[illegible]

[illegible]

[illegible]

[illegible] / [illegible] Order	02.07.2016 (?)	[illegible]	04.07.2016 (?)

[illegible]

Passed by [illegible] Kumar [illegible] [illegible]

[illegible]

[illegible] & [illegible] Appellant & Respondent [illegible]

M/s Aggarwal and Company, [illegible] Hill Drive, [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

1. [illegible] Commissioner of Central Goods and Services Tax [illegible]

2. [illegible]

i. [illegible]

ii. [illegible]

iii. [illegible]

[illegible]

i. [illegible]

ii. [illegible]

iii. [illegible]

[illegible]

3. [illegible]

Department of Revenue [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

7. [illegible]

8. [illegible]

9. [illegible]

10. [illegible]

11. [illegible]

12. [illegible]

13. [illegible]

ORDER-IN-APPEAL

M/s. Aggarwal and Company, UE Aggarwal House, Bhavnagar 229/2282-A/1, Hill Drive, Bhavnagar (hereinafter referred to as 'Appellant') filed present appeal against Order-in-Original No. 37/Excise/Demand/2016-17 dated 28.3.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise Division, Surendranagar (hereinafter referred to as 'the lower adjudicating authority').

2. The brief facts of the case are that the appellant, a manufacturer of Oxygen gas were availing SSI exemption under Notification 8/2003-CE dated 1.3.2003 during the period from April, 2012 to September, 2012. Appellant also started manufacturing of MS Angle, Channels etc. by re-rolling process in the same premises after obtaining Central Excise Registration No. AAAJFA8875CEM005 on 2.5.2012. Audit pointed out that the appellant had obtained Central excise registration in March, 2012, availed exemption under Notification 8/2003-CE dated 1.3.2003 in respect of Oxygen Gas valuing at Rs.72,40,840/- cleared during April, 2012 to Sept. 2012, and started paying duty for the remaining period from October 2012 to March, 2013 after availing Cenvat credit on inputs allegedly in contravention to the provisions of Notification 8/2003-CE dated 1.3.2003. Show Cause Notice dated 31.8.2016 was issued demanding central excise duty of Rs.8,94,843/- under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') denying the SSI exemption for the clearances made by the appellant during the period from April, 2012 to Sep. 2012, interest under Section 11AA of the Act and imposing penalty under Section 11AC of the Act. The lower adjudicating authority vide impugned order confirmed demand of Rs. 8,94,843/-, ordered to pay interest under Section 11AA of the Act, imposed penalty of 8,94,843/- under Rule 25(1) of Central Excise Rules, 2002 read with under Section 11AC of the Act.

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

(i) Appellant did not pay duty on the clearances of Oxygen gas from April, 2012 to Sept. 2012 as aggregate value had not exceeded the threshold limit provided under the said notification; that appellant later on decided to avail Cenvat credit on inputs and therefore, they started paying duty at the normal rate however, did not intimate the JAC about exercising the option under condition (i) of Para 2 of the said Notification under the belief that nothing will

was a new factory and from beginning they had started availing Cenvat Credit; that under that impression appellant did not intimate the JAC about exercising their option.

(ii) A detection during Audit does not mean that non payment was with intent to evade payment of duty unless facts bring out that the appellant had not paid duty despite having knowledge that CENVAT was payable on such clearances; that no such circumstances were brought out in the Show Cause Notice; that in absence of any evidence contrary to their bona fide belief, extended period of 5 years can not be invoked; that mere technical breach and not [illegible] call for imposition of penalty when there is no mandate in statute that every breach should necessarily be punished; that they relied upon the Hon'ble Supreme Court's decision in the case of M/s. Bharat Heavy Electricals Ltd. reported as 1996(81) ELT [illegible](SC); that no penalty was imposable under Rule 25 (1) of the Rules; that Penalty equal to duty confirmed imposed on the appellant is beyond the provisions of Section 11AC(1)(a) of the Act; that details of clearances were recorded in their books of accounts for the period in question and hence, penalty of fifty percent of duty confirmed only could be imposed under proviso to Section 11AC(1)(c) of the Act; that therefore maximum penalty of Rs.4,4[illegible] can only be imposed.

4. Personal hearing in the matter was attended to by Shri Madhav Vadodaria on behalf of the Appellant who reiterated the grounds of appeal and submitted written submission to say that there has been only procedural lapse of not intimating department to opt for not availing benefit of Notification No.[illegible]/2003-CE (NT) dated [illegible].3.2003; that substantial benefit can't be denied for procedural lapse.

4.1 In their written submission, appellant contended that case law of Hari Chand Shri Gopal - 2010 (260) ELT 3 (SC) relied upon by the lower adjudicating authority was not applicable in this case as the appellant had followed the procedure as required under the said notification and as held by the Hon'ble Supreme Court in the said case; that show cause notice was time barred inasmuch as there was/is no evidence in the show cause notice and in the impugned order as to wilful suppression of facts have been made by them; that the show cause notice was issued on the basis of Audit and no mens-

not noticeable from the records as the Cenvat credit is never been shown/ reflected by the appellant in their books of accounts that penalty imposed is not justified.

FINDINGS

5. I have carefully gone through the facts of the case, impugned order, Appeal Memorandum and submissions made during personal hearing. The issue to be decided in the present appeal is as to whether demand of Rs. 8,94,913/- confirmed and penalty of Rs.8,94,913/- imposed in the impugned order is correct or not?

6. I find that the appellant has contended mainly on the ground that non exercising an option was a procedural lapse on their part. I also find that the appellant had availed exemption notification 8/2003-CE dated 1.3.2003 for their oxygen gas plant with full understanding and compliance of law. Appellant started re-rolling mill in the same factory premises and obtained central excise registration in Feb 2012 rendering them under obligation to fulfill all conditions stipulated in central excise law and to abide by provisions of notification 8/2003-CE dated 1.3.2003. I am, therefore, of the view that appellant can not hide behind the argument that they treated the re-rolling mill as new factory as appellant were well conversant with the Central Excise Law, procedures and provisions of Notification No. 8/2003-CE dated 1.3.2003 (hereinafter referred to as "the said notification").

6.1 The conditions prescribed in the notification are aimed to prevent the misuse of benefit extended to Small Scale Industries and therefore, the same have to be treated as substantive conditions and cannot be said to be a mere procedural lapse of technical nature and the non observance of this can not be condoned. Exercising option is essential and foundation for availing the benefits under the Notification. It cannot be said that conditions and procedures are mere procedural requirements, with no consequences attached for non-observance. Therefore, I find that the appellant has not fulfilled the condition of the said Notification. The very purpose of the procedures and conditions under the Notification is to prevent misuse of the facility. Department is facilitator for all benefits due to the assessees. However, if such [illegible] is to be verified for its correctness, the administrative system will collapse. Department can not admit

the process beyond the stipulated procedures. If the appellant's plea is accepted, then the very purpose of the notification will be defeated. They cite the decision in the case of Chikay Containers — 2013 (29?) ELT 1?? (GOI) wherein it has been held as under:-

> "9. *Government notes that nature of above requirement is a statutory condition. The submission of application for removal of export goods in ARE-1 form is must because allowing such deviations would lead to possible fraud of claiming an alternatively available benefit which may amount to additional/double benefit. This has never been the policy of the Government to allow unintended benefit. Hon'ble Supreme Court in case of Sharif-ud-Din v. Abdul Gani — AIR 1980 SC 3403 has observed that distinction between required forms and other declarations of compulsory nature and/or simple technical nature is to be judiciously done. When non-compliance of said requirement leads to any specific/odd consequences then it would be difficult to hold that requirement as non-mandatory. As such there is no force in the plea of the applicant that this lapse should be considered as a procedural lapse of technical nature which is condonable in term of case laws cited by applicant. The Hon'ble Supreme Court in the case of J. Yashoda v. Shobha Rani [2007 (212) E.L.T. 458 (S.C.)] has discussed Sections 63, 64 & 65 of Evidence Act, 1872 and therein upheld the High Court view that the photocopies cannot be received as secondary evidence in terms of Section 63 of the Act and they ought not to have been received since the documents in question were admittedly photocopies; there was no possibility of the documents being compared with the originals. Government therefore holds that non-submission of statutory documents i.e. ARE-1 original and duplicate copy duly endorsed by customs and not following the basic procedure of export goods as discussed above, cannot be treated as just a minor/technical procedural lapse for the purpose of granting rebate of duty. Government has already held in GOI Order Nos. 245/2011-CX., dated 17-3-2011, 218/2011-CX., dated 7-3-2011, 835/2011-CX., dated 17-6-2011, 726/2011-CX., dated 15-6-2011, 560/2011-CX., dated 30-4-2012, 925/2012-CX., dated 25-6-2012 and 557-559/2012-CX., dated 22-5-2012 and several other orders issued subsequently, that rebate claim is not admissible if the original and duplicate copy of ARE-1 is not submitted along with rebate claim.*"
>
> (Emphasis supplied)

6.2 I also find that the appellant was registered manufacturer and had availed the benefit of same notification previously and hence, non-intimation of their option is not justified. The adjudicating authority has correctly recorded his findings on non-fulfilment of mandatory conditions of the notification ibid. I find that the Hon'ble CESTAT in the case of M/s. Sonal Metallics P Ltd reported as 2016(340) 1099 (Tri-Ahmd) held as under:

> "8. *A plain reading of the said notification, particularly the condition in clause 2, it is clear that the assessee manufacturer is required to exercise their option to avail exemption under this notification i.e., to pay duty at 60% of the normal rate of duty at the beginning of the financial year itself and the option once exercised cannot be changed in the same financial year. Needless to emphasize that the condition to exercise the option is*

the basis for availing the benefit of the exemption notification, and therefore, ought to be complied with so as to be eligible for the benefit of the said notification. That condition 2 is mandatory one is further clear from a reading of sub clause (a) along with the illustrations enumerated thereunder. Therefore, the said condition 2 cannot be designated as a mere procedural one and to avail the benefit of the notification must be fulfilled. Recently, the Hon'ble Supreme Court in the case of [illegible] Power Products Ltd.'s case (supra), while considering the eligibility to the Notification No. 10/2002-C.E., dated 1-3-2002, observed as follows :-

> "11. We find that the Tribunal has decided the case in favour of the assessee by observing that clearing of goods with payment of Excise duty with current account was only an error and the assessee had not violated the main substantial condition viz. no Cenvat credit should be taken in regard to the goods. This is clearly a faulty approach on the part of the Tribunal. It is stated at the cost of repetition that the assessee was required to fulfil the condition in strict sense viz. to pay the duty either in cash or through account current if it wanted to avail the benefit of exemption notification and not through adjustment of Cenvat credit which is not the mode prescribed in the aforesaid conditions. Once we find that the conditions have not been fulfilled the obvious consequence would be that the assessee was not entitled to the benefit of the notification."

7. Therefore, in view of the principle of law laid down in the aforesaid case and in Hari Chand Shri Gopal case (supra) by the Hon'ble Supreme Court, in our opinion, non-fulfilment of the said mandatory condition would disentitle the appellant in availing the benefit of the SSI exemption Notification No. 8/2003-C.E., dated 1-3-2003. However, we find that the appellants had recorded all facts in their statutory records and the invoices have been issued for the relevant period. Thus, in our view, imposition of penalty of Rs. 1.50 lakh in the circumstances of the case, appears to be too harsh. It would be appropriate and meet the ends of justice, if the appellants are directed to pay a penalty of Rs. 25,000/- (Rupees twenty five thousands only) instead of Rs. 1.50 lakh, as held by the authorities below. In the result, the impugned order is modified to the extent of imposition of penalty and the appeal is allowed partly to the extent of reduction of penalty. The appeal is disposed of as above."

6.3 I also find that the Hon'ble CESTAT in the case of M/s. Shiker Metal reported as 2011 (263) ELT 192 (Tri-Mumbai) has held as under:-

> "2. The issue involved in this appeal is whether a manufacturer who is availing the benefit of exemption Notification No. 8/2003, dated 1-3-2003 can during the same financial year opt out of the small scale exemption notification. The adjudicating authority held that a manufacturer cannot opt out in between a financial year once the option is exercised. The Commissioner (Appeals) set aside the order. The Revenue is in appeal against the order passed by the Commissioner (Appeals).
> 5. We find that as per the provisions of Notification 8/2003-C.E., dated 1-3-2003 once a manufacturer opted to avail the benefit of the notification there is no option to get out of the scheme of the notification during that financial year. In view of the clear provisions of the notification, we find

that the impugned order is not sustainable and is set aside and the order passed by the adjudicating authority is restored."

6.1 In view of above, I am of the considered view that appellant has not fulfilled the condition of the said notification and hence not eligible for exemption as correctly held by the adjudicating authority in the impugned order.

7. As regards invocation of extended period of limitation and imposition of penalty under Section 11AC of the Act, I find that in era of self assessment and mechanism under the Central Excise Law, the said exemption is very unequivocal title as to practice and implement and there is no scope to harbor any doubt. I also find that there was no ambiguity in law and the appellant on his own was trying to make an interpretation of law suitable to them. The ingredient of suppression of facts from the department with intent to evade payment of duty is available in this case for invoking extended period. Therefore, I am of the considered view that penalty is imposable under proviso to Section 11AC(1)(c) of the Act even if transactions are recorded in the books of accounts of the appellant as because they did not inform department even when they started re-rolling process in the same premises where oxygen gas was being manufactured. I find that proviso to Section 11AC (1) (c) provides that when details of transactions are recorded in statutory records, penalty shall be fifty per cent of the duty confirmed. The relevant portion of Section 11AC reads as under:

> *"SECTION 11AC. Penalty for short-levy or non-levy of duty in certain cases. — (1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows, -*
> *(a) ......*
> *(b) ......*
> *(c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined :*
> *__Provided that in respect of the cases where the details relating to such transactions are recorded__ in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the duty __so determined__;*
> *(d) ......*
> *(e) ......*
>
> *(2) ......*
>
> *(3) ...."*

7.1 I find that the appellant needs to be imposed penalty @15% of duty as the demand is raised in the period from April, 2012 to September 2012 which is covered under the prescribed proviso. And merit in the appellant's argument that maximum penalty imposable on them under law is fifty percent of duty confirmed i.e. Rs.1,17,471/-.

8. In view of above, I uphold confirmation of demand of Rs.8,31,897/- and allow appeal to reduce penalty to Rs.1,17,471/- and modify the impugned order accordingly.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है
9. The appeal filed by the Appellant stands disposed of in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Aggarwal and Company,
JD Aggarwal house,
2291/2292 A/1,
Hill drive
Sivasagar

सेवा में अग्रवाल एंड कंपनी
जे डी अग्रवाल हाउस
2291/2292 ए/1, हिल ड्राइव
शिवसागर

Copy to:-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Shivsagar Commissionerate, Shivsagar.
3. The Assistant Commissioner, GST & Central Excise, City Division, Shivsagar.
4. Guard File.