



::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
	V2/187/GDM/2017	01/GST/AC/2017-18	31/08/2017

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

KCH-EXCUS-000-APP-139-2018-19

आदेश का दिनांक / Date of Order:	03.10.2018	जारी करने की तारीख / Date of issue:	03.10.2018
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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 :-**

Friends Oil & Chemicals Terminals Pvt. Ltd., "Maitri Bhavan", Plot No. 18,, Sector- 08, Gandhidham (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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 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 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 सलग्न 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 नियमवली, 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 सलग्न 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 सलग्न 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 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 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 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 मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 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 तरीख अथवा समयाविधि 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 है, इस आदेश के संश्लेषण 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 दंग 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 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, 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-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 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

:: ORDER IN APPEAL ::

M/s. Friends Oil & Chemical Terminals, Maitri Bhavan, Plot No.18, Se4ction-8, Gandhidham (Kutch)-370201 (herein after referred to as "Appellant") filed present appeal against Order-in-Original No. V.ST/15-155/Adj/2013 dated 31.08.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, CGST Gandhidham (Urban) Division, Gandhidham, (hereinafter referred to as 'the lower adjudicating authority'),

2. The brief facts of the case are that the appellant is service tax assessee registered under the category of "Storage & Warehousing Services". Audit found that appellant availed Cenvat credit of duty paid on H.R. Plates, M S Angles, M S Channels, etc. falling under Ch. 72 of Central Excise Tarff Act, 1985 used in construction/fabrication or extension of storage tanks as well as repairs and maintenance of storage tank by treating it as Capital goods which are neither inputs nor capital goods under Cenvat Credit Rules,2004 (hereinafter referred to as "CCR,2004") and hence the Cenvat Credit was not available to the appellant. Show Cause Notice dated 8.10.2014 was issued to Appellant proposing recovery of wrongly availed Cenvat Credit of Rs.5,78,043/- under Section 73 of the Finance act,1994 (hereinafter referred to as "Act") read with Rule 14 of CCR,2004 along with interest under Section 75 of the Act, penalty under Section 77 of the Act and penalty under Rule 15 of the CCR,2004 read with Section 78 of the Act. The lower adjudicating authority vide impugned order disallowed the Cenvat Credit and ordered for recovery of Rs.5,78,043/- under Section 73 of the Act read with Rule 14 of CCR,2014, interest under Section 75 of the Act, penalty of Rs.5,78,043/- under Rule 15 of CCR,2004 read with Section 78 of the Act and penalty of Rs.10,000/- under Section 77 of the Act.

3. Being aggrieved with the impugned order, the Appellants preferred present appeals on the following grounds:-

(i) The plates and angles utilized by the appellant for repairs and extension of height of storage tanks in providing services of giving Storage Tank on hire; that there was no suppression on their part as department is well

aware about model of their business and appellant filed regular ST-3 return and disclosing the details of CENVAT credit availed and utilized by them.

(ii) The lower adjudicating authority has not considered the decision of the Hon'ble CESTAT, South Zonal Bench, Bangalore in the case of M/s. Sai Samhita Storages P Ltd reported as 2010(255 ELT (91) and upheld by the Hon'ble Andhra Pradesh High Court reported as 2011 (23) STR 341 (AP); that in given set of facts, the lower adjudicating authority has erred in demanding interest under Section 75, imposing penalty under Section 77 and Section 78 of the Act.

4. Personal Hearing in the matter was attended to by Shri Manish Vora, Chartered Accountant, who reiterated the grounds of appeals and made written submission dated 31.7.2018 to say that though storage tank made by them is immovable property, it is defined as capital goods and cenvat credit on inputs used to manufacture storage tanks or maintenance thereof is admissible; that CBEC Cir. No. 58/1/202-Cx dated 15.1.2002 is not valid as storage and warehousing service has been brought under taxable category w.e.f. 16.2.2002, which the appellant is providing since 2000 but credit taken in 2009-10 for extension of height of storage tanks and repairs & maintenance thereof; that without storage tanks, they will not be able to provide this service; that the above circular has no relevance as Hon'ble High Court of Andhra Pradesh has allowed Cenvat credit in similar case of Sai Samhita Storage (P) Ltd reported as 2011 (23) STR 341 (AP) which is followed by Hon'ble Chhattisgarh High court in the case of M/s. Vimla Infrastructure India P Ltd reported as 2018(13) GSTL 57 (Chhattisgarh) & by the Hon'ble CESTAST in the case of M/s. East India Petroleum P Ltd reported as 2017 (48) STR 267 (Tri-Hyd). Appellant also submitted that demand is time barred; that the SCN dated 8.10.2014 raising issue of Cenvat Credit taken in 2009-10 is hit by limitation of time.

4.1. The appellant in written submission dated 31.7.2018 ("31.8.2017"), interalia, contended that appellant is private limited company engaged in the business of providing liquid storage tanks on hire/rent and registered under "Storage & Warehousing Service"; that appellant is collecting service charges describing it as "Terminal Charges" along with Service tax; that duty paid goods like H.R. Plats, M.S.Angles, M.S. Plates etc. falling under chapter 72

were utilized by them either for extension of height of storage tanks or repairing and maintenance of storage tanks wherein material of their clients are stored; that that appellant availed Cenvat Credit of duty paid on these goods classifying it as "Capital Goods" in their ST-3 return instead of correct head of "Input"; that increasing height of storage tank and repairing of it is essential to provide output services; that without these storage tank appellant could not carry out the business of providing storage service and therefore denying credit of inputs used for extension of heights and repair or maintenance of storage tank is devoid of merit.

5.2 Appellant submitted that Section 37B order No.58/1/202-CX dated 15.1.2002 relied upon by the lower adjudicating authority is misplaced inasmuch as it was not issued in connection to the scheme of Cenvat Credit and did not envisage a situation where storage tanks made out of duty paid input for the purpose of providing output services; that circular was issued on 15.2.2002 when Storage and Warehousing Service were not under the ambit of Service tax net.

5.3 As per the explanation 2 to Rule2(k) of CCR,2004,towards definition of input, the word input carried a wide and comprehensive meaning specifically when it is interpreted in the context of "*used in or in relation to the manufacture of final product whether directly or indirectly and whether contained in the final product or not*". All the above consideration become relevant only when they are read with the expression "used in or in relation to the manufacture of final product' in the substantive/ specific part of the definition. In each case it has to be established that input mentioned in the inclusive part is 'used in or in relation to the manufacture of final product'; that it is the functional utility of the said item which would constitute the relevant consideration; that unless and until the said Input is used in or in relation to the manufacture of final product or completion of any service, the said item would not become an eligible input; that the said expression used in or in relation to the manufacture has many shades and would cover various situation based on the purpose for which the input is used. Appellant relied upon the Hon'ble CESTAT's decision in the case of M/s. Sai Samhita Storages P Ltd reported as 2010(255 ELT (91) as affirmed by the Hon'ble High Court of Andhra Pradesh. Appellant also submitted that the said decision is followed by the Hon'ble Tribunal in the case of M/s. East India Petroeum P Ltd reported as 2017(48) STR 267 (Tri Hyd),

M/s. Mysore Holding P Ltd [2017(52) STR 70 (Tri-Bang)], M/s. Vamona developers [2016 (42) STR 227 (Tri-Mum)], Masharashtra Cricket Association [2016(41) STR 833 (Tri-Mum)] and M/s. Grasim Ind Ltd [2015(315)ELT 426 (Tri-Del)].

5.4 Appellant contended that the demand is barred by limitation for the period from April, 2009 to March, 2010 as they had never claimed cenvat credit of inputs and capital goods as "input services" as alleged in the impugned SCN; that it is settled law that when the demand is worked out on the basis of records & documents, initially drawn by the tax payer, larger period for recovery is not invocable nor penalty is imposable; that Appellant submitted copy of ST3>Returns and relied upon following case laws:

- M/s. H.M.M. Ltd [1995(76) ELT 497 (SC)]
- M/s Chemphar Drugs and Linements [1989(40)ELT 276 S(C)]
- M/s. Easland Combines [2003(152) ELT 39 (SC)] and
- M/s. Padmini Products[1989(43) ELT 195 (SC)].
- M/s. Narbada Steel Ltd [2007(217) ELT 469 (Tri-Del)]

5.5 Appellant submitted that they had bonafide belief that they were eligible for Cenvat Credit and no intentional avilment and utilization of Cenvat Credit in their case and therefore provisions of Section 80 of the Act may be invoked and penalty may not be imposed upon them.

Findings:

6. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made during personal hearing. The issue to be decided in this appeal is as to whether the appellant is eligible for Cenvat Credit of inputs like H.R. Plate, M.S. Angles, M.S. Plates etc. utilized by them for extension of height of storage tanks and for repair and maintenance of storage tanks used for providing output services or not.

7. I find that the appellant is engaged in providing storage and warehousing services by way of letting the Storage tank on rent/hire. It is not in dispute that goods i.e. H.R.Plates, M.S. Angles, M.S. Plates etc. are utilized for extension of heights of storage tanks and its repair/maintenance and these

storage tanks are used for providing of taxable output services by the appellant. It is appellant's contention that goods utilized by them are inputs used in manufacturing Capital Goods i.e. storage tanks which are further used in providing services. I would like to reproduce the definition of Capital Goods and Input under Rule 2 of Rules, 2004 which reads as under:-

"(k) "input" means -

- (i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting-oils, coolants, accessories of the final products cleared along with the final product; goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;
- (ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1. - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods;

"(a) : "Capital goods" means :-

(A) the following goods, namely :-

(B) (i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90 [heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804] of the First Schedule to the Excise Tariff Act;

- (ii) pollution control equipments;
- (iii) components, spares and accessories of the goods specified at (i) and (ii)
- (iv) moulds and dies, jigs and fixtures;
- (v) refractories and refractory materials;
- (vi) tubes and pipes and fittings thereof; and
- (vii) storage tank,

used -

- (1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or
- (2) for providing output service".

7.1 The lower adjudicating authority has denied cenvat credit on the ground that inputs utilized by the appellant are not used for providing output services and storage tanks are not excisable goods as per section 37B order No.58/1/2002-1CX dated 15.1.2002. I find that lower adjudicating authority has erred in relying section 37B order dated 15.1.2002 inasmuch as storage tank is covered under the definition of Capital goods under Rule 2A of CCR,2004

notified vide Notification No.23/2004 CE (NT) dated 10.9.2004 and also not relevant as the Order is not in relation to use of storage tank for providing output services. I find that the appellant is registered for the taxable category of "Storage and Warehousing Service" and appellant can not provide such services without having storage tanks. I find that the goods i.e. H.R.Plates, M.S. Angles, M.S. Plates etc. used by the appellant are essential inputs for construction and maintenance of storage tanks and are well covered under the definition of input as defined at Rule 2(k) of CCR,2004. Thus, these goods are inputs used for providing the storage and warehousing services. It is not department's case that such output services can be provided in absence of Storage Tanks owned by the appellant. I find that the issue is no longer *res integra* and stands decided by the Hon'ble CESTAT in the case of M/s. Sai Samhita Storages P Ltd reported as 2010 (255) ELT 91(Tri-bang) and upheld by the Hon'ble Andhra Pradesh High Court reported as 2011(23) STR 341 (AP.) . I also find that the Hon'ble CESTAT has held that such material used for construction of storage tanks are inputs and cenvat credit can not be denied to the service provider. Para 9 of the Final Order reads as under:-

"9. It can be seen from the above reproduced definition of 'input', that it includes inputs which are used for the manufacture of Capital Goods, which are further used in the factory of the manufacturer. It was argued by the learned JCDR that the appellant is not a manufacturer. It is undisputed that the appellant is not a manufacturer, but a person who is providing output services under the category of 'Storage and Warehouse' services. It is also seen from the definition of Capital Goods that the credit of the duty paid on tubes and pipe fittings, storage tanks is eligible for availment of Cenvat credit. It is undisputed in this case that the inputs viz. cement, TMT bars, and steel tubes are used for the purpose of construction of storage tanks and for the pipelines for transfer of liquid cargo, the benefit of credit cannot be denied to the appellant, as the appellant is using these inputs for manufacture of the capital goods i.e. storage tanks and pipeline for delivery of the cargo from such storage tank to truck delivery station. The Cenvat Credit Rules, 2004 clearly allow the appellant to take the Cenvat credit".

7.2 I find that the relevant part of the judgment of the Hon'ble High Court reads as under:-

"7. A plain reading of both the above definitions would show that, unless excluded, all goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT credit. In Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi-III, (2009) 9 SCC 193 = 2009 (240) E.L.T. 641 (S.C.) the Supreme Court laid down as follows.

9. Coming to the statutory definition of the word "input" in Rule 2(g) in the CENVAT Credit Rules, 2002, it may be noted that the said definition of the word "input" can be divided into three parts, namely:

- (i) specific part*
- (ii) inclusive part*

(iii) place of use

10. Coming to the specific part, one finds that the word "input" is defined to mean all goods, except light diesel oil, high speed diesel oil and petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. The crucial requirement, therefore, is that all goods "used in or in relation to the manufacture" of final products qualify as "input". This presupposes that the element of "manufacture" must be present.

8. Yet again considering the inclusive part of the definition of "input", it was held as follows.

All these considerations become relevant only when they are read with the expression "used in or in relation to the manufacture of final product" in the substantive/specific part of the definition. In each case it has to be established that inputs mentioned in the inclusive part is "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" have many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product. Hydrogen gas used in the manufacture of sodium cyanide is an eligible input, since it has a significant role to play in the manufacturing process and since the final product cannot emerge without the use of gas. Similarly, Heat Transfer Oil used as a heating medium in the manufacture of LAB is an eligible input since it has a persuasive role in the manufacturing process and without its use it is impossible to manufacture the final product. Therefore, none of the categories in the inclusive part of the definition would constitute relevant consideration per se. They become relevant only when the above crucial requirement of being "used in or in relation to the manufacture" stands complied with. In our view, one has to therefore read the definition in its entirety.

9. There is no dispute, in these cases, that the assessee used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided. Therefore the finding of the original authority as well as the appellate authority are clearly erroneous, which was correctly rectified by the CESTAT. In so far as the levy of penalty under Rule 15(2) of the Rules is concerned, unless and until there is a finding that there was suppression of fact, and irregular claim of CENVAT credit, the question of levying penalty under Rule 15(2) of the Rules does not arise. In that view of the matter, the order levying penalty was rightly set aside by the CESTAT."

7.3 I further find that similar views have been taken by the Hon'ble CESTAT by following the Hon'ble Andhra Pradesh High Court's decision, *supra*, in the case of M/s. East India Petroleum P Ltd reported as 2017 (480) STR 267 (Tri-Hyd) and allowed Cenvat Credit on MS items used for fabrication of Storage Tank for providing output service of storage and warehousing by the assessee.

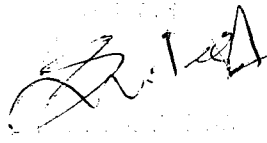
8. In view of above, by following the ratio of the above decisions, I hold that the issue stands decided in favour of the appellant by the Hon'ble High

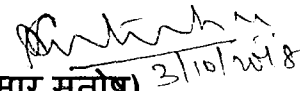
Court/CESTAT and the appellant is eligible for cenvat credit of H.R. Plates, M.S. Angles, M.S. Plates etc. used for increasing height of storage tanks and also for repairs and maintenance thereof. I hold that the impugned order denying cenvat credit is not correct, legal and proper. Since CENVAT credit is admissible, demand of interest and imposition of penalty vide the impugned order cannot survive and are required to be set aside.

9. I, therefore, set aside the impugned order and allow the appeal.

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

9.1. The appeal filed by the Appellant is disposed off in above terms.




(कुमार सतोष) 21/10/2018
आयुक्त (अपील्स)

By RPAD

To

M/s. Friends Oil & Chemical Terminals P Ltd "Maitri Bhavan", Plot No.18, Section-08, Gandhidham- 370201	मेसर्स फ्रेंड्स ऑइल एंड केमिकल टर्मिनल्स प्रा ली "मैत्री भवन", प्लॉट नं १८, सेक्टर नं -०८, गांधीधाम -३७०२०१
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Copy to:-

- 1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
- 2) The Commissioner, CGST & Central Excise, Kutch Commissionerate, Gandhidham for necessary action.
- 3) The Assistant Commissioner, CGST Gandhidham(Urban) Division, Gandhidham for further necessary action.
- 4) Guard File.