

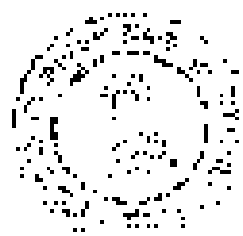
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ORDER IN APPEAL

M/s. Madhu Sona Pvt. Ltd., DCTI, Plot No. 73/4, GIDC, Chilla Bhavnagar (hereinafter referred to as 'Appellant') engaged in the manufacture of Precipitated Silica classifiable under Chapter sub-heading No. 3824 9025 of Central Excise Tariff Act, 1985 filed appeal against Order in Original No. 46/Demand/Excise/2016-17 dated 28.07.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority').

2. The brief facts of the case are that the audit of records of the Appellant revealed that the Appellant had used M.S. Angles, Channel, M.S. Plates etc. for fabrication of plant and machinery etc. and taken Cenva. credit of Rs. 22,49,038/- as capital goods allegedly in contravention of provisions of Rule 2 of the Central Credit Rules, 2004 (hereinafter referred to as 'the Rules') and against instructions issued by CBEC vide F. No. 25711/2010-CX6 dated 09.07.2010 that Cenva credit on items like Cement, Angles, Channel, etc. and other items used for construction of factory shed, building or laying of foundations or making of structures for support of capital goods were not eligible for Cenva credit. Show Cause Notice No. M/S-54/Dan/HQ/2013-14 dated 11.06.2014 was issued to the Appellant demanding Central Excise duty under Section 11A of the Act read with Rule 14 of the Rules and Interest under Section 11AA of the Act and proposing penalty under Rule 15(2) of the Rules read with Section 11AC of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') on the ground that the appellant has wrongly availed Cenva credit on ineligible items. The lower adjudicating authority, vide the impugned order, confirmed demand of Rs. 22,49,038/- along with Interest and also imposed penalty of Rs. 22,49,038/- under Rule 15(2) of the Rules read with Section 11AC(1)(a) of the Act.

3. Being aggrieved with the impugned order, the appellant presented the present appeal *inter alia*, contending that the lower adjudicating authority has not expedited the certificate of the government approved Chartered Engineer who issued certificate after verifying the facts and technicality. That the lower adjudicating authority has erred in concluding that disputed items cannot be termed as components, spares and accessories of the capital goods; that disputed items have been used to manufacture capital goods exclusively to manufacture excisable goods; that definition of terms Components, Spares and Accessories is provided in Foreign Trade Policy according to which:



28/07/2017

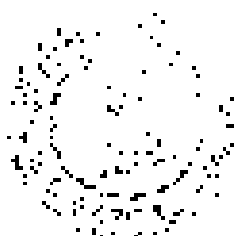
-> "Accessory" or "Attachment" means a part, sub-assembly or assembly that contributes to efficiency or effectiveness of a piece of equipment without changing its basic functions.

-> "Component" means one of the parts of a sub-assembly or assembly of which a manufactured product is made upon and into which it may be resolved. A component includes an accessory or attachment to another component.

-> "Spares" means a part or a sub-assembly or assembly for substitution that is ready to replace an identical or similar part or sub-assembly or assembly. Spares include a component or an accessory.

3.1 The above definitions should be considered for the purpose instead of meaning adopted by the lower adjudicating authority that the findings of lower adjudicating authority that components, spares and accessories are test final goods and not raw material for manufacture of capital goods are not correct as it depends upon the usage of items as per Rule 2(a)(A) or Rule 2(k) of the Central Credit Rules; that findings of lower adjudicating authority that flow chart of the erection and manufacturing process of capital goods had not been submitted and therefore, Central credit cannot be allowed is not legal and proper as there is no such provision under Central Credit Rules; that reliance placed upon Explanation 2 of Rule (K) of Central Credit Rules is unwarranted; that neither audit officer nor the adjudicating authority had put forth any documentary evidence to prove that the disputed items were used for construction or factory buildings or laying of foundation / structure support or civil work and therefore, the impugned order is not legal and proper.

3.2 The appellant contended that the disputed items were received during the period from 2007-08 and Central credit was availed in the year 2008 and 2009 and Certificate of Chartered Engineer was issued on 28.03.2008, however the impugned order did not accept the certificate on the ground that photographs of machineries were not given / submitted to him and Certificate did not correlate with the Invoicemarking on the items. That the Chartered Engineer had issued the Certificate of usage of items after its utilization that identification marks in form of embossing of Tata, Essar, Hydra etc. were available on the items used; that photograph of machinery where the items were used are not statutory requirement and therefore, Central credit cannot be denied on such grounds; that the lower adjudicating authority has quoted decision of the Hon'ble Judge Bench of CESTAT in the case of M/s. Vandana Global Ltd. recorded as 2010 (253) ELT 440 (Tri-L3) but has not considered subsequent case laws as under



(i) **Mardia Perle & SEZ Ltd.** 2015 (38) STN (726) (91)

Credit credit of Input Tax - Input service - Cement and steel used in construction of up-jetties and other commercial buildings - 1999 - Appellant entitled for input credit and is asked to decide that since construction of jetties was completed, appellant would not be entitled for input credit - Impugned order set aside - Rules 2(6) and 2(7) of Central Credit Rules, 2004. Para 27

*Central Credit Rules, 2004 - Amendment to Explanation 1 of Rule 2(6) that it of 1999 was not the clause in nature. However legislative intent to clarify the provision, it clearly mentions building in the explanation and seeks to clarify entering provision - Tribunal's larger bench order in *Standard Global Ltd (2010) 323 ELT 449* (tribunal) since intention of Legislature behind amendment was to clarify the provision was based on construction and language. Para 3*

(ii) **Jachair Steels Pvt Ltd** 2013(266) EL 449 (Tri-Or)

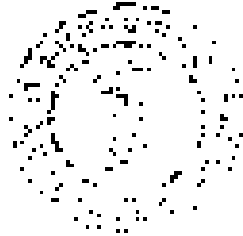
Meaning of Input credit - Entitled on purchase of steel items for fabrication of cooling bed permanently attached to earth used for rolling mill. Rolling mill covered by heading 84.33 of Central Excise tariff is capital goods as per Rule 2(a) of Central Credit Rules, 2004. Cooling bed a component of rolling mill even though it needs to be permanently fixed to earth. Steel items for fabrication of cooling bed are inputs used in fabrication of components of rolling mill. It is covered by definition of input under Rule 2(6) and eligible for Input credit. Impugned order set aside - Rule 2(a) ibid. Para 57

(iii) **Perle Products Pvt. Ltd.** 2016(243) EL 456 (Tri-Bang)

Input - Input - steel rods used in factory for starting inputs and finished goods - if proper storage facility is not provided to the goods handled by appellant, then there is every possibility of consumption of the manufactured products - Rule 2(a) - In per definition of 'input', it is not necessary to use the goods should be used in or in relation to manufacture of goods. As long as inputs are used for any other purpose of production in factory premises, the same can be termed as input. Therefore, in view of statutory definition of input and requirement under the provisions of Final Duties Act, 1951 regarding the manner of storing the semi-worked and finished product, it can be said that disposed goods are very much essential to be considered as input, used in or in relation to manufacture of final product - Rule 2(a) of Central Credit Rules, 2004. Para 11

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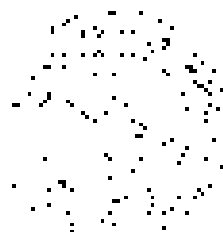
Demand - Demand - The requirement of Input credit was known to Central Excise Department well in advance through the returns filed by appellant and the periodic audit conducted by Audit Wing - Exemption however by limitation - Amended period of limitation not applicable - Section 114 of Central Excise Act, 1944. Para 67



3.3 That in view of above facts and legal position, the decision of Mrs. Vandana Global Ltd. is not correct and not applicable; that in view of the contention of the appellant and the case laws on the issue, demand is not sustainable and interest is not chargeable and penalty is not imposable upon them.

4. The Assistant Commissioner, Central Excise and C&BT, Jaisalmer, Bhanuvaran submitted report vide F.No. 1971-36/Excise/Returns Recovery/2017-19/197 dated 16.12.2017 whereas he, inter alia, submitted report in respect of Order in Original No. 12/Demand/Excise/2017-18/Order-Original Nos. 45/BA and 94/Demand/2016-17, stating that the disputed goods have been used in different plants of the factory viz. packing plant boiler, coal crusher, motor etc.; that one-to-one correlation of the disputed goods and its actual usage at particular plant could not be ascertained; that the disputed goods have been mostly used in structural construction for supporting capital goods / machinery; that structures such as stairs, platforms, barriers with the help of channels, beams, slabs etc.; that cables are placed on the structure in order to carry out with the help of LMT bar/wire channels etc.; that the disputed goods like SS Pelli, SS HR Plates, Sheet, been used under the dust; ISMC used in Conveyor. Plates used in Coal fire air generator SS Plate. Coi. SS Flat used in hot air duct were not visible; that racks, conventional pallet packing, spars were used in racking system spray dryer for storage of finished goods; that MS angles, SS Round were used in maintenance of storage of all part spares; that some pipes were used to transport waste water to effluent treatment plant wherein water is purified and then discharges outside the factory premises.

4.1 Persons hearing in the matter was attended by Shri R. R. Dave, Counsel for the appellant whereas he, inter alia, reiterated the grounds of appeal and submitted photographs of the machinery where the disputed inputs were used to form case parts, components, accessories of various plants and machines, that he submitted machines hearing and use of those machines in manufacture of their final product; that Central credit on MS angles, channels, coils, plates used in stairs to support structural construction have not been taken; that period of 2008-10 and 2010-11 involved in this case is prior to insertion of exclusion clause, that penalty is not imposable as they have taken Central credit on inputs actually used in the manufacture of parts of capital goods as allowed under law; that demand is time barred as Show Cause Notice has been issued on 11.03.2014 for the year 2008-10, 2010-11, 2011-12 when no suppression of facts etc. is involved; that they have filed monthly returns regularly and the department did not raise any objection within normal period of time. The appellant submitted their wise explanation along with the photographs



of machineries as under :-

Photo No. 21 :-

This is a photo of Air Classifier Mill (Fig. 1.06) i.e. having made out of M.S. Channels, M.S. Angle and M.S. Pipe (see item 11 of Annexure to Show Cause Notice) which works under Chapter Sub-Heading No. 94210950 of Central Excise Tariff Act, 1985, required for crushing or separation of finished products i.e. separation of Air and Sand (Powder) contained in finished products. The finished products cannot be marketed without this process.

Photo No. 22 :-

This is a photo of HV Lag Filter (i.e. having frame out of H.R. Coil, H.R. Plate, 1540, M.S. Channel and M.S. Pipe (2), No. 55 to 56 of Annexure to Show Cause Notice, and fed under Chapter Sub-Heading No. 84210950 of Central Excise Tariff Act, 1985, required for crushed or separation of finished products i.e. separation of Air and Sand (Powder) contained in finished products. The finished products cannot be marketed without this process.

Photo No. 23 :-

This is a photo of Spray Dryer chamber which is part of Spray Dryer made out of S.S. Sheet, S.S. Plate and H.R. Coil (2), No. 57 to 61 of the Annexure to Show Cause Notice, which works under Chapter Sub-Heading No. 84221010 of the Central Excise Tariff Act, 1985.

All the machineries are fabricated within Factory Premises and installed / Erected / Commissioned without contract and any construction work as well as no activity of construction of structural foundation is required. Moreover, a copy of any instruction of supplier / Technology of the above machinery may be submitted duly with invoice % of waste and it may be assembled at other place of Factory Premises.

All the above machinery is acquired for the purpose of Manufacture of article / article / goods which are not exempt or required to payment of Duty in 1985.

(Signature)

4.2 The appellant also submitted Write up during personal hearing wherein stage-wise process and utilisation of various machineries is shown. The details of the processes submitted by the appellant are reproduced as under :-

Stage 1

The sodium silicate glass from the truck unloaded in the meter section silicate unloading platform through Truck Hooper operated with the help of Jack. The whole truck gets filled on the Platform and unloads the SS glass within short period of time. This will save the manpower to unload the material and time also.

Then the sodium silicate Glass is being from in the meter hopper through bucket elevator. The Meter hopper is situated above the meter having load cell to feed the fixed quantity of SS glass in to meter. At the meter hopper outlet we have connected Y chute - Called Y pipe - to feed the SS Glass in two meters from one hopper.

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The function of melter is to dissolve the glass in water under the pressure of 4 KG at temp. of 160 degree. In the melter the SS glass is being feed from the feed hopper after opening the hood of melter. There is a platform on the melter where the operator is feeding the glass. After the water is being feed in the melter and steam is given to raise the temp. up to 150 degree with pressure of 4 kg/cm². The steam is supplied from the boiler. The Water is being circulated in the melter through pump and after 2.5 hrs the complete glass is being dissolved in the water. By this way the solid sodium silicate is get melt in the water and become liquid silicate.

This liquid silicate is transferred to the unloading tank where we check the quality and then transfer it to settling tank. In settling tank the liquid silicate is being kept for 24 hrs to settle off the impurities in liquid silicate.

The Settled liquid silicate is being transferred to process tank. We use this settled liquid silicate during the process in reactor.

Stage 2

In stage 2 we are using reactor between liquid silicate & Sulphuric Acid and water in reactor. We provide steam to maintain the required temp. in reactor. With the controlled flow of liquid silicate, Acid and water at a required temp. the precipitation start inside the reactor. We have a reaction between cycle from 1 hr to 3 hrs as per the grade & quality to be produced. Once the reaction completes the slurry is being transferred to Slurry holding tank. The reaction process is fully automatic for all the sensors and controlled by PLC hence there is no error in the reaction occur.

Stage 3

The slurry produced in the reactor is being feed into filter press through pump for separation of liquid to solid. During filter feeding the High PDS water is coming out from the filter press. In the High PDS water there are chances of silica going - when any cloth get damaged. So we are collecting the High PDS water in to HLD tank and pass this water again through filter press so that silica could not get in waste.

In the filter press - from the slurry the water gets removed and cake of silica forms. The cake is being transferred through belt conveyor to Scraper hopper which give control feed of cake to the dryer via paddle mixer. The silica cake is having 100% moisture.

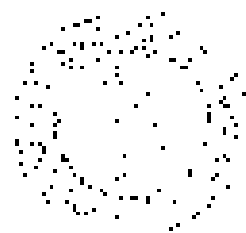
Stage 4

There are two types of dryers - 1. Flash dryer and 2. Spray dryer. In flash dryer the silica cake is being feed to the cage mill where the cake gets disintegrate. We inject hot air in the cage mill. The hot air is generated from the hot air generator and conveyed from hot air generator to the cage mill through hot air duct.

The cake come in contact with hot air and water gets evaporated from the cake hence Cake is converted into powder. The stream of powder and air pass through the bag filter for the separation of air & solid (powder). The bag filter is fixed on the rotating structure.

The finished powder from the bag filter is being passed through the vibro sifter to remove any foreign material from the finished product.

The powder is being conveyed to the finished product silo with the help of pneumatic conveying system for packing.



In Spray Dryer the silica cake sends to the slurry preparation tank (Liquidation tank) where it gets mixed with the small proportion of acid and the cake is converted in to slurry. The slurry is being transferred to slurry holding tank.

The slurry is fed in to spray dryer through screw feed drum. In spray dryer the slurry is passing through atomizer wheel. The dryer platform is being fabricated to operate the spray dryer attached to the machine. The hot air is being injected in to the dryer chamber where the water gets evaporated from slurry and powder separated. The fine particles of powder are being collected in bag filter (Bag Filter – Annex. Sr. No. 55 to 58 – HR Coil, HR Plate – ISMC – MS Channel – MS Pipe – Photo No. 2) and the heavy particles are collected at chamber (Spray dryer Chamber – Annex. Sr. No. 57 to 61 – SS Sheet Sheet – SS pipe – HR Coil – Photo No. 3). The silica powder is conveyed through the screw conveyor to vibro screen for removal of foreign material from the finished product.

The powder is being conveyed to the finished product silo with the help of pneumatic conveying system for packing.

The Spray dryer finished material is further grinding in to AC Mill. Air Classifier Mill to reduce the particle size of finished material for the special application. After grinding in the AC mill the material is send to the bag filter (AC mill bag filter – Annex. Sr. No. 62 to 64 – MS Channel – MS Angle – HR Coil – Photo No. 4) to remove the air from the product. The finished material is packed from the bag filter.

Stage 5

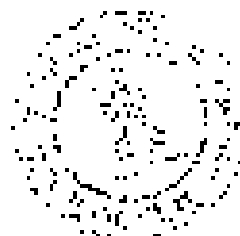
The finished powder is then conveyed to the Pre Hopper with the help of rotary valve & screw conveyor. The pre hopper is a feed hopper for automatic packing machine. There is slide gate valve below the hopper which control the flow of powder for packing. The automatic packing machine are of two types one is for small bags and another is for jumbo bag packing.

4.2 No one appeared from the Deceased despite personal hearing notices sent to the Commissionerate.

Findings :-

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal, written and oral submissions made by the appellant. The issues to be decided in the instant appeal are -

- (i) Whether the Impugned order confirming demand of regularly availed Central credit of Rs. 22,46,830/- under Rule 14 of Central Credit Rules read with Section 11A of the Act is correct or not;
- (ii) Whether interest is payable under Rule 14 of Central Credit Rules, read with Section 11/A of the Act;
- (iii) Whether penalty usual is demanded under Rule 15(2) of Central Credit Rules read with Section 11/A of the Act is imposable on the Appellant or not.



8. The lower adjudicating authority has confirmed demand for conveyance levied availed on terms like M.S. Channels, M.S. Scaff, M.S. Pipes etc. holding availed against provisions of Rule 2(a)(i),(ii) & (v) and Rule 2(k) of the Rules. The lower adjudicating authority has based his findings from explanation-2 to Rule 2(x) of the Rules inserted vide Notification No. 13/2010 Central Excise (N) dated 07.07.2009 and also from CBEC Circular issued vide No. 28/71/1/2010-CX8 dated 31.07.2010 to deny conveyance credit holding that the goods have been used for laying of the foundation and supporting structure. The lower adjudicating authority has awarded Chartered Engineer Certificate dated 29.03.2009 on the ground that it is not categorical. The said Certificate is reproduced as under:



To Whom It May Concern

Dear Sir,

I, the undersigned, Mr. Madhu Sankar Pillai, CEM, No. 1774, 6/10, 10th Cross Street, Thiruvananthapuram, Government Engineer, Kerala P & T, hereby certify that on the date of 29.03.2009, I have issued Chartered Engineer Certificate to M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala.

M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, which is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala.

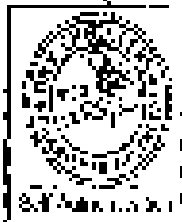
M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, which is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala.

M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala, which is a member firm of the firm of M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala.

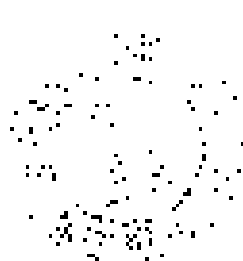
I, the undersigned, Mr. Madhu Sankar Pillai, CEM, No. 1774, 6/10, 10th Cross Street, Thiruvananthapuram, Government Engineer, Kerala P & T, hereby certify that on the date of 29.03.2009, I have issued Chartered Engineer Certificate to M/s. Sankar & Sons, 20/10, 10th Cross Street, Thiruvananthapuram, Kerala.

Yours faithfully,

 Mr. Madhu Sankar Pillai, CEM, No. 1774, 6/10, 10th Cross Street, Thiruvananthapuram, Government Engineer, Kerala P & T.



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3.1 The period of receipt of goods being 2007-2008 Explanation -2 to Rule 2(k) of the Rules prior to 07.07.2009 would be applicable, which was as under :-

"Explanation 2 Input include goods used in the manufacture of capital goods which are further used in the factory or the manufacture."

3.1.1 Whereas the lower adjudicating authority applied amended Explanation 2 to Rule 2(k) of Central Credit Rules (see let) on 07.07.2008 which reads as under :-

"Explanation 2 - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacture but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD); or Thermal Mechanically Treated Bar (TMT) and other items used for carrying out of factory shed, building or laying of foundation or making of structures for a part of capital goods."

[inserted vide Notification No. 10272/2008 (Central Credit Rules) dated 07.07.2008]

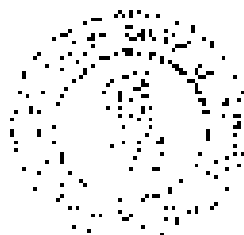
[Emphasis supplied]

3.1.2 I find that definition of input as provided in Rule 2(k) of Central Credit Rules was more broad-based and non-restrictive prior to 07.07.2008 whereas specific exclusion clause was added w.e.f. 07.07.2009 in the definition of input.

3.2 The lower adjudicating authority made observations at Para 25 & 27 of the Impugned order as under :-

"28. I further find that the above said goods was received during the period from 2007 to 2008 and Central credit was availed during the period from 2008 to 2009 whereas the certificate was issued on 26.03.2009, i.e. after the utilization of the goods as submitted by them. The certificate itself states that at the time of inspection they the said goods were utilized, hence, as per the circumstances it leads me to conclude that by the time the materials i.e. TMT Bars / channels / Bars / MS Plates etc. were used and not identifiable in the year 2008. The Chartered Engineer has also not explained how he has estimated the large number of items purchased by them during the long period of setup of unit and used in specific capital goods. I further find that there can be no specific marks and numbers on the said goods. Hence, I find that on a basis of assumption the Chartered Engineer has issued certificate that such goods might have been used. Therefore, I find that nothing can be derived as to whether such items have been used in said capital goods or otherwise. The Notice has not submitted any photographs of full machinery and the description and also no invoices of the items said goods, as such it cannot be treated under any circumstances as to whether such items has been used

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in said capital goods or otherwise. I also find that the Noticee has not submitted the details as and when the said items have been used for the purpose of manufacture of capital goods and for which capital goods. Hence, any contention that credit of above said goods as a capital goods is admissible to them, is not tenable and legal.

27 Therefore, I do not rely on the contention raised by the Chartered Engineer being issued on assumption and for the reasons as stated above as the Noticee has failed to substantiate their claim that the said items has been used as precise and accessories of the capital goods. I find that looking to the nature of the items as detailed above the same were used for the laying / foundation / support of the capital goods.

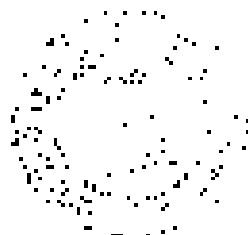
6.2.1 Whereas at Para 18 of the impugned order, the lower adjudicating authority applied amended Explanation - 2 to Rule 2(x) of the Rules, which was not relevant for the period or on 07.07.2009 :-

"19. Without prejudice to the above, but as to whether they are components, spares and accessories of the capital goods I confine me to whether the credit on the said goods can be availed as an excise. The definition of the goods has been stated as above. However, I reproduced the contentious process which reads as under:-

Explanation 2 - Types of items goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, pipes, channels, Gullys, Trenches, Ditches, Sewer line (OTG) or Trench Mechanically Treated soil (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods."

6.3 The Explanation to Rule 2(x) of the Rules which the lower adjudicating authority relied upon was inserted w.e.f. 07.07.2009 whereas exclusion clause was not present prior to 07.07.2009. I find that the Central credit on the disputed items which have been received and used to make parts, components of capital goods prior to 07.07.2009 cannot be denied placing reliance on Explanation - 2 which existed after 07.07.2009. For this, I rely upon a decision of the Hon'ble Madras High Court in the case of M/s. T. V. Anand & Sons recorded as 2017 (355) ELT 373(Mad.); wherein it has been held as under :-

"36. A bare reading of the 2009 Notification reveals that it brings about an amendment in Explanation - 2 by specifically excluding from its ambit inter alia the structures and components. Furthermore, the initials evidence contained in the Notification points in the direction that it is neither retrospective nor retrospective in its impact, a fact which is brought to fore upon a bare perusal of the same. The 2009 Notification in no uncertain terms states that it shall come into force from the date of its publication. It



the official website. Clearly, if the judgment was so clearly in favor of retrospective effect, it would have been brought into force from a date anterior to the date of publication of the Notification.

35.1 For the sake of convenience, the relevant part of the Notification is extracted hereafter:

1.1.1. (1) These rules may be called the GENMAT Credit (Amendment) Rules, 2008.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the GENMAT Credit Rules, 2004 (hereinafter referred to as the said rules) in rule 2, in clause (k), in Explanation 2, after the words "factory of the manufacturer", the following shall be inserted, namely:-

That shall not include cement and ropes, strands, Gerdyns Treated Limestone for (GTL) or Thermal Mechanically Treated Coal (TMT) and other items used for construction of factory sheds, cutting or laying of foundation or making of structures for support of capital goods.

(Reference to 2008-09 in 2007 Amendment is 2008-09)

(Translation)

33. A plain reading of the relevant parts of the Notification which have been emphasized by us, would bring forth the point which we have sought to articulate hereon above that is, in the said relevant parts of the Notification the notification is not retrospective.

33.1 It, that as the conclusion certainly, the submitter advanced on behalf of T&E and DGB has weight, which is that the Revenue, with effect from 7-7-2008, has sought to, in a sense, nullify the impact of the judgments of this Court in the decisions referred to above by amending Explanation 2 appended to Rule 2(k). Thus, clearly the amendment in our opinion, can only operate prospectively.

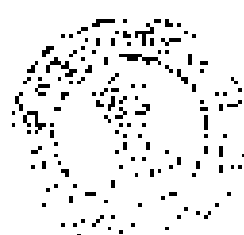
33.2 The said judgment also held that Great credit of Structural items used in the fabrication of parts of capital goods will be available as under:-

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43. As would be evident from the abovesaid extract, in Rajasthan Spinning & Weaving Mills Limited case the Court relied upon the law laid down in its earlier judgment rendered in Jawahar Mills Limited case. Clearly the Court held that steel plates and MS plates are structural used in the fabrication of the chimney, which were an integral part of the steel generating set which fall within the ambit and scope of definition of capital goods. The Court went on to further hold that such equipment had to be treated as an accessory. As a matter of fact, in Sarawathi Sugar Mills case, the Court while adopting the view taken in Rajasthan Spinning and Weaving Mills Limited held that as long as it could be shown that the item in issue was an integral part of the machinery, i.e. capital goods, it would fall in the definition of 'component' and thus, as capital asset, eligible with the ambit of capital goods.

43.1 To be noted, Harbans Mehta as J.K. Jain (as he then was), was party to both the judgments rendered by the Supreme Court, i.e., Rajasthan Spinning and Weaving Mills Limited as well as Sarawathi Sugar Mills Limited case.

43.2 The above in its entirety, the two judgments referred to above cannot, be read in the manner, as the Revenue is seeking to read them, that is, as cross purposes. In our opinion, the ratio of the two judgments is that as long as it is shown that the component under 'accessory' is an integral part of the capital goods, even if, in turn, fall within the scope and ambit of the expression 'capital goods', referred to in Rule 2(k)(ii) of the 2004 [rules] they would also qualify as capital goods.



44. In the facts of this case, we have to consider that MS structures, which support the plant and machinery which are, in turn, used in the manufacture of sugar and molasses are an integral part of such plant and machinery. The assessee has clearly demonstrated that its columns as well as foundations which are erected by using steel and cement are integral part of the capital equipment plant and machinery, as they hold in position the plant and machinery, which manufactures the final product. Therefore, in our opinion, whether the "user test" is applied, or the test that they are the integral part of the capital goods is applied the assessee in these cases should be in benefit of Central credit as they fall within the scope and spirit of both Rule 2(a)(A) and 2(k) of the 2004 Rules.

(Emphasis supplied)

6.4 I find that the appellant has submitted photographs of plant and machineries where the structural inputs under consideration have been used. The appellant has very clearly demonstrated through their detailed write up as discussed in Para 4.1 and 4.2 and photographs that structural items have been used in fabrication of parts of Air Classifier Unit, which falls under Heading 8421 2990 of Central Excise Tariff which is allowable in the light of definition of the capital goods under Rule 2(a)(A) of the Rules.

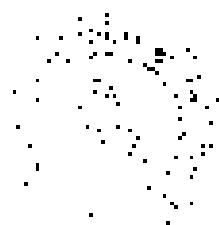
6.4.1 It is seen from the paragraphs and submissions made by the appellant that the disputed inputs have been used in fabrication of parts of Mill Bag Filter, which also falls under Heading 8421 2990 of Central Excise Tariff, which is applicable as per definition of capital goods under Rule 2(a)(A) of the Rules.

6.4.2 It is seen from the photographs and submissions made by the appellant that the disputed inputs have been used in fabrication of parts of Spray Dryer Chamber which falls under Heading 8421 2100 of Central Excise Tariff which is applicable as per definition of capital goods under Rule 2(a)(A) of the Rules.

6.4.3 The appellant has submitted stage wise uses of above machineries as detailed in Para 4.2 and emphasized that these machineries are necessary to carry out the processes to manufacture their finished product 'Pre cipitate Filter'.

6.5 It is, thus, seen from the above details that the appellant has submitted overwhelming supporting evidences stage wise processes as to where disputed inputs have been used in fabrication of the plant and machineries to substantiate their claim of Central credit. These detailed submissions establish that the disputed inputs have actually been used to fabricate parts and components of various machineries, which have been used to manufacture their final products and hence they are entitled to avail Central credit on these items. I rely on the following decisions of the Hon'ble CESTAT and High Courts in the cases as under :

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(1) M/s. P. D. Industries Pvt. Ltd. (referred as 2017(347)ELT487(1-04))

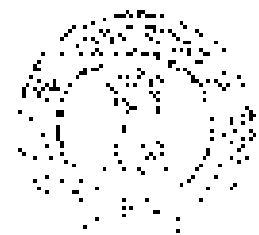
Revenue is in appeal against the impugned order dated 13-4-2010 passed by I. T.O. (Appellate), Mumbai. The main facts of the case are that the respondent herein is engaged in the manufacture of sponge iron furnace under category 72 of the Central Excise Tariff Act, 1954. The assessable goods show credit of Central Excise duty paid on inputs and essential inputs used in or in relation to manufacture of final products within the factory. During the period April, 2004 to March, 2005 and from 2005 to October, 2008 the respondent had taken credits amounting to Rs. 33,82,96.04 and Rs. 67,20,77.00 respectively on MS angle channel, iron, IIR coil, skraped plates and flat, etc. considering the inputs or inputs. Taking of Central credits was also denied by the Central Excise Department on the ground that the disputed items are neither covered under the definition of central goods or inputs. The show cause notices issued in this regard culminated in the adjudication order dated 5-2-2010, wherein the Central credit of the above mentioned amounts were disallowed and ordered for recovery along with interest. Further, central amount of vouchers were deposited on the respondent. In appeal, the ld. Commissioner (Appeals), vide the impugned order has allowed the appeal of the respondent holding that the availing of Central credits as the disputed goods is legal and proper, as the said goods are contributing to the definition of input and capital goods covered in the Central scheme. Finding appealed with the impugned order, Revenue is in appeal before this Tribunal.

3. Shri. Sri R.S. Mishra, ld. Departmental Representative appearing for Revenue and Shri. M.S. Singh, ld. advocate appearing for the respondent and viewed the records.

4. I find that upon consideration of the issue and the facts involved in this case, the ld. Commissioner (Appeals) has held that the disputed goods shall be considered as manufacturing goods for the purpose of availing of Central credits. The relevant paragraphs in the impugned order is extracted herein below:-

"It is a fact on record that appellant is holder of Central Excise Registration is a manufacturer of Sponge Iron and has availed credit on various items such as MS Angle, Channel, Irist, IIR Coil, Cast and Plate, and Flat, etc. used as structural items and used in production and installation of various machines and as inputs essential for their manufacture and other. The impugned goods mentioned in the impugned order are Iron, Steel, Sheet, Tank, etc. supplied to various industrial units such as ABC (Metal) (Pvt) Ltd., and Hopper, Crusher and Screening Machinery, etc. which were ultimately used for carrying the manufacturing activities of the appellants. It is also fact known and accepted that structural items such as Angles, Channels, plates, etc. are always required to make machines smoothly and without their help it is very difficult for any machines to run smoothly giving the desired production or result and these items are always linked with machinery used in the production of final products. Once it is established that these items are essential for production, smooth running, faster efficiency and better result becoming an essential requirement of plant and machinery for use of manufacturing activities and thus an integral part of process with which the primary machines are equipped. I do not find any reason to deny the benefit of Central credit on these items and hence there is no impairment for the goods in question, available as manufacturing goods to Central credit."

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5. The issue regarding eligibility of Convey credit on the engaged goods, has already been settled by this Tribunal in various cases. In the case of ITC & Co. v. 499 Mills Ltd [2011] 291 I.T.D. 582 (Trib. Hyd.), this Tribunal has held that M/S angles, plates and joists used for fabricating structural members to plant and machinery used for manufacturing of precision goods shall be taken as machinery and hence covered under the definition of capital goods. Further, in Tribunal in the case of Sitaram Steels India & Power Ltd v. ITC, Mysore [2014] 316 I.T.D. 102 (Trib. Jc.) has held that M/S rounds, M/S shafts and CR coils used for making of various machines shall be eligible for Convey benefit. In the case of ITC v. Mysore v. Sitaram Steels & Steel Ltd [2014] 316 I.T.D. 424 (Trib. Hyd.), the Tribunal has held that the goods items used in fabrication of steel round pipes like end round pipes, end cracker pipes, conveyor rollers, shaft hanger, roller bearing chamber, kiln roller transformer hangers are eligible for Convey benefit under the said input definition in Rule 2(f) of Convey Credit Rules, 2004.

6. The engaged goods during the material point of time were not covered under the exclusion clause contained in the definition of input. Since the engaged goods are used for erection/Installation of capital goods only at the plant, the same are closely nexus with the manufacture of the product in the factory of the respondent. The definition of input is broad enough to take within its ambit, the goods which are used for or in relation to manufacture of final product either directly or indirectly.

7. In view of the above findings no any infirmity is to be impugned under passed by Id. Lower authority (Appeal). Thus, the appeal filed by Revenue is dismissed."

[Emphasis supplied]

(ii) M/s. Saguna Metals P. Ltd. reported as 2016 (335) ELT 116(Trib. Hyd)

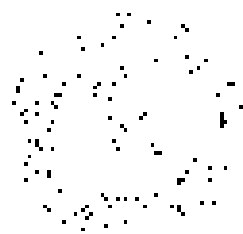
4. I have heard the rival submissions and perused the appeal records. The issue posed for decision is what as been discussed in the impugned order is that the appellants failed to furnish sufficient documentary evidence that the engaged goods were used in fabrication of capital goods/accessories/infrastructure. A Chartered Engineer's Certificate though produced before with the quantities has not been considered at all. The said appeal has given details regarding the manner and use of the impugned items. Further, the list of purchase of these items and their location in factory is not attached. Revenue does not have a case that such purchased items were diverted by the appellant in any manner. In such case, I am not in a position to issue an order on the evidence relied by the Chartered Engineer and accordingly, use the impugned items were used for fabrication of capital goods/accessories/infrastructure.

5. The issue whether M/S items used for fabrication of capital goods/accessories/infrastructure are eligible for credit is no longer an issue. The decisions cited by the appellant stated above have categorically held that credit is admissible. Facts of the present case being similar, applying the well laid down ratio I am that the admission of credit is justified.

6. In the result, the impugned order is set aside, and the appeal is allowed with a consequential order. (Appeal)

(iii) Gudavari Power & Ispat reported as 2016 (340) ELT 111(Trib. Hyd)

Convey credit - Input - Capital goods - M/S items - Angles, Channels, MS, Plates and Rounds - Change in said items in different types of fabrications and manufacture established to view of significant force contained in Section - Application of this provision in favour of respondent as quantities used and goods are furnished as quantum work orders



upon nature and use of such marks - Credit available - S.No. 363 and 264 of Central Goods Taxes, 1985 (para 5)

3. Specific reference has been made by the Revenue regarding certain reference was not relying with that of originally examined by the original adjudicating authority. Without going into the correctness of such claim and the implication of such assertion, it is not admitted that the usage of various marks even in different types of fish powder and compound has not been questioned with any amount of consideration by the Revenue to controvert the submission made by the respondent before the lower authority. The original authority, as well as in the grounds of appeal, observation has been made regarding the Chemicals Department Certificate being not presented, although it is not clear as to the nature of such violation. It would appear that the quantity of steel drums used in a particular type of structure compound is alleged to have been higher or lower, considering the nature and size of the machine.

6. Regarding the impugned order being taken pursuant to violation of Rule 3 of the Appeal Rules, I find that the grounds of appeal in certain nature, without mentioning, which are all additional grounds which will be barred under the said rule. Certain documentary materials and photographs as produced before the original authority which were also produced before the appellate authority, were mentioned as the reason for allowing the said violation of Rule 3. The Commissioner (Goods) is well within his right to seek clarification to examine any evidence submitted before him, before appreciating the said evidence for a finding. Seeking additional information or clarification on evidence as sought to facilitate the proper finding cannot be squarely barred by the abovesaid rule. There is also no allegation that the new set of evidence have been submitted by the respondent which came into existence after the said case was decided by the original authority. I find no substantial ground in the appeal by the Revenue when there is no challenge on merit. A copy of the impugned order to examine the merit reveals that the factual usage of various marks have been examined by the Commissioner (Goods) and he was provided by various detailed cases including the application of "over haul" as laid down by the Revenue through order in Hyderabad Quoting and Hearing File No. - 2100 (200) S.L.T. 481 (S.T.), and in Mumbai 4600 - 2000 (102) S.L.T. 0 (S.C.). The eligibility of the marks has been decided by the lower authority on each merit.

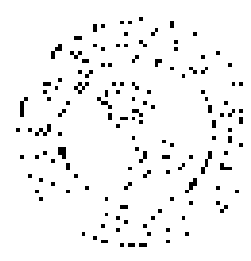
7. Considering the above discussion and analysis, I find no merit in the present appeal by the Revenue. Accordingly, the same is dismissed.

(Signature)

[Enriched's supplied]

6.5 The order of the Hon'ble CESTAT in Mrs. SSK, East and Power Ltd. reported as 2015 (326) CLT 620 (T Del) distinguishes decision of the Larger Bench of CESTAT in the case of Mrs. Vandana Lakshmi. It is referred to in the impugned order. The relevant portion of the order is reproduced as under :-

"7. The reasoning of the ld. AO is that as there is no use made to the mark and FTD is not a mark being run over there. Therefore, there are the circumstances which are established in facts. In such circumstances, the respondent has not been able to establish merit. In support of its contention, he relies on the decision in the case of Mulamba East India (P) Ltd. v.



CCA Madhya Pradesh 2017 (2017) 127 (19) JT. It is submitted by the appellants that the impugned order is not a part of the case.

4. In order to give effect to the findings and conclusions of the impugned order, the appellants have submitted the following facts, which are not in dispute. The appellants have submitted that the goods in question were used for DOT cranes and they are essential components of DOT cranes. The Hon'ble Commissioner has observed at para 134 that in the appellants' case they have manufactured parts like Crane & Cochran Bed by employing structural steel. It is also stated that the impugned structural steel i.e. Sub is not supporting structure of Plant & Machinery, or for laying foundation and hence the findings of the assessing authority that such are not goods being excluded to the extent are in the nature of dutiable goods and are not goods of dutiable goods in terms of CBAT, Circular No. 10/11/2012-CX dated 20-11-2012 is not proper. It is also stated that the appellants have used certain credit on account of structural steel items used for manufacture of components of DOT Crane and Rolling Bed for Rolling Mill Unit and accordingly they are entitled for certain credit amount to Rs. 15,25,227/- availed on structural steel items i.e. Sub. Thus, allowing of certain credit on those items which are used for manufacture of parts and components of their final product is not precluded being the said items under the provision of Capital goods as defined under Rule 20 of Central Credit Rules, 2004 and the items used for manufacture of the said items are 'Goods' in terms of Explanation 2 to Rule 20 of Central Credit Rules, 2004.

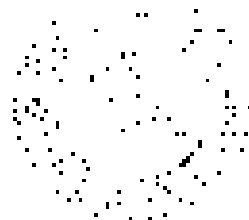
5. In support of my findings, I have gone through the case of Madhya Pradesh State v. CCE reported in 2011 (173) MTR 307 (SC) in which the Hon'ble Supreme Court while dismissing the appeal filed by the appellants held that in order to avail benefit, every credit, or amount has to satisfy the following conditions, that the Capital Goods in the form of components, spares and accessories had been utilized during the process of manufacture of the finished goods. In the instant case the appellants have submitted evidence regarding manufacture of capital goods items with its function and that such capital goods actually used have been used in their factories on account of such evidence and at the stage of the aforesaid decision of the Hon'ble Supreme Court, I conclude a conclusion that certain credit would be admissible on the basis of facts and issues of capital goods structure, legal, field accordingly.

5/11/2019

6. Further I got support from Hon'ble High Court of Chandigarh in the case of State of India v. CCE reported in 2011 (267) MTR 13 (Chandigarh) held that, Capital Goods - Credit on manufacturing. MRB of the MP state, engine and chassis - allowed credit on structural steel and 44% discount on the purchase of engine for diesel generating set - credit allowed for manufacturing steel engine and chassis in view of manufacturing of turbocharger product. Chassis - Impugned. Financial credit - the credit on capital goods as capital goods is available. Rule 20 of Central Credit Rules, 2004.

7. In the instant case, revenue has not filed a return in the name of the appellants to show that the appellants had used such items for the construction of factory, shed, building or types of machinery or making of structures for storage of capital goods. On the other hand the appellants have shown that the said items were used in the manufacture of Capital goods, hence same are eligible for credit. Rule 20 of Central Credit Rules, 2004.

8. There is no dispute that the observations made by the Hon'ble Commissioner (a) in the impugned order are not a part of the certificate issued by the



7.1 The Chartered Engineers Certificate dated 25.03.2009, very categorically states that 10 % of inputs have been used in concrete and brick work and only 87 % of material/inputs had been used in machinery/plant.

7.2 The lower adjudicating authority has brushed aside the said Certificate of Chartered Engineer stating that :-

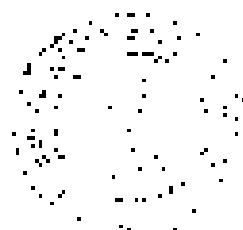
- (i) the certificate has been issued on request of the appellant;
- (ii) certificate nowhere mentioned that what type of capital goods were manufactured and installed in the factory and how much quantity of each inputs has been utilized for specific capital goods;
- (iii) that certificate does not describe which raw material was issued for manufacture of which capital goods;
- (iv) that notification on availing Cenvat credit was come into effect and Notification No. 31/2008-Central Excise(NT) dated 27.07.2008 whereas certificate was issued on 25.03.2009 and
- (v) Chartered Engineer Certificate is misleading.

7.3 And that the lower adjudicating authority has discarded the Certificate of Chartered Engineer in a very casual manner even though the Certificate is elaborate and has quantified that about 10 % of deputed inputs have been used in Civil work and only 87 % in plant and machinery. In this regard, I rely upon an order of the Hon'ble CESTAT in the case of M/s. Mangal Springs & Steel - Ltd. reported as 2015 (128) E.L.T.898 (T) - Del.) wherein it has held as under:-

“5. It is no doubt some of the items have been used by the appellant for fabrication of supporting structure embedded in earth for which the Chartered Engineer who is an expert in the field has already given in his report that appellant has used the quantity of 49.85 MT of these items for supporting structure and on the same quantity appellant has not utilised Cenvat credit. The appellant is able to show by way of Chartered Engineer Certificate that out of the total quantity 155 MT were used by the appellant for fabrication of capital goods. These observations of the Chartered Engineer which have been relied by the appellant have been discarded by the authorities below without any tangible evidence. Merely saying that all the items were used for supporting structure is not admissible evidence. Therefore as the appellant has been able to show the usage of the items in question for fabrication of capital goods as directed by this Tribunal in the earlier report of Wharfedale, I have no hesitation to hold that appellant is entitled to take Cenvat credit on this quantity. For the remaining quantity of remaining tools that appellant has taken the credit they may initiate another procedural matter the appellant but to the quantity upto 150 MT appellant is entitled to take Cenvat credit.”

6. “The issue arose in favour of the appellant by selling steel in impugned order.”

(Emphasis supplied)



7.3.1 I also rely upon a judgment of Hon'ble Bombay High Court in the case of Air Carrying Corp (I) Pvt. Ltd. reported as 2109 (248)ELT175(Dun) wherein it has been held that if certificate of a Chartered Engineer was to be distributed, revenue ought to record his statement and/or call him for cross-examination.

"9. The contents of the Chartered Engineer regarding the specific details of loss produced before the Commissioner. The material on record shows that the chief of the factory had developed a large loss resulting into a huge hear loss. Though statements of the Directors of the respondent no. 1 and some other persons were recorded, the statement of the Chartered Engineer who had certified the input was not recorded. If his certificate was to be distributed, the Revenue would have and ought to have recorded his statement and/or called him for cross-examination."

(Emphasis supplied)

7.4 In light of the above legal position and explanation of the appellant detailing machineries and plant where the disputed inputs have been used by the appellant duly supported by the photographs and detailed technical Write up I find that said and sweeping denial of Central credit on the inputs used in manufacture of plant and machineries, without going into actual usage, is not correct legal and proper.

7.5 Since 13 % of the disputed inputs have not been used in fabrication of the machineries, I am of the considered view that 13 % of disputed Central credit has to be held as inadmissible and accordingly, I find that 87 % of input Central credit (Rs. 19,98,215/-) is admissible, whereas 13 % (Rs. 2,92,223/-) is not admissible, which must be paid by the appellant forthwith.

Prakash

8. Regarding interest under Rule 14 of Central Credit Rules read with Section 11AA of the Act I find that interest on Rs. 2,92,223/- (i.e. 13 % of Central credit held not eligible) is required to be paid by the appellant immediately.

9. Regarding the appellant's contention on the ground of limitation that they were regularly filing monthly returns and therefore, the demand is time barred I find that merely by filing monthly returns, the facts are not declared to the Department. The appellant was required to inform full details (as they have submitted facts during appeal proceedings) when department asked them to submit. Having not done so at assessment stage and over at adjudication stage I am not inclined to accept the plea of the appellant that the demand in the Show Cause Notice is time barred.



10. As regards penalty under Rule 15(2) of Central Excise Rules read with Section 11AC of the Act, I find that the position of law regarding availment of Central credit on the inputs used in the manufacture of capital goods at factory premises are open to scrutiny and there are conflicting decisions of the Hon'ble CESTAT and High Court compelling Central Board of Excise and Customs (CBEC) to issue clarifications in the matter. I therefore, find that imposition of penalty under Rule 15(2) of the Rules and Section 11AC of the Act is not warranted in this case. I therefore, set aside penalty imposed on the appellant under Rule 15(2) of the Rules read with Section 11AC of the Act.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
11. The appeal filed by the appellant is disposed off in above terms.

मि. अशोक क. शर्मा
(कृष्णार शर्मा)
जयिभुक्त (अनीस)

By R.P.A.D.

To,

M/s. Madhu Silica Pvt. Ltd.,
DU-III,
Plot No. 73/74,
GIDC Chitra, :
Bhavnagar - 364 060.

Copy for information and necessary action to :-

1. The Chief Commissioner, CGST & Central Excise Ahmedabad Zone Ahmedabad for his kind information.
2. The Commissioner, CGST & Central Excise Bhavnagar Commissionerate Bhavnagar.
3. The Assistant Commissioner, CGST & Central Excise, Bhavnagar Division, Bhavnagar.
4. Guard File.

