



:: आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर/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



सत्यमेव जयते

Tele Fax No. 0281 - 2477952/2441142 Email: commrappl3-cexamd@nic.in

रजिस्टर्ड डाक ए.डी.द्वारा

DIN-20220464SX00005075C1

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/26/BVR/2021	05/AC/HKM/BVR-2/2021-22	01-06-2021

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

BHV-EXCUS-000-APP-020-2021-22

आदेश का दिनांक / Date of Order:	31.03.2022	जारी करने की तारीख / Date of issue:	01.04.2022
------------------------------------	------------	--	------------

श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Akhilesh Kumar, Commissioner (Appeals), Rajkot.

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

M/s. Shree Ram Oxygas Pvt. Ltd., (Manar, 3rd Floor, "Shree Ram House",), Khargada Street, Khargate, Bhavnagar-364001, .

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक 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। स्वगन 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 fee of Rs. 1000/- 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 प्रथम S.T.-7 में की जा सकती 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 होगी 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 (सेन्टेट) 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 जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनबेट जमा की ली गई गलत राशि
(iii) सेनबेट 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 होगी।

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन 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 छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो झूठी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाचिधि 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 ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क 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 ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.



:: ORDER-IN-APPEAL ::

M/s. Shree Ram Oxygas Pvt. Ltd., Manar, 3rd floor, "Shree Ram House", Khargada Street, Khargate, Bhavnagar:- 364001 (herein after referred to as the appellant) has filed the present appeal against OIO No. 05/AC/HKM/BVR-2/2021-22 dated 01.06.2021 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST Division, Bhavnagar-2 (hereinafter referred to as "the adjudicating authority").

2. The brief facts of the case, in brief, are that during the course of scrutiny of ER- 1 Returns filed by the appellant, it was observed that they were engaged in manufacture of Nitrogen, Oxygen Argon etc. and had cleared Nitrogen Gas without payment of Central Excise duty by availing benefit of Exemption Notification No. 12/2012-CE (Sr. No. 97) dated 17.03.2012 (as amended) and Notification No. 64/1995-CE (Sr. No. 8) dated 16.03.1995. They had also cleared Oxygen (Medicinal Grade) which attracted Nil rate of Central Excise duty. It was further observed that the Appellant had availed CENVAT Credit on Inputs, Capital Goods and Input Services used in the manufacture of dutiable and exempted goods but had not followed the provisions of Rule 6 of the Cenvat Credit Rules, 2004 ("CCR, 2004"). Accordingly, a Show Cause Notice dated 02-02-2018 was issued to the Appellant for demand and recovery of Cenvat Credit amounting to Rs. 23,58,893/- i.e. @ 6% of Rs. 3,93,14,891/- (value of exempted goods) for the period from March-2014 to June-2017 under Rule 14 (ii) of the CCR, 2004 read with Rule 6(3)(i) of the CCR, 2004 and Section 11A(4) of the Central Excise Act, 1944 ("the Act") by invoking extended period of limitation along with interest and penalty under Rule 15(1) of CCR, 2004 and 11AC of the Act.

2.1. The above said Show Cause Notice was decided vide the impugned order wherein the adjudicating authority has confirmed the demand of central excise duty to the extent of Rs. 23,58,893/- under the provisions Rule 14(ii) of the CCR, 2004 and Section 11 (A)(4) of the Act along with interest under Section 11AA of the Act. The adjudicating authority also imposed equivalent penalty under Rule 15(1) of the CCR, 2004 read with Section 11AC of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal on various grounds, *inter alia*, contending that:-

- (i) The impugned order is a non-speaking one as the pleas raised by the appellant during the course of hearing and submission made in reply to show cause notice, and the judgments relied upon by them have not been



Signature

considered;

(ii) The appellant at the outset adopts and reiterates to avoid repetition the various pleas made by them in their reply to SCN and written submission filed before the Adjudicating authority as if the same are specifically canvassed herein.

(iii) The SCN is time barred as Revenue authority cannot invoke the extended period of limitation, when the records of the appellant were audited by the officers once but did not find any short payment from records. The entire alleged action initiated by the proper officer for demanding the amount payable under Rule 6(3) (i) of the Rules was time-barred and without authority of law as the demand is for the period March-2014 to June-2017 and the notice was received on 5/2/2018 alleging suppression with intent to defraud the revenue or evade payment of amount payable under Rule 6(3) (i) of the Rules. Moreover, there is no evidence that the appellant has any intention to defraud the revenue or evade payment of amount payable under Rule 6(3) (i) of the Rules. Hence, extended period cannot be applicable and the show cause notice is time barred.

(iv) With regards to findings recorded by the adjudicating authority at Para-15 of the impugned order, the appellant submit that they had not intentionally cleared the impugned goods without payment of amount as provided under Rule 6(3) (i) of the Rules. On clearance of the exempted goods no payment of central excise duty is required to be made by the appellant. The appellant has only to reverse the amount which is required to be paid equal to 6% of value of exempted goods as provided under Rule 6(3)(i) of the Rules and the said amount is not duty.

(v) With regards to findings recorded at para 18 of the impugned order, it is to submit that the disputed clearance of exempted goods i.e. Nitrogen & Oxygen by the appellant was also reflected in their monthly returns. The appellant was also filing the copies of relevant statutory records showing that the appellant was taking credit in respect of the inputs and input services utilized for their manufacturing activity which can be ascertained from the self-assessed monthly ER1 returns for the month of March 2014 to June 2017 filed by the appellant. There was no willful suppression or mis-statement on the part of the appellant to invoke longer period of limitation.

(vi) Further, on perusal of the self-assessed monthly ER-1 returns for the months of June-2016 to June-2017, it can be ascertained that CENVAT credit available in the credit account of the appellant is Zero during the relevant period. Thus, the appellant does not have to pay an amount as provided under Rule 6(3)(i) of the Rules as amended w.e.f. 01/06/2016 as such amount payable was 6% of value of exempted goods and shall be maximum upto CENVAT credit available in the credit account at the end of period to which such payment relates i.e., at the end of the months of June-2016 to June-2017. Since, no amount is available in the credit account of the appellant at the end of the months of June-2016 to June-2017, the appellant is not liable for payment of amount as demanded and ordered under the impugned order. Thus, the demand confirmed under the impugned order is not only illegal but arbitrary and for harassing to the appellant only. It can be seen from the impugned order that a demand of Rs.23,58,893/- was confirmed on the value of Rs.3,93,14,891/- of exempted goods @ 6% without considering the provisions of the Rule 6(3)(i) of the Rules.



ds

(vii) With regards to findings recorded at Para-19 to 21 of the impugned order, it is to submit that the amount demanded under the SCN and confirmed under the impugned order is not duty but it is amount of ineligible common CENVAT credit. However, at Para 19 to 21 of the notice, it is mentioned as central excise duty amount payable under Rule 6(3)(i) of the Rules. This shows that the adjudicating authority is not clear and issued the impugned order in arbitrary manner with pre-determined mind.

(viii) The demand of duty on the basis of data received from the appellant and is not corroborative with any evidence, is unjust, improper and unreasonable. If the appellant had cleared the goods by fraudulent means and evaded the central excise duty, then the purchasers to whom the appellant had sold the exempted goods had also committed an offence. However, there is no such case against any purchaser which proves that the appellant had not cleared any exempted goods by fraudulent means. The appellant denies all the charges levelled against them and allegation made against them in these paras in toto. The Appellant is not liable for interest under Section 11AA of the Act.

(ix) With regards to findings recorded at Para-20 of the impugned order, it is submitted that the appellant has to pay the 'amount' as provided in Rule 6(3)(i) of the Rules which is zero in the instant case and the same can be ascertained from the self-assessed monthly ER-1 returns filed by the appellant. The Rule 14 of the Rules provides for recovery of CENVAT credit wrongly taken or utilized. Thus, it is clear that interest can be recovered where CENVAT credit has been taken and utilized wrongly. However, in the instant case, neither the appellant has taken the CENVAT credit wrongly nor utilized the same wrongly. Also, there is no contravention of any provisions of any Rule of the Rules by the appellant. Therefore, the appellant is not liable for payment of interest on the amount confirmed under the impugned order.

(x) With regards to findings recorded at Para-21 of the impugned order, it is submitted that penalty imposed under Section 11AC of the Act is illegal. The Rule 15 of the Rules provides for penalty for wrongly taking or utilizing CENVAT credit. Thus, it is clear that penalty can be imposed where CENVAT credit has been taken or utilized wrongly. However, in the instant case, neither the appellant has taken the CENVAT credit wrongly nor utilized the same. Also, there is no contravention of any provisions of any Rule of the Rules by the appellant. Hence, the appellant is not liable for any penalty.

(xi) Moreover, no evidence was adduced in the show cause notice to establish that the alleged acts or omissions had been committed by the appellant deliberately or contumaciously or in flagrant violation of provisions of law or with intention to evade duty. The appellant also submit that no penalty was imposable when there was no mala fide intention to evade payment of duty. Therefore, the appellant is not liable for penalty under Section 11AC [now 11AC (1) (a)] of the Act.

(xii) It was further to submitted that the adjudicating authority has not given any grounds in his findings that for contravention of which rule or act, the appellant is liable for penalty under Rule 15(1) of the Rules.

3.1 The Assistant Commissioner, Central GST, Division - Bhavnagar-2 has also filed a written submission/para wise comment dated 02.09.2021 inter-alia



dy

contending that

- (i) As regards Para 1, All the case laws cited by the Noticee were examined and none of them were squarely applicable to the present issue.
- (ii) With regard para 3.0 , it is clear that the appellant had availed cenvat credit on all the inputs and input services and have utilized the same for payment of central excise duty on the non-exempted final product cleared for home consumption;
- (iii) As pe Rule 6(2) CCR, 2004 they were required to maintain separate register/ records or had to follow the procedure laid down under Rule 6(3)(a) of CCR, 2004. They did not comply the said condition, though during the material time they were enjoying the self assessment procedure.
- (iv) The matter has been briefly discussed at Para 18 & 19 of the impugned order which is based on facts on records and submission made by the appellant. I feel that the appellant has vehemently protested the action taken which is not tenable and cannot be entertained.
- (v) As regards charging of interest their deliberate act to evade duty has rendered themselves liable to interest. The same is discussed in the OIO which is self- explanatory.
- (vi) Also penalty on the appellant has been imposed for non-payment of duty which has been discussed in the finding portion of the OIO.
- (vii) The Plea of the appellant is not sustainable and is required to be set aside.

4. Personal hearing in the matter was scheduled on 17.12.2021. Shri Sarju S. Mehta, Chartered Accountant, appeared on behalf of the Appellant. He re-iterated submissions made in the appeal memorandum. He further stated that he would make additional written submission. He further stated that the demand is barred by limitation as they were showing exemption claimed in the E.R.-1 for the relevant period.

4.1 The appellant submitted written submission vide letter dated 17/12/2021 wherein he reiterated the grounds raised earlier and also relied upon the judgement of Arihant Arts V/s. Commissioner of Central Excise, Mumbai reported in 2004 (173) ELT 194 (Tri. Mumbai)

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellants and written submission filed by the Assistant Commissioner, Central GST Division-



Bhavnagar-2. The issue to be decided in the case is as to whether the impugned order, in the facts of this case, confirming demand along with interest and imposing penalty is correct, legal and proper or not.

6. From the facts recorded in the impugned order, I find that during the scrutiny of E.R.-1 Returns filed by the appellant, it was noticed by the jurisdictional authority that the Appellant had cleared Nitrogen Gas without payment of central excise duty by availing benefit of exemption under Notification No. 12/2012-CE (Sr. No.97) dated 17.03.2012 and Notification No. 64/1995-CE (Sr. No.8) dated 16.03.1995. It was also noticed that the Appellant had cleared Oxygen (Medicinal grade) which attracted NIL rate of Central Excise duty. It was further observed that though the Appellant had availed CENVAT credit of inputs, input services and capital goods in respect of dutiable and exempted goods, but they had neither maintained separate records nor opted to follow the procedure prescribed under Rule 6(3A) of CCR, 2004. It was also noticed that the Appellant had not shown any amount in column "credit utilized for payment of amount in terms of Rule 6 of the CCR, 2004". Accordingly, a SCN covering the period from March-2014 to June-2017 was issued to the Appellant demanding an amount of Rs. 23,58,893/- @ 6% Rs. 3,93,14,891/- (value of exempted goods). The demand made in the above SCN has been confirmed by the adjudicating authority vide the impugned order.

6.1 I find that the Appellant has challenged the impugned order mainly on the ground that the submissions made by them have not been discussed in the impugned order nor the judgments relied upon by them have been taken into consideration. Further, the demand was time barred as they had already shown the clearance of exempted goods in the E.R.-1 Returns for the relevant period. Moreover, their records have also been audited by the officers of the department. It was also contended that during the period from June-2016 to June-2017, the cenvat credit available in the credit account was zero. In terms of provisions of Rule 6(3) (i) of the CCR, 2004 as amended, the amount payable @6% of the value of exempted goods shall be maximum upto the CENVAT credit available in the credit account at the end of the period to which such payment relates i.e., at the end of the months of June-2016 to June-2017. Since no balance was available during the above period, the Appellant was not liable for any payment in this regard.

6.2. As regards the confirmation of demand by invoking extended period of limitation under Section 11A(4) of the Act, I find that the Appellant has contested this aspect before the adjudicating authority and contended that they had shown the



dy

clearance of the exempted goods in the E.R.I returns and their records have also been audited by the officers of the department. The Appellant has also relied upon various case laws in support of the above contention. The findings of the adjudicating authority recorded in Para 17 of the impugned order is reproduced below:

“17. The Noticee has contended that the Show Cause Notice is time barred as they have disclosed the information before the Central Excise Audit officers as well as in other Central Excise Records. It is pertinent to note that the Audit is conducted merely on a random basis. Further, mere declaration/disclosure of including that attributable to the manufacturing of exempted goods, therefore I do not agree with the contention of the Noticee regarding Show Cause Notice being time barred. I have also gone through all the case laws cited by the Noticee in this regard and find none of them squarely applicable in the present case.”

6.3. I find that the findings of the adjudicating authority are arbitrary in as much as audit is supposed to be conducted thoroughly by reconciling the ER-1 returns filed by the appellant with the records maintained by the appellant, including their financial records. Further, the adjudicating authority has not denied the contentions of the appellant. Hence, it was incumbent upon him to examine the applicability of case laws as well as the periods for which audit of records of the appellant was undertaken. Thus, I find that the impugned order is also a non-speaking one and is not legally sustainable.

6.4. As regards contentions of the Appellant that since there was no balance available at the end of the months of June-2016 to June-2017, no amount was payable by them under Rule 6(3) (i) of the CCR, 20004, I find that the impugned order is silent on this aspect. The SCN has been issued on the basis of ER-1 Returns filed by the appellant and the figures of CENVAT for these months should be reflected in the ER-1s. I also find that the appellant has not furnished any documentary evidences in support of above contention, without which it is not possible to comment on this aspect. Anyway this requires verification from the relevant records. I also find that the Appellant had raised above contention before the adjudicating authority also but the adjudicating authority has not recorded any findings in this regard while passing the impugned order. Accordingly, I find that the impugned order is non-speaking on this aspect also and is not legally sustainable.

6.5. I also find that the adjudicating authority has also not discussed the applicability of the case laws relied upon by the Appellant against imposition of penalty under Section 11AC of the Act.

7. In view of the above discussions, I am of the opinion that matter necessitates



fresh consideration by the adjudicating authority for examination of contentions of the appellant and record his findings after verification of relevant documents. Accordingly, I set aside the impugned order and remand the matter to the adjudicating authority to decide the matter afresh. Needless to mention that principles of natural justice should be adhered to while passing *de novo* order.

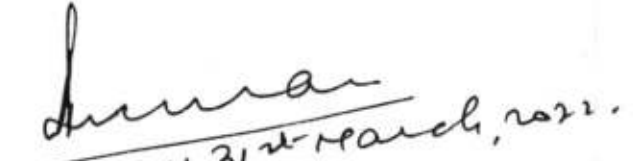
8. I set aside the impugned order and dispose the appeal by way of remand to the adjudicating authority.

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

9. The appeal filed by the Appellant is disposed off as above.

सत्यापित / Attested


केतन दवे
Ketan Dave
सुपरीन्टेण्ड (अपील)
Superintendent (Appeal)


(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To

M/s. Shree Ram Oxygas Pvt. Ltd., Manar, 3 rd floor, "Shree Ram House", Khergada Street, Khargate, Bhavnagar:- 364001.	M/s. श्री राम ऑक्सीगैस प्रा. लिमिटेड, मनार, तीसरी मंजिल, "श्री राम हाउस", खेरगाड़ा स्ट्रीट, खरगेट, भावनगर:- 364001
---	--

प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) उप / सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल, भावनगर-2 को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फाइल।

