::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL 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.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/EA2/16/GDM/2018-19	**04/JC/2017-18**	**19/05/2017**

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

KCH-EXCUS-000-APP-123-2018-19

आदेश का दिनांक / Date of Order: **04.09.2018** जारी करने की तारीख / Date of issue: **07.09.2018**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ 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 / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

M/s.Sanghi Industries Ltd. (Cement Division)Grinding Unit, Sanghipuram, P.O. Motiber Tal: Abdasa, Dist. Kutch Gujarat

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 एव 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, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asanwa 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 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 नियमवाली, 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 अपील 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" मे 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 अर्ज़ी एवं अपील को लागू नहीं होंगे।/
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 पुनरीक्षण याचिका निम्नलिखित मामलो 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 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 भुगतान के लिए जो इयूटी क्रेडीट 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 समायाविधि पर या बाद में पारित किए गए है।/
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 है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदनें 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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण 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 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 ::

The Commissioner, Central Excise & Service Tax, CGST Bhavan, Plot No. 82, Sector – 8, Opposite Ramlila Maidan, Gandhidham - 370201 (hereinafter referred to as "the Department") has filed the present appeal against Order-in-Original No. 04/JC/2017-18 dated 19.05.2017 (hereinafter referred to as "impugned order") passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (hereinafter referred to as 'lower adjudicating authority") in the case of M/s. Sanghi Industries Limited (Cement Division) holding Central Excise Registration No. AAEC5510QXM004, Grinding Unit, Sanghipuram, P.O. Motiber, Tal. Abdasa, Dist.Kutch (hereinafter referred to as "Respondent").

2. Brief facts of the case are that the respondent was engaged in manufacture of Cement and during the scrutiny of the returns filed by them for the period from July, 2007 to December, 2007, it was found that the respondent availed cenvat credit in respect of service tax paid for Port Service, Technical Inspection and Certification Service, Rent paid to Gujarat Maritime Board, Stevedoring Service, Surveyor Service used at the port whereas cenvat credit was allegedly not admissible to them as 'input service' credit under the Cenvat Credit Rule, 2004 (*hereinafter referred to as* 'CCR, 2004'). Show Cause Notice No. V.GND/ARII/COOMR./96/2008 dated 05.08.2008 was issued to them demanding availed Cenvat Credit under Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944 (*hereinafter referred to as* "the Act"), interest under Section 11AB of the Act and imposing penalty under Rule 15 of the CCR, 2004 read with Section 11AC of the Act. The lower adjudicating authority vide impugned order dropped the proceedings initiated vide SCN dated 05.08.2008 on the ground that the respondent can avail input stage credit for the services availed at port of export.

3 Being aggrieved with the impugned order, the department preferred this present appeal, *interalia,* on the following grounds:

(i) The lower adjudicating authority has decided the matter merely on the basis of the CBEC Circulars, which is not proper when similar issue is pending before the Hon'ble Supreme Court in case of Sanghi Industries Ltd. vide SLP (C) No. 1768/2012, which tagged with SLP (C) No. 25857/2011 in the case of ABB Ltd.;

(ii) Appeal No. E/13428/2013 filed by the department before the Hon'ble CESTAT, Ahmedabad is pending for decision in respect of respondent's sister unit – Sanghi Industries Ltd., Clinker Unit on similar issue. It was not

appropriate and correct to decide the said SCN dated 05.08.2008 in absence of finality of the said appeal pending before the Hon'ble Supreme Court/CESTAT;

(iii) The respondent claimed that they were availing the services in question for export of goods, where the finished goods were delivered on board the ship i.e. Shipping Line and when the place of removal stands extended, they were entitled for cenvat credit of services in question. However, it is an admitted fact that the jetty was being utilized for importing/exporting by another unit of Sanghi Industries Ltd. and other parties. In that case, taking credit by the respondent posing utilization of such services only for the export purpose required proper verification prior to dropping demand. However, no attempt was made by the lower adjudicating authority in this regard prior to dropping the demand. Hence, the order passed without any such verification is not proper and legal.

(iv) The respondent is a manufacturer exporter and goods were exported from their captive jetty; that the respondent took risk of damage/lost/theft of the goods till the goods were handed over to Shipping Line; that the delivery of the goods was on FOB basis as per contract; that no specific submission was made by the respondent to substantiate such crucial aspects and the lower adjudicating authority had also not considered it necessary to verify; that the jetty was not being utilized solely by the respondent and hence, claim of the respondent that utilization of jetty as captive jetty was not beyond doubt and such issue could have gone into detailed verification prior to dropping of demand; that the respondent availed the services not only at their jetty located at Jakhau, but they obtained services at Kandla also, but the impugned order no where mentioned about export from Kandla; that the services, which claimed as port services were in fact port services as well as CHA, cargo handling, stevedoring etc. and not solely related to the port wharfrage etc. service; that the relevancy of such bundled services for being eligible within the scope of port service and consequently as input service is a matter of due verification and apparently no such verification done by the lower adjudicating authority before dropping demand.

(v) As per Rule 2(l) of the CCR, 2004, 'input service' means – used by a provider of taxable service for providing an output service; or used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal; or be services of the types specified in the inclusive part of the

definition supra. Whereas the respondent availed cenvat credit on 'Rent paid on Gujarat Meritime Board'; 'Stevedoring'; 'Surveyor'; 'Port Service' and 'Technical Inspection and Certification' etc. It was not disputed that the services mentioned above can neither be stated to be used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal nor are they the services of the type enumerated in the inclusive part of the definition. The appellant relied upon decision dated 07.11.2012 of the Hon'ble High Court of Gujarat in case of Cadila Health Care Ltd. passed on Tax Appeal No. 353 of 2010 and submitted that in view of such clear ruling of the Hon'ble High Court of Gujarat, the services as mentioned above cannot be stated to be 'input service' as defined in Rule 2(l) of the CCR, 2004 and hence the respondent was not entitled for such cenvat credit.

(vi) Mere inclusion of a service in the inclusive part of the definition, will *per se* not quality it as eligible as 'input service'. The ultimate test of the same as 'used in or in relation to the manufacture' or 'used by a provider of taxable service for providing an output service', is a quintessential characteristic for a service to qualify as input service. The appellant relied upon following decisions:

- Manikgarh Cement Works – 2010 (18) STR 275;
- Maruti Suzuki Ltd. – 2009 (240) ELT 641 (SC);
- Coca Cola India Pvt. Ltd. – 2009 (242) ELT (168) (Bom);

(vii) Since, the services used by the respondent had no relation to the manufacture of goods, directly or indirectly, the same cannot be treated as input service as hold in following judgments:

- Sundaram Brake Linings – 2010 (19) STR 172 (Tri.Chennai);
- Ultratech Cement Ltd. – 2007 (6) STR 364 (Tri.Ahmd.);
- Vandana Global Ltd. – 2010 (253) ELT 440 (Tri. LB);
- Nirma Ltd. – 2009 (13) STR 64 (Tri.Ahmd.);
- Excel Crop Care Ltd. – 2007 (7) STR 451 (Tri.Ahmd.)

(viii) The Hon'ble CESTAT observed in case of Hindustan Zinc Ltd. – 2012 (275) ELT 136 (Tri.Del.) on the issue of whether ports can be treated as the place of removal in case of exports is worth nothing.

(ix) The lower adjudicating authority relied on CBEC Circulars dated 28.02.2015 and 23.08.2007 and held that the port services etc. availed by the appellant may qualify as input service. Circular dated 28.02.2015 issued after amendment of Rule 2(l) of the CCR, 2004 whereas Circular dated 23.08.2007 clarified in respect of transportation service and not other services, which was procured by the assessee beyond the place of

manufacturing. Even otherwise, the Board clearly directed that "*the credit of service tax paid on the transportation upto such place of sale would be admissible, if it can be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Act as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place".* Thus, without proper verification exercise carried out in respect of eligibility for availment of cenvat credit, dropping of the demand is not legal and proper.

(x) In view of the above, the services in question cannot be termed to be input service, even if they had been part of inclusive definition, as the same are not used in or in relation to manufacture.

4. Personal hearing in the matter was attended to by Shri Jigar Shah, Advocate and Shri Dayalan Naidu, DGM(Excise), on behalf of the respondent, who reiterated the findings of the lower adjudicating authority and submitted that Grounds No. 2 and 3 of departmental appeal are not correct as these travel beyond allegations of SCN as held by Hon'ble Apex Court in cases as reported as 2013 (32) STR 532 (Bom.) and 1996 (88) ELT 641 (SC) and Hon'ble High Court of Gujarat 2016 (41) STR 884 (Guj.); that they would submitted detailed written submissions within a week; that appeal needs to be decided in the facts of this case.

4.1 No one attended personal hearing from the department despite PH notices issued to the Commissionerate and Division.

4.2 The respondent vide written submission dated 23.06.2018, *interalia,* submitted that:

(i) The respondent had correctly availed cenvat credit of Rs. 1,01,63,085/- on port services and technical testing services utilized for export of final products and the lower adjudicating authority vide impugned order held that the place of removal in case of export of goods would be port and hence, the respondent correctly availed cenvat credit on services utilized for export of goods and the lower adjudicating authority correctly dropped the proceedings initiated vide SCN dated 05.08.2008.

(ii) The lower adjudicating authority rightly relied upon the Circulars dated 28.02.2015 and dated 23.08.2007 while holding that the place of removal in this case of export would be port; the SCN alleged that the services were utilized beyond the place of removal i.e. factory and hence cenvat credit of service tax

paid on such services not available to the respondent, whereas the Board has clarified vide Circular dated 28.02.2015 that in the case of exports, for the purposes of cenvat credit of input services, the place of removal is the port or the airport from where the goods are finally exported; the department is bound by the circular and the Hon'ble High Court of Gujarat has also settled the issued in favour of the respondent in cases of Dynamic Industries reported as 2014 (35) STR 674 (Guj.) and Inductotherm India P. Ltd. reported as 2014 (36) STR 994 (Guj.); the present appeal filed by the department is for the period from July, 2007 to December, 2007 whereas appeal filed by the respondent for the subsequent period from January, 2008 to November, 2008 has already been allowed by Commissioner (Appeals), Rajkot vide OIA No. KCH-EXCUS-000-APP-123-TO-124-2017-18 dated 11.12.2017.

(iii) The input services were in nature of port services and technical testing and inspection services; the SCN alleged that the services availed beyond the place of removal and hence, cenvat credit denied; Whereas the input services can be availed anywhere by the manufacturer and there is no such condition in the definition/Rule 3 of the CCR, 2004 that the input services must be received in the factory; the respondent relied upon the cases of Deepak Fertilizers and Petrochemicals reported as 2013 (32) STR 532 (Bom) and Alidhara Textool Engineers Pvt. Ltd. reported as 2009 (14) STR 305 (Tri.-Ahmd).

(iv) The department argued that on the similar issue, the department filed SLP No. 1768/2012 (CA No. 011399/2016) tagged SLP(C) No. 25857/2011(CA No. 011402/2016) before the Hon'ble Supreme Court, which is pending for decision and hence, the lower adjudicating authority should not have decided the present issue. The respondent submitted that the said SLP/CA along with other SLP has already been dismissed by the Hon'ble Supreme Court and submitted copy of the orders passed by the Hon'ble Supreme Court reported as 2018 (11) GSTL 3 (SC).

(v) The department argued that on similar issue in respondent's own case, Appeal No. E/13428/2013 filed by the department was pending before the Hon'ble Tribunal and therefore, the issue should not have been decided. The respondent submitted that the Hon'ble Supreme Court observed in case of Kamlakshi Finance Corporation reported as 1991 (55) ELT 433 (SC) that the orders passed by the Commissioners and CESTAT are binding on the departmental officers; Appeal No. E/13428/2013 pending before CESTAT is pertaining to period post 01.04.2011, the date on which amendment in definition of input services was made and therefore, the grounds raised in relation to that appeal are not relevant to this case.

(vi) The department argued that another unit of the respondent, namely, Clinker Unit is also utilizing the captive jetty of the respondent; the said jetty is being used for import of inputs by the respondent as well and therefore, these facts should have been verified by the lower adjudicating authority before taking any final decision. The department further argued that the nature of services though mentioned as port services but the nature of services are CHA services, cargo handling services etc. The respondent submitted that the said grounds of the appeal are beyond the scope of show cause notice and therefore, not tenable at this stage; the said grounds were not incorporated while issuing the SCN dated 05.08.2008. The respondent relied upon following decisions in this regard:-

- Reckitt Coleman of India Ltd. reported as 1996 (88) ELT 641 (SC);
- Prince Khadi Wollen Handloom reported as 1996 (88) ELT 637 (SC);
- Reliance Ports & Terminal reported as 2016 (334) ELT 63 (Guj.);
- Ballarpur Industries reported as 2007 (215) ELT 489 (SC);
- Gas Authority of India reported as 2008 (232) ELT 7 (SC).

(vii) The definition of input service as referred by the department is effective from 01.04.2011 whereas present appeal is for the period from July, 2007 to December, 2007, therefore, reliance cannot be put on amended definition of input service, which is effective only from 01.04.2011 to deny cenvat credit of input service for the period from July, 2007 to December, 2007. Hence, reliance placed on the decision of Cadila Healthcare reported as 2013 (30) STR 3 (GUj.) is also of no consequence in this case as the issue in the present appeal is altogether different.

(viii) The decision of the Hon'ble Supreme Court in case of Maruti Suzuki reported as 2009 (240) ELT 641 (SC) cannot be referred to eligibility of input services in the present appeal as the Hon'ble Supreme Court has considered the definition of inputs while the issue in the present appeal is of eligibility & definition of input service and the respondent relied on decision of the Hon'ble High Court in case of Ultratech Cement reported as 2010 (20) STR 577 (Bom).

(ix) The department argued that services used by the units which had no relation to the manufacture of goods cannot be treated as input service. Whereas present SCN has been issued to the Grinding Unit only alleging that the service not eligible to the grinding unit. The respondent submitted that the department wants to canvass a ground that the services not utilized by the grinding unit; this is factually incorrect and the ground taken is also beyond the scope of show cause notice dated 05.08.2008.

(x) The department relied on decision of the Hon'ble CESTAT in case of Hindustan Zinc Ltd. reported as 2012 (275) ELT 136, which held that ports can be treated as the place of removal in case of export is not correct as the said decision of the Hon'ble CESTAT is contrary to the decisions of the Hon'ble Gujarat High Court in the cases of Dynamic Industries reported as 2014 (35) STR 674 (Guj.) and Inductotherm India P. Ltd. reported as 2014 (36) STR 994 (Guj.) wherein it is held that port is place of removal in case of export of goods.

(xi) The department argued that the lower adjudicating authority reliance on CBEC Circulars dated 28.02.2015 and dated 23.08.2007 was not proper and before deciding the issue, the lower adjudicating authority had not taken care to verify the factual aspects whereas the respondent submitted that the said argument of the appellant is not proper at this stage as necessary verification was required to be done at the time of issuance of SCN.

Findings:-

5. I have carefully gone through the facts of the case, the impugned order and appeal memorandum as well as the submissions made by the respondent. The issue to be decided in the present appeal is as to whether respondent is eligible to avail cenvat credit of service tax paid on various services availed by them at port of export for export of goods beyond factory gate or not.

6. I find that the eligibility of cenvat credit in dispute are in respect of service tax paid on the Port Service, Technical Inspection and Certification Service, Rent paid to Gujarat Maritime Board, Stevedoring Services, Surveyors Services and SCN alleged that the said cenvat credit of service tax paid on such services is not available on the ground that the services were used beyond the factory gate i.e. place of removal in violation of Cenvat Credit Rules, 2004, whereas the lower adjudicating authority has allowed the said cenvat credit of the service tax paid on such services on the ground that the place of removal in the present case is port of export where from goods have been exported. The respondent's contention is that since these services were used for export of goods, place of removal is port and these services are duly covered under the definition of "input service" whereas the lower adjudicating authority has found that the delivery of the goods was on FOB basis, which was part of the contract.

6.1. I find that in case of exports, goods are sold to foreign buyer and property in goods passes from the respondent at the port when the goods are handed over to shipping line or to a carrier, who has accepted the goods and who has been authorized by the foreign buyer to receive the goods for further

transmission of the goods to the destination. Thus, title of the export goods gets transferred from the exporter/respondent at the port only. I find that CBEC has clarified the issue vide Circular No. 999/6/2015-CX, dated 28-2-2015 (F. No. 267/13/2015-CX. 8) by stating that it is clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. It is also clarified that the place where sale takes place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal. Text of CBEC Circular is reproduced below for ease of reference:-

> *" Attention is invited to Circular No. 988/12/2014-CX, dated 20-10-2014 issued from F. No. 267/49/2013-CX.8 [2014 (309) E.L.T. (T3)] on the above subject wherein it was clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930 and that payment of transport, payment of insurance etc are not the relevant considerations to ascertain the place of removal. The place where sale takes place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.*
>
> *2. In this regard, a demand has been raised by the trade that it may be clarified that in the case of exports, for purposes of CENVAT credit of input services, the place of removal is the port or the airport from where the goods are finally exported.*
>
> *3. The matter has been examined. It is seen that section 23 of the Sale of Goods Act, 1930 provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract, and therefore, in view of the provisions of the Section 23 (1) of the Sale of Goods Act, 1930, the property in the goods would thereupon pass to the buyer. Similarly, section 39 of the Sale of Goods Act, 1930 provides that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.*
>
> *4. In most of the cases, therefore, it would appear that handing over of the goods to the carrier/transporter for further delivery of the goods to the buyer, with the seller not reserving the right of disposal of the goods, would lead to passing on of the property in goods from the seller to the buyer and it is the factory gate or the warehouse or the depot of the manufacturer which would be the place of removal since it is here that the goods are handed over to the transporter for the purpose of transmission to the buyer. It is in this backdrop that the eligibility to Cenvat Credit on related input services has to determined.*
>
> *5. Clearance of goods for exports....*
>
> *6. <u>In the case of clearance of goods for export by manufacturer exporter</u>, shipping bill is filed by the manufacturer exporter and*

goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS. Needless to say, eligibility to CENVAT Credit shall be determined accordingly.

7. .....

8. ....."

(Emphasis supplied)

6.2 I find that the issue has been very categorically addressed by Para 4 & Para 6 of the above CBEC circular that place of removal would be the port from where goods are exported as transfer of property can be said to have taken place at the port where shipping bill is filed and goods are handed over to the transporter for the purpose of transmission to the buyer. I find that in the case on hand, input services are used before the property of goods transferred from the respondent as discussed hereinabove and as clarified by the CBEC. I am, therefore, of considered view that the respondent is eligible for credit of service tax paid on the services in dispute. I find that the admissibility of input services used in relation to export of goods also draws ample force in view of various decisions of the Hon'ble CESTAT.

7. I find that Hon'ble CESTAT in the case of Rolex Rings P. Ltd., reported as 2008 (230) ELT 569 (Tri-Ahmd) held as under:-

"4. After considering the submissions made by both the sides and the reasonings adopted by Commissioner (Appeals), I find that the CHA and Surveyors' services are utilized at the time of the export of the goods. The respondents continue to remain the owner of the goods in question till the same are exported. As such, it can be reasonable concluded that the place of removal in case of exported goods is the port area. The above interpretation is also supported by Para 8.2 of the Board's circular No. 91/8/2007-S.T. dt. 23-8-2007 laying down that where sale takes place at the destination point and the ownership of the goods remain with the seller till the delivery of the goods, the place of removal would get extended to the destination point and the credit of the service tax paid on the transportation up to such place of sale would be admissible. Inasmuch as in the present case also, the ownership of the goods remain with the seller till the port area, it can be safely held that all the services availed by the exporter till the port area are required to be considered as input service inasmuch as the same are clearly related to the business activities. Activities relating to business are covered by the definition of input service and admittedly CHA and Surveyors' services are relating to the export business. As such, I agree with the reasonings adopted by Commissioner (Appeals) that the credit of duty paid on such services is admissible to the respondents."

(Emphasis supplied)

7.1 The Hon'ble CESTAT in the case of Leela Scottish Lace Pvt. Ltd. reported as 2010 (19) STR 69 (Tri-Bang) has also held as under:-

> "3. I have carefully considered the facts of the case and the rival submissions. As per the clarification issued by the CBEC vide Circular No. 91/8/2007, dated 23-8-2007, "place of removal" appearing in the Cenvat Credit Rules covers the place at which the ownership of finished goods are transferred. In the instant case, the export goods are sold on FOB basis. The said service is availed prior to export of the goods. In view of the clarification of the Board, the appellants are entitled to credit of service tax paid under CHA services in respect of the excisable goods at the port area. I find that this was the ratio of the decision of the Tribunal in the case of *CCE, Rajkot* v. *Rolex Rings Pvt. Ltd.* reported in 2008 (230) E.L.T. 569 (Tribunal-Ahmd.). I also find that in Final Order No. 1003/2009 dated 1-5-2009, a Division Bench of this Tribunal held that tax paid on services relating to business activities of a manufacturer was entitled to benefit of cenvat credit. The said order dealt with the services availed by the assessee in respect of the goods cleared on payment of duty and stored in its godown. In passing the said order, the Tribunal had followed the ratio of a decision of the Larger Bench of the Tribunal in *CCE, Mumbai* v. *GTC Industries Ltd.* reported in 2008 (12) S.T.R. 468 (Tribunal.-LB). Following these decisions of the Tribunal, I hold that the appellants are entitled to refund of service tax paid on CHA services used as input in the export of final products. The appeal is allowed."
>
> (Emphasis supplied)

7.2 In another case of Matrix Clothing Pvt. Ltd. reported as 2016 (44) STR 618 (Tri- Chan), Hon'ble CESTAT has held as under:-

> *"12. I find that it is alleged against the appellant that they are not entitled to Cenvat credit to the input service credit namely CHA and Courier Service as they are availed beyond the place of removal of the goods. I find that this Tribunal time and again held that any service availed by exporter up to the place of port of export, the exporter is entitled to avail Cenvat credit in the light of the decision of Premier Conveyors P. Ltd. (supra). In that circumstances, I hold that the appellant is entitled to avail Cenvat credit on input service credit namely CHA and Courier Services which have been availed by the appellant in the course of their business to export of goods, further, I find that in the case of ABB Ltd. (supra), it was held by the Hon'ble High Court of Karnataka that for the period prior to 1-4-2008, the assessee entitled to avail Cenvat credit on the service tax paid on the services beyond the place of the removal of goods."*
>
> (Emphasis supplied)

8. In light of the above case laws and clarifications issued by CBEC, it is evident that "place of removal' would be the port from where goods have been exported and hence cenvat credit of service tax paid on the services utilized for export of such goods is admissible to the manufacturer exporter. I, therefore, hold that the respondent is eligible to avail cenvat credit of service tax paid against the said services. Once cenvat credit is held admissible, payment of

interest and imposition of penalty cannot survive. Accordingly, I hold that the lower adjudicating authority has correctly dropped the proceedings initiated vide SCN dated 05.08.2008.

9. I find that the department submitted that the lower adjudicating authority cannot decide the present issue as the department had filed SLP No. 1768/2012 (CA No. 011399/2016) tagged SLP(C) No. 25857/2011(CA No. 011402/2016) before the Hon'ble Supreme Court on the similar issue, which is pending for decision. I find that the Hon'ble Supreme Court passed order in case of Vasavdatta Cement and others reported as 2018 (11) GSTL 3 (SC) wherein above SLP disposed off and issue was settled in favour of the respondent. Hence, this argument of the department is also not tenable.

9.1 I find that the department argued that the lower adjudicating authority cannot decide the present issue as departmental appeal No. E/13428/2013 is pending before the Hon'ble CESTAT on similar issue in respondent's own case. I find that the issue has already been decided by the Hon'ble Supreme Court as well as clarified by the Board vide Circular dated 28.02.2015. Therefore, there is no force in this argument.

9.2 The department also pleaded that another unit of the respondent utilized captive jetty of the respondent as the said captive jetty used for import of inputs by the respondent and hence, the lower adjudicating authority had to verify these facts before issue of the impugned order. It was also pleaded that the services, which were claimed as port services were in fact inclusive of the port services as well as CHA services, Cargo Handling Services, Stevedoring Services etc. I find that these grounds have not been covered under present SCN and hence, beyond the scope of the SCN, which was adjudicated vide the impugned order and hence, cannot be considered at this stage.

9.3 The respondent submitted that the department relied on the definition of input service amended w.e.f. 01.04.2011 for denial of cenvat credit, which is not correct. I find force in this submission of the respondent. The department referred the definition of input service as per Rule 2(l) of the CCR, 2004 which is effective only from 01.04.2011 onwards whereas the SCN/ and the impugned order covered period from July, 2007 to December, 2007 and the definition of input service effective from 01.04.2011 onwards cannot be made applicable in the present appeal/case.

10. In view of above legal and factual position, I uphold the impugned order and reject the appeal filed by the department.

११. विभाग द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

11. The appeal filed by the department stands disposed off in above terms.

(कुमार संतोष) 14/9/2018
आयुक्त (अपील्स)

By RPAD
To

M/s. Sanghi Industries Ltd, Cement Divisions, (Grinding Unit), Sanghipuram, P.O. Motiber Tal: Abdasa Dist:- Kutchh	**मेसर्स सांघी इंडस्ट्रीज लिमिटेड** **सीमेंट डिविजन, (ग्राईंडिंग यूनिट)** **संघीपुरम, पी. ओ.: मोटिबर, तालिका: आबदासा, डिस्ट्रिक्ट: कच्छ.**

Copy for information and necessary action to:

1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
2) The Commissioner, GST & Central Excise, Gandhidham (Kutch) Commissionerate, Gandhidham.
3) The Additional Commissioner, GST & Central Excise, Gandhidham(Kutch) Commissionerate, Gandhidham.
4) The Assistant Commissioner, GST & Central Excise Division, Gandhidham.
5) Guard File.