



::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 / 2<sup>nd</sup> Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

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रजिस्टर्ड डाक ए.डी.द्वारा-

DIN-20221064SX000000E69D

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/55/GDM/2021	01/DC/Anjar Bhachau/2021- 22	31-05-2021

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

**KCH-EXCUS-000-APP-043-2022**

आदेश का दिनांक / Date of Order:	26.09.2022	जारी करने की तारीख / Date of issue:	03.10.2022
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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 / गांधीधाम।  
द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham.

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

**M/s Varrsana Ispat Limited, Village: Varsana, Taluka: Anjar.**

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, 2<sup>nd</sup> 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) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/  
Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

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.5,000/-, 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.

(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 संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/  
Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

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 is less than five lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो कि 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, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त 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 होगा। /

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

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

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

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

(C) भारत सरकार को पुनरीक्षण आवेदन :  
Revision application to Government of India:  
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के 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 तरीका अथवा समयावधि 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 कि 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 पढ़ी 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 scription 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 लगाना 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.

एक अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। /  
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](http://www.cbec.gov.in).



**ORDER-IN-APPEAL**

M/s Varsana Ispat Ltd., Village Varsana, Taluka Anjar, Kutch (hereinafter referred to as 'appellant') has filed present appeal against Order-in-Original No. 01/DC/Anjar Bhachau/2021-22, dated 31.05.2021 (hereinafter referred to as 'impugned order'), issued by the Deputy Commissioner, Central GST Anjar Bhachau Division, Gandhidham(hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was holding Central Excise Registration Number AACCV1058BXM001 for manufacture of various excisable goods and Service Tax Registration No. AACCV1058NST001 for payment of Service tax on various services. They were availing CENVAT Credit under the CENVAT Credit Rules, 2004(hereinafter referred to as 'CCR, 2004'). It was pointed out during the course of audit by officers of CERA, that the appellant was having sale of services under two sub-heads namely (i) Erection and Job work and (ii) Bought out materials. The transaction of bought out items amounted to trading, as the said materials were not manufactured by the appellant. Trading of goods was included in the Negative list and made exempted services with effect from 01.07.2012.

3. Bought out items were those materials which the appellant used and sold during the execution of the WCT/erection, commission and installation of electricity transmission towers. The said materials were purchased from other vendors by the appellant and the title of the same was passed on to the customers, for which invoices were raised separately. The appellant had not paid Service tax on the value of bought out items but they had availed/utilized the CENVAT credit of all the input services used in the execution of Work Contract Services/erection, commission and installation of electricity transmission towers. The appellant sold the goods i.e. bought out items used in the execution of Work Contract services/erection, commission and installation of electricity transmission towers and also availed credit all the input services. This resulted in provision of exempted services i.e. trading which took place simultaneously during execution of WCT services/erection, commission and installation of electricity transmission towers. It was noticed that the Appellant failed to comply with the provisions of Rule 6(2) of CCR, 2004 inasmuch as they had not maintained separate accounts for receipt, consumption and inventory of inputs used and input service meant for use in the manufacture of dutiable final products and the quantity of input meant for use in the manufacture of goods or services and failed to take Cenvat credit only on that



quantity of input or input service which is intended for use in the manufacture of dutiable goods. They also failed to pay the amount as provided under Rule 6(3) of CCR, 2004.

4. Show Cause Notice No. V/15-10/Anjar-Bhachau/Varsana/2019-20 dated 12.06.2020 was issued to Appellant calling them to show cause as to why Cenvat Credit amounting to Rs. 13,66,366/- should not be disallowed and recovered from them under Rule 14 of the erstwhile Cenvat Credit Rules, 2004 read with Section 73(1) of Finance Act, 1994 (*hereinafter referred to as "Act"*) along with interest under Section 75 of the Act read with Rule 14 of CCR, 2004 and also proposing imposition of penalty under Section 77(3)(b) and 78 of the Act read with Rule 15 of CCR, 2004.

4.1 The above said Show Cause Notice was adjudicated vide the impugned order wherein the demand of Cenvat Credit amounting to Rs. 13,66,366/- was confirmed under Rule 14 of CCR, 2004 read with Section 73(1) of the Act, along with interest under Section 75 of the Act. The impugned order imposed penalty of Rs. 13,66,366/- under Section 78 of the Act upon Appellant with option of reduced penalty as envisaged under proviso (ii) to Section 78 of the Act. The impugned order also imposed penalty of Rs. 10,000/- upon the Appellant under Section 77 of the Act.

5. Being aggrieved with the impugned order, Appellant preferred appeal on various grounds, *inter alia*, as below :-

- (i) The whole proceeding is vitiated being based on provision of law omitted by the Finance Act, 2016 and that it has been held in Taxport Overseas P Ltd [IT(TD)A No-1722/Bang/2017] that this provision was never on the statute. The said provisions of Rule 6 has been omitted w.e.f 01.04.2016 vide Notification No 13/2016-CE(NT) dated 01.03.2016.
- (ii) That the requirement of maintaining separate records had been done away in view of the new provisions of Rule 6 substituted vide Notif.no 13/2016-CE(NT). Therefore the provisions as relied upon by the CERA and Adjudicating Authority stand omitted with effect from April 1<sup>st</sup> 2016 and new provisions are applicable.
- (iii) That the adjudicating authority had erred in considering the total Cenvat credit while calculating the proportionate amount as the new provisions of Rule 6(3) required them to reverse an amount



from 'COMMON CREDIT' proportionate to the exempted value of services.

- (iv) That the services used commonly for providing taxable and exempted service was not determined either in the SCN or in OIO.
- (v) That the Adjudicating authority had erred in not considering the submission made by the Appellant that no Cenvat credit had been availed in respect of input services for providing the exempted services i.e. sale of bought out material. That the adjudicating authority failed to consider the certificate from CA certifying the appellant's claim and also mentioned that the trading goods were E-1 transaction under VAT laws therefore Cenvat Credit had not been availed for the services used in such transactions.
- (vi) The Appellant placed reliance upon CBEC Circular No 868/6/2008-CX dated 09.05.2008 clarifying that the certificate of the Chartered Accountant can be submitted in respect of quantities of inputs used in the manufacture of exempted goods, value thereof and Cenvat credit taken on these inputs may be submitted at the end of financial year.
- (vii) That the adjudicating authority has erred in relying upon the judgment by Hon'ble Tribunal of Bangalore in the case of M/s Toyota Kirloskar Motors Ltd, since the said judgment was pertaining to the Unjust enrichment test.
- (viii) The appellant further submitted that the demand was hit by limitation since extended period cannot be invoked on the ground of suppression of facts. They placed reliance upon the following case laws in their support :-
- (1) Sipani Fibers Ltd Vs Commr of C.Ex. Bangalore reported in 2007 (6) STR 197 (Tri. - Bang.)
  - (2) CCE, Aurangabad Vs RohitInds. Ltd reported in 2008-TIOL - 2016-CESTAT-Mum.
  - (3) Gannon Dunkerley & Co. Ltd Vs Commissioner (Adj) reported in 2021 (47) GSTL 35(Tri.- Del)
- (ix) That since the demand itself is not sustainable, no interest and penalty are leviable. They placed reliance upon the following case laws in their support :-
- (1) Chanakya Mandal Pariwar Vs. Commissioner of C.Ex. Pune-II reported at 2021 (44) GSTL 280 (Tri. Mumbai)
  - (2) Ajay Kumar Gupta Vs CESTAT reported at 2015 (39) STR 736 (P&H)

6. Personal Hearing in the matter was fixed on 28.07.2022, 12.08.2022 and 20.08.2022. The Appellant did not appear for the Personal hearing on any of the



aforesaid dates. However, vide their letter dated 24.08.2022, the Appellant waived their right of Personal hearing and requested to set aside the impugned order.

7. I have carefully gone through the facts of the case, the impugned order, the appeal memoranda and written submissions made by the Appellant. The issue to be decided in the case is whether the impugned order, in the facts of this case, confirming demand and imposing penalty on the Appellant is correct, legal and proper or not.

8. On perusal of the records, I find that a Show Cause Notice was issued to the Appellant on the basis of observation raised during the course of Audit by CERA. It had been alleged that the Appellant was engaged in providing exempted and non-exempted services and by virtue of provisions contained in Rule 6(2) of CCR, 2004, they were required to maintain separate records pertaining to receipt, consumption and inventory of inputs and input services meant for use in exempted and non-exempted final products. And in case of non maintenance of separate records, they were required to reverse proportionate credit attributable to the exempted final product as provided under Rule 6(3) i.e. either pay amount equal to 5/6% of the value of exempted goods/services or pay amount as determined under Rule 6 (3A) of CCR, 2004.

9. I find that the observation has been raised for the period F.Y. 2016-17 to F.Y. 2017-18 (upto June-2017). Cenvat Credit Rules, 2004, was amended vide Notification No. 13/2016-CE(NT) dated 01.03.2016. Sub Rule (2) of Rule 6 which provided for maintenance of separate records has been amended to the effect that a manufacturer who exclusively manufactures exempted goods or a service provider who exclusively provides exempted services shall in effect, not be eligible for credit of any inputs and input services. Hence, the condition regarding maintenance of separate records has been done away with. However, the restriction regarding availment of Cenvat credit on the exempted final products was still in place. Sub rule (3) (i) and (ii) provides for the manner of payment of an amount for Cenvat credit attributable to the exempted final product/service. For the period from 01.04.2016 onwards, the appellant had only two options namely,

- (i) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during



that period.

(ii) pay an amount as determined under sub-rule (3A);

Hence it is an undisputed fact that the Appellant was not entitled to avail Cenvat credit with respect to the exempted final products and services.

10. For the purpose of exercising the option (i) above, it is necessary to have the values pertaining to value of exempted services, total of opening balance of credit of inputs and input services available at the beginning of the period to which the payment relates and credit of input and input services taken during that period. In the absence of all the aforesaid values, it is not possible to calculate the amount payable. For exercising the option (ii) i.e. under Rule 6(3A) of the CCR, 2004, the appellant is required to pay the amount as determined by applying the following formula:

- Arrive at the Common Credit denoted by C by application of formula  $C = T - (A+B)$  where T is the total credit of inputs and input services taken during the month, A is the credit attributable to inputs and input services used exclusively for providing exempted services and B is the credit attributable to inputs and input services exclusively used for provision of non-exempted services.
- The second step is to arrive at the ineligible common credit denoted as D by applying the formula  $D = (E/F) \times C$ , where E is the sum total of value of exempted services provided and value of exempted goods removed during the preceding financial year and F is the sum total of value of exempted service, non-exempted services provided and value of exempted goods, non-exempted goods removed during the preceding financial year.
- The eligible common credit denoted by G is to be worked out by applying the formula  $G = C - D$
- The appellant was required to provisionally pay the amount of credit A & D namely, ineligible credit and ineligible common credit.
- The actual amount payable has to be finalized before 30<sup>th</sup> June of the succeeding financial year, by applying the above formula with replaced values for the current financial year.

Further sub-rule (3AA) has been inserted w.e.f. 01.04.2016 which provides



“(3AA)Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) and follow the procedure provided under sub-rule (3A), the Central Excise Officer competent to adjudicate a case based on amount of CENVAT credit involved, may allow such manufacturer or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, mutatis-mutandis in terms of clause (c) of sub-rule (3A), with interest calculated at the rate of fifteen per cent, per annum from the due date for payment of amount for each of the month, till the date of payment thereof.”

11. I find that the adjudicating authority has arrived at the amount to be paid in terms of Rule 6(3A) calculated at the percentage of the exempted service to the total turnover related to services of works contract related to erection, commissioning and installation of electricity transmission plants. However, the details regarding the services used commonly for provisions of taxable and exempted services have not been specified in the impugned order. In order to arrive at the amount to be paid in terms Rule 6(3A), it is mandatory to have the particulars regarding the total Cenvat Credit, the Cenvat credit attributable to exempted goods/services and the Cenvat credit attributable to non-exempted goods/services. Using the formula prescribed under law, the Common credit attributable to exempted and non-exempted goods/services has to be worked out, which has to be used for calculation of the common credit attributable towards exempted goods/services. However, I find that there is no mention regarding the description or amount of common credit availed by the appellant. The adjudicating authority has not named any services which are used commonly for the provision of exempted and non-exempted services. I would like to mention that the amount payable is required to be strictly paid in terms of the statutory provisions and not in any other manner devised by the adjudicating authority on his own accord. Further, for calculation of the amount payable as per the formula under Rule 6(3A), it is necessary to have the details of the values as required in the formula supported by documentary evidence to corroborate such values. I find that none of the values required for calculation of the amount payable are available in the records. The arbitrary calculation devised by the adjudicating authority cannot be accepted as legally binding on the appellant.

12. I find that the appellant has submitted a certificate from their Chartered Accountant, ‘Sanjay Jhanwar & Associates’, to the effect that during the period from April-2016 to March-2017, the appellant had taken input services tax credit



*dh*



amounting to Rs. 2,35,00,014/- and that the entire Cenvat credit pertains to taxable business and that No service have been utilized for sales of Bought out items. It is also certified that the re-sale of Bought out items have been done by the company without taking physical possession i.e. E-1 Transaction under VAT Law. Thus, the company has not taken any Cenvat Credit of Input Services which is being used for exempted business. The adjudicating authority has negated the CA Certificate holding that the Appellant had not submitted any documentary evidence in their support. He placed reliance upon the decision of Hon'ble CESTAT, South Bangalore in the case of M/s Toyota Kirloskar Motor Ltd Versus Commissioner of Central Excise, Aurangabad. However, I find that the said decision pertained to issue regarding proof of unjust enrichment; that the incidence of duty was not passed on by the assessee. The ratio of the same is not applicable in the present case wherein it is not possible to calculate the amount payable as per the formula provided in the law. In the absence of any data regarding the required values, I extend the benefit of doubt in favour of the appellant to the effect that they have not taken any credit pertaining to the exempted goods/services. Hence, the entire Credit availed by them is eligible credit.

13. In view of above, the demand for recovery of Cenvat Credit confirmed by the impugned order is not legally sustainable and is liable to be set aside. As the entire demand is not legally tenable, the question of demanding interest under erstwhile Section 75 of the Act and imposition of penalties under erstwhile Section 77 and 78 of the Act does not arise and accordingly, the same are also required to be set aside. Accordingly, I set aside the impugned order and allow the appeal.

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

14. The appeal filed by the appellant stand disposed of in above terms.

सत्यापित / Attested

श्री. डी. वी. सिस  
अधीक्षक

(AKHILESH KUMAR)  
Commissioner (Appeals)

26/05/September, 2022

By R.P.A.D.

To,  
M/s Varsanalspat Limited,  
P.B. No. 133, Vill: Varsana,  
Taluka Anjar, Kutch.

सेवा में,  
मेसेर्स वरसना इस्पत लिमिटेड,  
पोस्ट बॉक्स नंबर 133,  
विल्लेज : वरसना, तालुका - अंजर,  
कच्छ।



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, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल अंजर भचाउ, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।

