



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE



सत्यमेव जयते

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/40/GDM/2019	10/AC/Anjar-Bhachau/2018-19	28-12-2018

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

KCH-EXCUS-000-APP-053-2020

आदेश का दिनांक / Date of Order:	28.04.2020	जारी करने की तारीख / Date of issue:	28.04.2020
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श्रीगोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri. Gopi Nath, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :
घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

M/s Gujarat NRE Coke Ltd (Coke Division), Survey no 231/1 Lunava, Bhachau, Gujarat-370140.

इस आदेश (अपील) से ब्याथत कोई ब्याक्त निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। /
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जानी चाहिए। /

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) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए। /

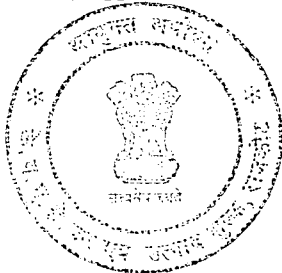
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गए प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

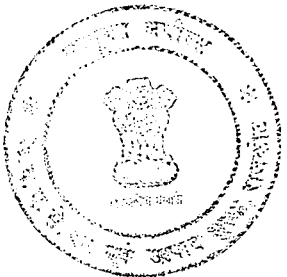
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty/demand/interest/penalty/refund is upto 5 Lac. 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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/-.



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जर्माना विवादित है, या जर्माना, जब केवल जर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- (i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ों एवं अपील को लागू नहीं होगा। / For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
- Under Central Excise and Service Tax, "Duty Demanded" shall include :
- (i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना 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-110001, 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 के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs 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 क्षेत्र को निर्यात कर रहे 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 क्षेत्र को निर्यात की गयी 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 उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के स्थगन 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 (नं 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायोजिधि 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.
- (v) उपरोक्त आवेदन की दो प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ 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.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण 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, notwithstanding 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.
- (E) 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 टिकिट 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.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित 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.
- (G) 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.



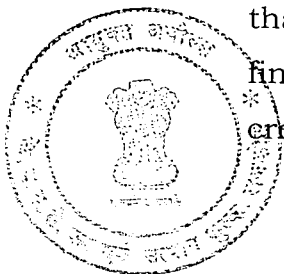
:: ORDER-IN-APPEAL ::

M/s. Gujarat NRE Coke Ltd. (Coke Division), Survey No. 231/1, Village: Lunava, Tal: Bhachau, Kutch-370140 (hereinafter referred to as '**Appellant**') has filed the present appeal against Order-In-Original No. 10/AC/Anjar-Bhachau/2018-19 dated 28.12.2018 (hereinafter referred to as '**the impugned order**'), passed by the Assistant Commissioner, CGST Division-Anjar-Bhachau. (hereinafter referred to as "**the adjudicating authority**").

2. The brief facts of the case are that the appellant are engaged in manufacture of Met Coke and Coking Coal falling under tariff item No. 2704 00 30 and 2701 19 10 respectively of the First Schedule to the CETA, 1985. Investigation carried out by the officers of Hq. Preventive Section, Central Excise, Gandhidham revealed that the appellant had paid "Education Cess" and "Secondary and Higher Education Cess" by utilizing Cenvat Credit of Central Excise duty amounting to **Rs. 17,86,221/-** (Rs. 11,85,044 for Education Cess + Rs. 6,01,177/- for Secondary and Higher Education Cess) during the period from **July-2013 to April-2015**. It appeared that as per Rule 3(4) and Rule 3(7)(b) of the Cenvat Credit Rules, 2004 (hereinafter referred to as "**CCR**"), Cenvat credit of Central Excise duty cannot be utilized for payment of Education Cess and Secondary Higher Education Cess. The above investigation resulted into issuance of Show Cause Notice dated 12.07.2018 proposing recovery of wrongly utilized cenvat credit to the tune of Rs. 17,86,221/- under Section 11 A (4) of Central Excise Act, 1944 (hereinafter referred to as "**CEA**") along with interest under Section 11AB/11AA of the CEA and penalty under Section 11 AC of the CEA. The adjudicating authority confirmed the demand along with interest and imposed penalty of Rs. 17,86,221/- under Section 11AC of the CEA.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, interalia, on the following grounds:

3.1 That as per Rule 3 of Cenvat Credit Rules, 2004, it is crystal clear that Cenvat Credit can be utilized for payment of any duty of Excise on final product; that as per Rule 3(7)(b) of Cenvat Credit Rule 2004, cenvat credit can be used for payment of any duty of excise, whereas cenvat



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credit of Education Cess & Secondary and Higher Education Cess can be utilized only for payment of EC & SHEC respectively.

3.2 That as per the provisions of Finance Act both Education Cess & Secondary and Higher Education Cess are duty of Excise, therefore as per Rule 3(4)(a) CENVAT credit may be utilized for payment of Education Cess & Secondary and Higher Education Cess.

3.3 That there is no restriction for using the Cenvat credit of basic Excise duty for payment of Education Cess & Secondary and Higher Education Cess.

The appellant in this regard, relied on following case-laws: -

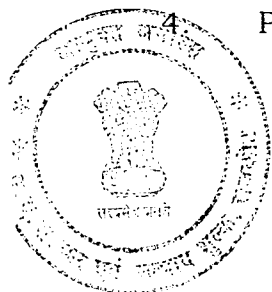
- *CCE, Vapi Vs. Donear Industries Ltd. - 2009 (233) ELT 0221 (Tri.Ahd.)*
- *Commissioner of Central Excise, Customs & Service Tax, Vapi Vs. Madura Industries Textiles, Tax Appeal No. 2210 of 2010 July 23, 2012 (Hon'ble High Court of Gujarat).*
- *CCE, Shillong Vs. Godrej Consumer Products Ltd. - 2007-TIOL-1174-Cestat Kolkata*
- *Sun Pharmaceutical Ind. Vs CCE Jammu. 2006-TIOL-1444-Cestat Delhi*
- *CCE, Vapi Vs. Balaji Industries - 2008-TIOL-2629-Cestat Ahm.*

3.4 That the adjudicating authority has referred the case of M/s Paras Petrofils Ltd. Vs. Commissioner of Central Excise & Service Tax Surat – II [2018 (10) GSTL 264 (Tri-Ahmd.)] is related to utilization of Education Cess and Secondary and Higher Education Cess for payment of Basic Duty; that their case is absolutely opposite to the case referred above.

3.5 That no penalty can be levied u/s 11 AC of the CEA, as there is no suppression of fact.

3.6 That the appellant is under liquidation process and the liquidation order has been passed by the Hon'ble National Company Law Tribunal (NCLT) vide its order dated 11.01.2018, under Insolvency and Bankruptcy Code, 2016, that "no suits or other legal proceedings shall be instituted by or against the Corporate Debtor".

Personal hearing in the matter was attended to by Shri Pradyot K



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Chattopadhyay, General Manager Commercial and Shri Amit Agarwal, AGM Commercial, who reiterated the submissions of appeal memo and submitted a copy of OIA No. KCH-EXCUS-000-APP-096-2019 dated 31.10.2019 passed in their own case for consideration and requested to allow the appeal.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and submissions made by the appellant. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority disallowing Cenvat credit of Basic Central Excise duty for payment of Education Cess and Secondary and Higher Education Cess for the period from July-2013 to April-2015 is correct, proper and legal or otherwise.

6. The crux of the dispute is sub-rule (4) of Rule 3 of CCR. I find that utilization of Cenvat Credit is governed by total 5 clauses of sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, which are as under:

Rule 3 (4) The CENVAT credit may be utilized for payment of –

- a) **any duty of excise on any final product;** or
- b) *an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed;* or
- c) *an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such;* or
- d) *an amount under sub rule (2) of rule 16 of Central Excise Rules, 2002;*or
- e) *service tax on any output service:*

Provided that

[Emphasis supplied]

6.1 Upon perusal of above clauses, it appears that the appellant's contention is that since the Education Cess and Secondary & Higher Education Cess are nothing but duties of excise, therefore they have rightly utilized the Cenvat credit of Basic Excise duty for its payment. However, on the other hand the department in the show cause notice has alleged that since the Education Cess and Secondary & Higher Education Cess do not appear in the above clauses, therefore the Cenvat Credit of Basic Excise duty cannot be utilized for payment of Education Cess and Secondary & Secondary Education Cess.



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6.2 I also find that sub-clause (iii) of clause (b) of sub-rule (7) of Rule 3 of Cenvat Credit Rules, 2004 stipulates that Cenvat Credit of Education Cess on excisable goods leviable under Section 91 read with Section 93 of Finance Act, 2004 shall be utilized only for payment of Education Cess on excisable goods leviable under Section 91 read with Section 93 of Finance Act, 2004.

6.3 Likewise, I also find that sub-clause (iiia) of clause (b) of sub-rule (7) of Rule 3 of Cenvat Credit Rules, 2004 stipulates that Cenvat Credit of Secondary & Higher Education Cess on excisable goods leviable under Section 136 read with Section 138 of Finance Act, 2007 shall be utilized only for payment of Secondary & Higher Education Cess on excisable goods leviable under Section 136 read with Section 138 of Finance Act, 2007.

7. In the backdrop of the above provisions, I find the first point that needs to be decided is whether the Education Cess and Secondary & Higher Education Cess can be considered as duties of excise as stipulated in clause (a) of sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004.

7.1 The Education Cess is leviable under Section 93 of Finance Act, 2004, which reads as under:

Section 93 as per provisions of Finance (No.2) Act 2004 relating to levy of Education Cess on excisable goods reads as under:-

(1) The Education Cess levied under section 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or produced, **shall be a duty of excise** (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in

force.



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(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 or any other law for the time being in force.

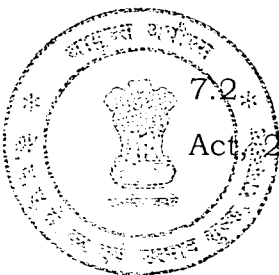
(3) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

Section 138 of Finance Act, 2007 reads as under:

(1) The Secondary and Higher Education Cess levied under section 136, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985(5 of 1985), being goods manufactured or produced, **shall be a duty of excise** (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess chargeable under section 93 of the Finance (No. 2) Act, 2004(2 of 2004) and Secondary and Higher Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944(1 of 1944) or under any other law for the time being in force.

(2) The Secondary and Higher Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944(1 of 1944) or any other law for the time being in force and the Education Cess chargeable under section 93 of the Finance (No. 2) Act, 2004(23 of 2004).

(3) The provisions of the Central Excise Act, 1944(1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944(1 of 1944) or the rules made thereunder, as the case may be.



7.2* Thus, upon plain reading of sub-section (1) of Section 93 of Finance Act, 2004 and sub-section (1) of Section 138 of the Finance Act, 2007, I

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find that Education Cess and the Secondary & Higher Education Cess are termed as duties of Excise. Consequently, in terms of Rule 3(4) of the Cenvat Credit Rules, 2004, the Cenvat credit of Basic Excise duty can be used for payment of Education Cess and Secondary & Higher Education Cess.

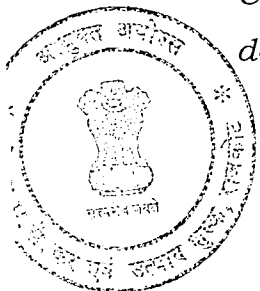
7.3 I find that the Hon'ble High Court of Gauhati in the case of **Union of India Vs Kamakhya Cosmetics & Pharmaceutical Pvt. Ltd. on 25.07.2012 and as reported in 2015 (323) E.L.T. 33 (Gau.)** has held that:

Cenvat credit - Utilisation of - Credit of Basic Excise Duty for payment of Education Cess - Cenvat credit of Basic Excise Duty was allowed by Gauhati High Court in Prag Bosimi Synthetics Ltd., to be utilised for payment of NCCD but not vice-versa - In view of ratio of impugned judgment, utilisation of Cenvat credit of Basic Excise Duty allowed by Tribunal for paying Education Cess - No infirmity in Tribunal's order, it being in conformity with views taken by High Court - Appeal of Department dismissed - Rule 3 of Cenvat Credit Rules, 2004.

7.4 I also find that the Hon'ble Tribunal in the case of **Asia Motor Works Ltd. Vs Commissioner of C.Ex. & S.T., Rajkot** as reported in **2016 (338) E.L.T. 419** held that:

".....I find that the issue involved in this case is as to whether the appellant is to be allowed utilisation of Cenvat credit of basic Excise duty for payment of Education Cess and Secondary and Higher Education (SHE) Cess. The learned Advocate for the appellant submits that as per Rule 3(7)(a) of the Central Excise Rules permits utilisation of basic Excise duty for payment of Education Cess and SHE Cess. She relied upon Hon'ble Gujarat High Court judgment in the case of Commissioner of Central Excise, Customs & Service Tax, Vapi v. M/s. Madura Industries Textiles - 2012-TIOL-1094-HC-AHM-CX. The relevant portion of the said decision is reproduced below :-

"3. The respondent paid the Education Cess for utilizing the Cenvat credit of basic excise duty available in the Cenvat credit account. The department demanded the duty and also imposed penalty. The Commissioner (Appeals) allowed the appeal and therefore, the department filed second appeal before the Customs, Excise and



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Service Tax Appellate Tribunal ('the Tribunal' for short). The Tribunal dismissed the appeal of the appellant on the ground that the benefit of utilization of credit of basic excise duty for payment of Education Cess could be allowed. It is necessary to extract Paragraph No. 3 of order of the Tribunal, which is as under :-

"3. I have considered the submissions. The very same issue had come up before this Tribunal also and in case of CCE Vapi v. M/s. Balaji Industries as reported in 2008 (232) E.L.T. 693 (Tri.-Ahmd.) This Tribunal had also allowed the benefit of utilization of credit of basic excise duty for payment of education cess. Further, as submitted by the respondent, there are several other decisions of the Tribunal rendered subsequent to the decision of M/s. Sun Pharmaceutical, where similar view has been taken. The learned SDR could not submit a copy of the stay order also."

4. We agree with the view taken by the Tribunal; and the appeal is devoid of any merits. Both the substantial questions raised by the appellant do not involve any substantial question of law and therefore, the appeal is dismissed."

2. In view of the decision of the Hon'ble Gujarat High Court in the case of M/s. Madura Industries Textiles (supra) the impugned order cannot be sustained and it is set aside. The appeal filed by the appellant is allowed."

7.5 Upon reading of the above decision it is clear that sub-rule (7) of Rule (3) of Cenvat Credit Rules, 2004 does not restrict the Cenvat Credit of the Basic Excise duty from being utilized for payment of Education Cess and Secondary & Higher Education Cess.

8. I also find that the appellant has rightly placed reliance on the ratio of the decision of the Tribunal in the case of (i) **Commissioner of Central Excise, Vapi Vs Balaji Industries reported at 2008 (232) ELT 693 (Tri. Ahmd)**, (ii) **Sun Pharmaceutical Industries Vs Commissioner of Central Excise, Jammu reported at 2007 (207) ELT 673 (Tri. Del)** and (iii) **Commissioner of Central Excise, Shillong Vs Godrej Consumer Products Limited reported at 2007 (219) ELT 585 (Tri. Kolkata)** wherein it has been clearly held that Education Cess can be paid by utilizing the Cenvat Credit of Basic Excise duty.

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The other decisions relied upon by the appellant are also applicable to the present case.

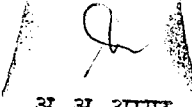
8.1 I also find that the ratio of the decision of the **Commissioner of Central Excise, Vapi Vs Balaji Industries reported at 2008 (232) ELT 693 (Tri.Ahmd.)** has been upheld by the **Hon'ble High Court of Gujarat** in the judgment dated: 23.07.2012 in Tax Appeal No: 2210 of 2010 filed by the **Commissioner, Central Excise, Customs and Service Tax, Vapi Vs Madura Industries Textiles.**

9. Thus, in the light of clear position of law, I hold that the Education Cess leviable under Section 93 of Finance Act, 2004 and Secondary & Higher Education Cess leviable under Section 138 of the Finance Act, 2007 are nothing but duties of excise. Since these are duties of excise, the Cenvat credit of Basic Excise duty can be utilized for their payment as per clause (a) of sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004. As the demand itself does not survive, the point of charging interest and imposing penalty does not survive.

10. In view of the discussions and findings as above, I set aside the impugned order and allow the appeal filed by the appellant.

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

11. The appeals filed by the appellant stand disposed off in above terms.

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 (Gopi Nath) 20/4/2020
 Commissioner (Appeals)

By R.P.A.D.

To,

M/s. Gujarat NRE Coke Ltd. (Coke Division),
 Survey No. 231/1, Village Lunava, Tal Bhachau,
 Kutch-Gujarat-370140.

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham.
3. The Deputy/Assistant Commissioner, GST & Central Excise Division-, Anjar-Bhachau.
4. Guard File.

