



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

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



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/4/EA2/GDM/2017	मूल आदेश सं / O.I.O. No. 02/Dy.Commr/2017	दिनांक / Date 31.01.2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-010-2018-19

आदेश का दिनांक / Date of Order:	17.04.2018	जारी करने की तारीख / Date of issue:	20.04.2018
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Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुनील कुमार सिंह, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीनगर, को को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar, has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम/ भावनगर। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /

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

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-

M/s Agrocel Industries Ltd., Village - Dhordo, Dist : Kutch.

इस आदेश(अपील) से व्यथित कोई व्यक्ति 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 प्रति 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 अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असर्वा 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

(C) **भारत सरकार को पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक 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 छुट (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 an 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 भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट हैं, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (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 पंजी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (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 और 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

- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये 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 रजिस्टार 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 नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी 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 रजिस्टार 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 नियमावली, 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 For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (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 जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए 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 अर्जी 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.

ORDER-IN-APPEAL

This order arises out of the appeal filed by the Deputy Commissioner, Central Excise, Division-Bhuj, Gandhidham (Kutch) (hereinafter referred to as 'the appellant') against the Order-in-Original No. 02/Dy.Commr./2017 dated 31.01.2017 (hereinafter referred to as 'the impugned order') passed by the Deputy Commissioner, Central Excise, Division-Bhuj, Gandhidham (Kutch) ('hereinafter referred to as 'the adjudicating authority') in respect of M/s. Agrocel Industries Limited, Village - Dhordo, District-Kutch (hereinafter referred to as 'the respondent') in pursuance of Review Order No. 02/2017-18 dated 03.05.2017 passed by the Commissioner of Central Excise & Service Tax, Gandhidham (Kutch) (hereinafter referred to as 'the reviewing authority') under the sub-section (2) of section 35E of the Central Excise Act, 1944.

2. Briefly, the facts are that a show cause notice dated 29.01.2016 was issued to the respondent alleging that they were engaged in exempted service viz. trading activity in addition to manufacturing goods falling under CETH 28 and 29 of the first schedule to the Central Excise Tariff Act, 1985 and had availed CENVAT credit in respect of common input services but had failed to maintain separate accounts as stipulated in Rule 6 of the CENVAT Credit Rules, 2004 (CCR). This notice was issued based on Revenue Para 1 of FAR No. D-554/2012-13 dated 16.02.2013 and proposed for recovery of amount of Rs. 18,78,929/- in terms of Rule 6(3)(i) of CCR for non maintenance of separate accounts for taxable and exempted goods / service for the period from April, 2011 to May, 2013 with interest and penalty. Vide the impugned OIO dated 31.01.2017; the adjudicating authority decided the aforementioned show cause notice wherein he dropped the demand along with interest and penalty.

3. Being aggrieved, the appellant has filed this appeal on the following grounds:

- That the adjudicating authority has overlooked the Explanation-I below Rule 6(3) of the CCR, 2004 which stipulates that if the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year and in this case, it is not in dispute that the option were given at the end of the year whereas the option were required to exercise at the beginning of the year;
- That as per Rule 6(3A)(a) & (b) of the CCR, 2004, it is mandated that this option has be exercised in writing and intimation has to be given to the

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jurisdictional Superintendent of Central Excise, with further stipulation that the Cenvat credit attributable to the exempted services has to be paid provisionally every month. Only thereafter the amount finally determined has to be paid at the end of the financial year;

- That the conditions and the procedure to be followed under the Rule are mandatory in nature and are required to be followed scrupulously. The word '**Shall**' in the aforesaid Rule 6(3) of the CCR, 2004, signifies the mandatory nature of the stipulation, incorporated therein. In this regard, the Hon'ble Bombay High Court, in the case of Malaysian Airlines Vs. UOI - 2010(262) ELT 191 (Bom.) has inter-alia, observed as: '*Para 52.The use of word "Shall" in the statute, ordinarily speaking, means the statutory provision is mandatory. It is construed as such, unless there is something in the context in which the word is used, which would justify departure from that meaning....*'
- That the non following of the mandatory conditions / procedures laid down under Rule 6 of the CCR, 2004 should not be treated as a mere procedural lapse. That not giving any option under Rule 6(3) of the CCR, 2004, the Department cannot be faulted for raising the demand in terms of Rule 6(3)(i) of the CCR, 2004. That at no point of time the assessee disclosed the material facts to the Department regarding non maintenance of separate accounts and this facts came on record only during audit.
- That the Hon'ble Supreme Court in the case of M/s. Mangalore Chemicals and Fertilizers Ltd. Vs. Deputy Commissioner as reported in 1991 (55) ELT 437 (SC) observed that- "*Distinction is to be made between a procedural condition of a technical nature and a substantive condition. Non-observance of the former is condonable, while that of the later is not condonable, as it is likely to facilitate commission of fraud and introduce administrative inconveniences.*"
- That the Tribunal's observations that, "*Rule 6 is not enacted to extract illegal amount from the assessee*" appears to be entirely improper and unwarranted in the facts and circumstances of this case, in as much as in the absence of any option under Rule 6(3) of the CCR, 2004 at the beginning of the year, the Department has no option but to issue the demand in terms of Rule 6(3)(i) of CCR, 2004. That the Hon'ble Bombay High Court in the case of CCE, Thane-I Vs. M/s. Nicholas Piramal (I) Ltd. as reported in 2009 (244) ELT 321 (Bom.) in para 21 of its judgment, has observed that- '*21.We may only mention that hardship cannot result in giving a go-by to the language of the rule and making the rule superfluous. In such a case it is for the assessee to represent to the rule making authority pointing out the defects if any. Courts cannot in the*

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guise of interpretation take upon themselves the task of taking over legislative function of the rule making authorities. In our constitutional scheme that is reserved to the legislature or the delegate. It is not open to countenance such an argument as the Finance Minister while providing for a presumptive tax under Rule 57CC had realized this difficulty. This presumptive tax has been continued in Rule 6. Hardship or breaking down of the rule even it is happens in some cases by itself does not make the rule bad unless the rule itself cannot be made operative. At the highest it would be a matter requiring reconsideration by the delegate. On a reading of Rule 6(1) and Rule 6(2) it is not possible to say that the construction now given would result in manifestly unjust results or render the rule absurd. It is never possible for the Legislature to conceive every possible difficulty. As noted a provision or a rule can occasion hardship to a few, that cannot result in the rule being considered as absurd or manifestly unjust

- That the OIO decided on the decision of Hon'ble CESTAT in case of M/s. Mercedes Benz (I) Pvt. Ltd. Mumbai Vs. Commissioner of Central Excise, Pune-II, has not been accepted by the department and an appeal has been filed before the Hon'ble High Court of Mumbai vide Appeal No. CEXA No. 162/2016.
- The appellant has requested that the OIO is therefore not legal and proper and unsustainable on law and requested to set aside the impugned order.

4. The respondent filed reply / cross objection on 26.08.2017 as under:

- That while filing of appeal, Hon'ble Deputy Commissioner has completely overlooked this important fact of the case that the company has already filed intimation as per Rule 6(3A) with department for the period 2012-13 to 2014-15 and reversed Cenvat Credit of Rs. 10,274/-, hence the demand on that ground needs to be set aside.
- That they had already reverse Cenvat Credit of Rs. 39,336/- as per Rule 6(3A) for the period April, 2011 to November, 2012 on 23.01.2013 (audit period).
- That the payment of 5% / 6% and payment of pro-rata service tax are two different options and they having the option to go for the option under Rule 6(3A) if separate accounts are not maintained. There is no bar in the rules that option under Rule 6(3A) cannot be opted and when no such option is opted, the assessee cannot be compelled to go for option under Rule 6(3)(i). They are free to choose between two modes of payment and department cannot mandate to follow a particular mode of

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payment favourable to the Department merely because they have not followed the procedural requirement.

- That they are following the procedure laid down in the rules before opting for proportionate reversal and there is no bar that such procedure cannot be followed after the audit was conducted or show cause notice was issued. Intimation and following the process laid down is merely a procedural part as against the legal part of proportionate reversal of Cenvat Credit.
- That CBEC Circular No. 868/6/2008-CX dated 09.05.2008 states that if an assessee is not maintaining separate accounts for CENVAT credit for dutiable and exempted outputs, there are two options available.
- That the Hon'ble Tribunal of Chennai in the case of Burn Standard Co. Ltd. Vs. Commissioner of Central Excise reported in 2010 (262) ELT 786 (Tri-Chennai) has held that "*Amendment for April, 2008 to Rule 6 of Cenvat Credit Rules, 2004 by Finance Act, 2010 allowing option of reversing of proportionate credit where separate accounts were not kept, was procedural / retrospective in effect, and assessee was entitled to its benefit.*". The said order has been affirmed by Madras High Court as reported in 2013 (295) ELT 671 (Mad.).
- That the Hon'ble Bombay High Court in the case of Mercedes Benz India (P) Ltd. Vs. Commissioner of Central Excise, Pune-I ruled out the judgment passed by Tribunal and remanded back the case to Tribunal with clear instructions to decide on the issues of calculation and formula to be accepted in case of Rule 6(3) of Cenvat Credit Rules, 2004.
- That there is no specific time frame specified in the rule for giving an intimation and time frame for submission of intimation is the date of exercising the option for a financial year.
- That the department's allegation that the credit was not reversed at relevant time is completely baseless since there is no time limit prescribed by law for reversal of the credit.
- That they have identified the common input credits and have reversed such Cenvat credit amounting to Rs. 49,610/- as per formula mentioned in Rule 6(3A) of Cenvat Credit Rules, 2004. Although there is a requirement to intimate the concerned officer for such proportionate reversal; however, considering these lapse as a procedural lapse, requested to set aside the demand as raised in the SCN for the F. Y. 2011-12 being a procedural lapse.
- That no interest is recoverable.
- That no penalty is imposable.

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5. Personal hearing in the matter was held on 22.03.2018. Shri Rashmin Vaja, Chartered Accountant, appeared on behalf of the respondent and pleaded that the ground of appeal is itself not proper as there are many decisions which support the course of action followed by the responded and order-in-original issued by AC. He reiterated the points and citations taken in his cross examination and requested to uphold the impugned order-in-original.

6. I have gone through the facts of the case, the appellant's ground of appeal, respondents cross objection dated 26.08.2017 and submissions made by the respondents during the course of personal hearing. The issue to be decided is whether the demand of Rs. 18,78,929/- under Rule 6(3)(i) of CENVAT Credit Rules, 2004 for the period from 01.04.2011 to 31.12.2015 dropped along with interest and penalty is correct or otherwise.

7. The dispute as is evident revolves around Rule 6 of the CCR, 04, which is extensively quoted and discussed in the impugned order dated 31.01.2017. The text of the rule is therefore, not re-produced. The adjudicating authority while dropping the proceedings has viewed that the respondent has failed to file the option for the year 2011-12 which being a procedural lapse but has paid the proportionate amount as determined under Rule 6(3A) along with interest and intimated the same to the jurisdictional range superintendent on 24.01.2013 and for the remaining period the intimation have been filed well within the concerned financial year and payment of proportionate amount has already been made hence question of payment under Rule 6(3)(i) would not arise.

8. Rule 6(1) of CCR, 2004, clearly states that CENVAT credit shall not be allowed on input service used in manufacture of exempted goods or provision of exempted services except in the circumstances mentioned in sub-rule(2). Rule 6(2), *ibid*, puts an obligation on a manufacturer who avails CENVAT credit in respect of inputs and input services, used in both dutiable and exempted final products, to maintain separate records. Rule 6(3), *ibid*, a non-obstante clause, gives a facility to a manufacturer, opting not to maintain separate accounts to either

- [a] pay an amount of 6% of the value of exempted goods; or
- [b] pay an amount as determined under rule 3A; or
- [c] maintain separate accounts and take CENVAT credit as per conditions therein and thereafter, pay an amount as per sub rule 3A of CCR '04.

9. The undisputed fact is that the respondent was engaged in trading activity also. There is also no dispute as far as the allegation of non maintenance of separate accounts, is concerned. It was imperative on the respondent, to either, not take CENVAT credit in respect of input service used in

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trading activity or maintain separate accounts as per Rule 6(2), *ibid*. However, as is already mentioned, the respondent took CENVAT credit in respect of input service used in trading activity and also failed to maintain separate accounts. It is also not in dispute that the respondent has not filed the option to pay an amount as per Rule 6(3)(ii) of CCR, 2004 from 01.04.2011 for the year 2011-12 but vide letter dated 24.01.2013 the respondent has intimated the payment of proportionate amount as per Rule 6(3)(ii) of CCR, 2004 along with interest. The contention of the appellant that the adjudicating authority has overlooked the Explanation-I below Rule 6(3) of CCR, 2004 is baseless because it is observed that the respondent has filed the option to pay amount as per Rule 6(3)(ii) of CCR, 2004 for the year 2012-13 on 07.02.2013, for the year 2013-14 on 06.04.2013 and for the year 2014-15 on 29.04.2014 before the Superintendent of Central Excise, Range-I, Bhuj Division.

10. It is further observed that the respondent contended that they have identified the common input service credits and have reversed such Cenvat credit amounting to Rs. 49,610/- as per formula mentioned in Rule 6(3A) of CCR, 2004 and the lapse of intimation may be considered as procedural lapse for the F. Y. 2011-12. It is observed that the adjudicating authority has clearly held that the respondent has already paid the amount as per Rule 6(3A) along with applicable interest for the period 2011-12 to 2014-15 and the delay in filing of intimation under Rule 6(3A) for the year 2012-13 and not filing of intimation for the year 2011-12 are procedural lapses which are condonable on the ground that substantial benefit cannot be denied for procedural lapses as held by various judicial authorities. It is further observed that the Hon'ble Tribunal, Mumbai in the case of M/s. Hindustan Antibiotics Ltd. [2016 (42) STR 387 (Tri.-Mumbai)] and the Hon'ble Tribunal Hyderabad in the case of M/s. Aster Pvt. Ltd. [2016 (43) STR 411 (Tri.-Hyd.)] has allowed proportionate reversal of credit and held that the failure if any is only procedural lapse of not filing declaration of availing option.

11. It is further observed that in view of amended provisions of Rule 6(3) of CCR, 2004, the Joint Secretary (TRU) has issued a letter No. 334/8/2016-TRU dated 29.02.2016 which states that:

"(h) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.

(i) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.

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(ii) sub-rule (2) of rule 6 is being amended to provide that a manufacturer who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.

(iii) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products excluding exempted goods or when a provider of output services provides two classes of services, namely exempted services and output services excluding exempted services, Page 33 of 38 then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services, subject to a maximum of the total credit taken or (b) pay an amount as determined under sub-rule (3A).

(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit."

The amendment to CENVAT Credit Rules, 2004 reflects the interpretation and intent of the Government. In-fact Joint Secretary himself states that the rules are *being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit*. Even otherwise to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal.

12. In view of above discussion, I hold that there is no dispute regarding the trading activity carried out by the respondent is falling within the meaning of 'exempted service' as defined under Rule 2(e) of CCR, 2004. Further, it is also undisputed fact that the respondent had availed Cenvat credit on input services which were used in relation to both dutiable and exempted activity (trading). Therefore, it was imperative on the respondent, to either, not to take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2) of CCR, 2004 for the input services used for trading activity as well as for manufacturing of dutiable goods. However, as is already mentioned, the respondent took Cenvat credit in respect of input services used in trading activity and also failed to maintain separate accounts for the same. Therefore, the provisions of Rule 6(3) of CCR, 2004 clearly attracts in respondent's case. Nowhere the quantum of Cenvat credit taken on input services used for trading activity has been disputed by the department. Rule 6(3) provides options either (i) to pay an amount @ 6% of the value of exempted goods or, (ii) to pay an amount as determined under Rule 6(3A) or, (iii) to maintain separate accounts and take CENVAT credit as per conditions therein and thereafter pay an amount as per Rule 6(3A). In the present case, I find that the respondent have availed the provisions of Rule 6(3)(ii) and have followed the procedure as laid down under Rule 6(3A) of CCR,

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2004 by filing declarations, as required under Explanation to Rule 6(3) of CCR, 2004 belatedly or within time limit for the financial year 2012-13, 2013-14 & 2014-15 except for the financial year 2011-12 and also paid an amount of Rs. 49,610/- with interest in compliance of Rule 6(3A) ibid. Further, belatedly filing or non-filing of such declarations is merely a procedural lapse as held by various judicial authorities, hence I condone the same, in absence of any substantial discrepancies noticed in respondent's case.

13. Therefore, I hold that the adjudicating authority has correctly held that the question of payment under Rule 6(3)(i) of CCR-04 would not arise in as much as the intimations have been filed in the relevant financial year and payment of proportionate credit had already been made under Rule 6(3)(ii), ibid, and accordingly, I uphold the impugned order and dismiss the appeal filed by the Department.

14. The appeal is accordingly disposed off in above terms.

सत्यापित,
अ. ए. चोरीया
अधीक्षक (आपील)

Smy Singh 17.04.18
(Sunil Kumar Singh)
Commissioner (Appeals)/
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD

F. No. V2/04/EA2/GDM/2017

Date: 17.04.2018

To,
The Commissioner,
Customs and Central Excise,
"Central Excise Bhavan"
Plot No. 82, Sector-8, Opposite Ramlila Maidan,
Gandhidham-370201.

Copy to:

- (1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
- (2) The Commissioner (Appeals), CGST & Central Excise, Rajkot.
- (3) M/s. Agrocel Industries Limited, Village - Dhordo, District-Kutch.
- (4) The Deputy Commissioner, CGST & Central Excise, Division: Bhuj.
- (5) The Assistant Commissioner (Systems), CGST & Central Excise, Rajkot
- (6) The Superintendent, CGST & Central Excise, Range-III, Division: Bhuj.
- (7) PA to Commissioner of CGST & Central Excise, Gandhinagar.
- ~~(8)~~ Guard file.