

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. - 6776/B-1, "SIDDHI SADN" BUILDING
NARAYAN UPADHYAY ROAD
BHAVNAGAR

Corrigendum

(Order-In-Original No. 08/ADC/BVR/2011 passed by Additional Commissioner, Central Excise, Bhavnagar)

In Order -in-Original No. 08/ADC/BVR/2011 dated 10.06.2011 issued from F. No. V/15-01/Adj/Denovo/2009, on Page 5 under heading 'ORDER', in place of words and figure Rs. 30,872/- (Thirty thousand, eight hundred and seventy two only) and Rs.57,619/- (Fifty seven thousand, six hundred and nineteen only) the words and figure Rs.11,084/- (Eleven thousand and eighty four only) and Rs. 77,407/- (Seventy seven thousand, four hundred and seven only) respectively shall be substituted.

sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

F. NO. V/15-01/Adj/Denovo/2009

Date: 29/06/2011

BY R.P.A.D

To,
M/s Gujarat Heavy Chemicals Ltd.,
Sutrapada, Dist-Junagadh
Gujarat - 362275

Copy to:-

1. Commissioner, Central Excise, Bhavnagar
2. Assistant Commissioner, Central Excise, Bhavnagar
3. Deputy Commissioner (Audit), Central Excise, Bhavnagar
4. Superintendent, AR-II, Porbander.
- ✓ 5. Guard File.


29/6/2011
ADDL. COMMISSIONER

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR-364001.

F. No. V/15- 01/Adj/Denovo/2009

Date of Order: 06.06.2011

Date of issue: 10.06.2011

Passed by Harcharan Singh, Additional Commissioner.

Order-in-Original No. 08/ADC/BVR/2011

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner (Appeals-II), Central Excise, Ahmedabad, 7th floor, New Central Excise Building, Near Polytechnic, Ambawadi, Ahmedabad- 380015 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub :- Wrongful availment of CENVAT credit of Service Tax.

Brief Facts:

The facts of the case in brief are that M/s Gujarat Heavy Chemicals Ltd, Sutrapada, District Junagadh (hereinafter referred to as "Noticee") are engaged in the manufacture of Soda Ash falling under Chapter Sub-heading No. 2836.10 of first schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise registration and availing the benefit of Cenvat Credit of duty paid on input services under Cenvat Credit Rules, 2004.

On scrutiny of the monthly returns of the Noticee, it was found that the Noticee has taken credit of duty on various services amounting to Rs. 7,16,293/- and Rs. 14,324/- (Edu. Cess) for services of port authority, clearing and forwarding agents, Credit card services, Export application, security services including the service provided to colony areas. Commission on sales, maintenance charges, management consultant services, which services received prior to 10.09.04 . The credit availed by the Noticee on the above inputs services was neither used for providing any out put services nor for the manufacture of there final product directly or indirectly and hence not admissible under the provision of Cenvat credit Rules, 2004 and the same is required to be recovered / reversed.

Show cause notice was issued by Joint Commissioner, Central Excise, Bhavnagar demanding duty of Rs. 7,16,293/-+14,324/- Ed. Cess under Rule 14 of Cenvat Credit Rules, 2004 read with section 11A of Central Excise Act, 1944 alongwith interest at the applicable rate under section 11AB of the Central Excise Act and penalty imposed upon them under Rule 15 of Cenvat Credit Rules, 2004. Joint Commissioner vide impugned order decided the show cause notice and disallowed the Cenvat Credit of Rs. 7,30,617/- wrongly taken by the Noticee in the guise of "input service" under section 3(1) of Cenvat Credit Rules, 2004 and held that the same is recoverable under Rule 14 of CCR-2004 read with section 11 A of Central Excise Act,

1944 and also imposed penalty of Rs. 10,000/- upon Noticee under section 15(3) of Cenvat Credit Rules, 2004.

Being aggrieved by above order, Noticee preferred an appeal along with stay application for the relief to set aside the above referred OIO and waive the requirement of pre-deposit of penalty.

The Commissioner (A) vide order No. 11/BVR/2007 dated 06.08.2007 directed the Noticee to pre-deposit of duty within three weeks. Since, Noticee did not pre-deposit the duty, therefore, Commissioner (Appeals) has rejected the appeal under section 35F of the Central Excise Act. 1944 without going into the merits of the case vide his OIA No. 78/2007 (BVR)/CE/RAJU/Commr. (A)/Ahd dated 19.09.2007.

Being aggrieved by the said OIA, Noticee filed an appeal before CESTAT, WZB, Ahmedabad. CESTAT, Ahmedabad decided the case vide Order No. A/1311-1312/WZB/AHD/2008 dated 27.06.2008 by remanding the matters to Commissioner (Appeals) for decision on merit. The Noticee paid pre-deposit of Rs. 7,30,347/- vide challan No. 1 dated 18.09.2007 and debited vide PLA Entry No. 45 dated 18.09.2007 as reported vide letter dated 11.10.2007 as directed in Stay Order No. 11/BVR/2007 dated 06.08.2007.

Commissioner (A) vide Order No. 92/2008(BVR) KCG/Commr(A)/Ahd dated 23.10.2008 partially allowed the appeal by allowing the Cenvat credit of Service Tax paid on services utilized at the port of export of final products i.e. Container stuffing, C & F charges, Storage Charges, Weightment charges, stevedoring charges and services of commission agent and disallowed the CENVAT credit of service tax paid on the services utilized prior to 10.09.2004 and the Service Tax paid on credit card services and security services.

Noticee being aggrieved by the said OIA filed appeal before CESTAT, WZB, Ahmedabad. CESTAT, Ahmedabad vide their order No. A/8/5 /WZB/AHD/200922/4/2009 allowed CENVAT credit on security agent services and disallowed credit on credit card services. As regards, the remaining services which were disallowed by Commissioner (A), the matter has been remanded to the original adjudicating authority to work out the proportionate inadmissible credit relating to period prior to 10/09/2004 and consider the imposition of penalty afresh. Therefore, Noticee was given opportunity for personal hearing and produce relevant documents to claim admissible credit under letters dated 24.11.2009, 24.04.2010 and 21.01.2011.

Defence:

The Noticee submitted their defence replies vide letters dated 11.05.2010 and 2.02.2011 contending that ;

Cenvat credit availed on Repairs & Maintenance Service

The Noticee had entered into a maintenance contract with M/s Bharat Bijlee Limited for providing the comprehensive maintenance of the lift during the period from 01.09.2004 to 31.08.2005 and the service provider raised the invoice for the service on 23.11.2004.

Only the part of maintenance service has been received by the Noticee for the period prior to 10.09.2004. Hence, the Cenvat credit can be denied only on the part of the service which has been received prior to 10.09.2004 and not on the entire services. In the present case, the proportionate inadmissible Cenvat credit for the period from 01.09.2004 to 09.09.2004 works out to Rs. 374/-. Noticee is entitled to proportionate admissible Cenvat credit of Rs. 14,779/- in respect of the services received from 10.09.2004 to 31.08.2005

Cenvat credit availed on Storage Service

Noticee availed the storage facility in the port premises from Gujarat Pipavav Port Ltd. The Port has provided the storage facility for the period from 12.09.2004 to 11.10.2004. For providing the storage facility for the period of one month, the Port has raised an invoice and

arising out of interpretation of the provisions of the law and not because of any intentional avoidance of tax. Reliance is placed on following case laws in this regard:

- a) Bharat Wagon & Engg. Co. Ltd. v. Commissioner of C. Ex., Patna, 2002 (146) ELT 118 (Tri. - Kolkata);
- b) Goenka Woollen Mills Ltd. v. Commissioner of C. Ex., Shillong, 2001 (135) ELT 873 (Tri. - Kolkata);
- c) Bhilwara Spinners Ltd. v. Commissioner of Central Cxcise, Jaipur, 2001 (129) ELT 458 (Tri. - Del.).

In view of the foregoing, it is respectfully prayed to your good office to -

- a) Grant the admissible Cenvat credit as requested above;
- b) Not to impose penalty upon Noticee; and
- c) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

Shri Deepak Singhal, Manager appeared for personal hearing and submitted written submission to the above effect.

Discussion & Findings:

I have carefully gone through the records of the case and submissions made by the Noticee.

Present proceedings arise out of the Order No. A/8/5 /WZB/AHD/2009 dated 22/4/2009 of CESTAT, Ahmedabad. The scope of the proceedings is therefore restricted to working out of the proportionate inadmissible credit relatable to the period prior to 10/9/2004.

I find that there is dispute as regards the period of receipt and hence the availability of CENVAT credit in respect of the following three services

1. **Repairs and Maintenance Services-** The Noticee have submitted that the maintenance contract was for the period 1.9.2004 to 31.8.2005 and the invoice was raised on 23.11.2004 and therefore proportionate inadmissible credit is only Rs.374/-. The Noticee have also produced copy of the invoice from which aforesaid submission is verifiable. Therefore, I hold that amount of Rs. 14,779/ is admissible as CENVAT credit.
2. **Storage Service:** The Noticee pleads that the port has provided facility for the period from 12.9.2004 to 11.10.2004 which is period of one month and the date of invoice is 27.10.2004. On perusal of the invoice, it can be seen that 'Allotment date' is clearly mentioned as 12-9-2004 and against 'Allotted up to' the date mentioned is 11-10-2004 also against 'Total Days' it is mentioned 1(one)month. This clearly indicates that the service was provided after 10.9.2004. Merely because 2nd month is written in description part of the invoice, it can not be assumed that the services were provided in February of 2004. I therefore allow credit of the entire amount of Rs. 19788/-
3. **Management Consultancy Service:** The Noticee have contended that the services were availed or the period from 1.9.2004 to 15.10.2004 and that management service is advisory service and is deemed to be concluded on finalization of the report and the rest all activities undertaken prior to completion of the report are the part of the service and not constitute the service in itself. Hence they have claimed the entire credit. This contention of the Noticee is illogical and devoid of any merits for the reasons that the report can only be issued/prepared on the basis of the activities or the processes undertaken which have been carried out. The issuance of the report in itself is not any taxable services, the entire process leading to issuance such report constitute a service

taxable under the law. Hence I do not find any merit in this contention and allow the proportionate credit of Rs. 42,840/-.

I find that the availment of credit was forbidden prior to 10.09.2004, hence there was no doubt whatsoever as regards the restriction on availment of credit of the services received prior to 10.9.2004. Therefore, wrong availment of credit would definitely entail penal action. However, Commissioner has imposed penalty of Rs. 5000/- while disallowing the credit on taxable services received prior to and after 10.09.2004, I am inclined to further reduce the penalty commensurate with the reduction in the amount of inadmissible credit.

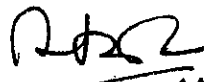
In view of the above, I pass the following order.

ORDER

I disallow CENVAT credit of Rs 30,872/- (Rupees thirty thousand, eight hundred and seventy two only) and allow credit of Rs 57,619/- (Rupees Fifty seven thousand, six hundred and nineteen only) out of the total amount of credit which was availed in respect of the taxable service received prior to and subsequent to 10.09.2004. The amount of CENVAT credit disallowed is recoverable from the Noticee under Rule 14 of the CENVAT credit Rules, 2004 read with section 11A of the Act along with the interest leviable under section 11AB of the Act.

I impose penalty of Rs. 2000 under Rule 15 of CENVAT Credit Rules, 2004.

The Noticee shall pay the aforementioned amounts forthwith.


10/6/2011
(HARCHARAN SINGH)
ADDL. COMMISSIONER

BY R.P.A.D.

To,
M/s Gujarat Heavy Chemicals Ltd.,
Sutrapada, Dist Junagadh
Gujarat-362 275

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