagar
3. The Additional Commissioner, CGST & C. Ex. (System), Bhavnagar
4. Assistant Commissioner CGST & C. Ex., Bhavnagar.
5. Guard file.