भारत सरकार
आयुक्त कार्यालय, केंद्रीय उत्पाद शुल्क
सिद्धी सदन, नारायणभाई उपाध्य रोड, प्लाट नो. ६७-७६, बी-१, भावनगर-३६४००१
Ph. No. : 0278- 2523627 E-mail - adjbhavnagar@gmail.com
Fax No.: 0278-2513086

F. No. V/15-66/Dem/HQ/2010-11 Date of Order: 28.11.2014
Date of Issue: 04.12.2014

पारितकर्ता : श्री अनिल मिश्रा,

अपर आयुक्त, केंद्रीय उत्पाद शुल्क एवं सेवा कर, भावनगर

Passed by : SHRI ANIL MISRA,
Additional Commissioner, Central Excise & Service Tax, Bhavnagar.

ORDER IN ORIGINAL NO. : BHV-EXCUS-000-ADC-021-14-15 DT. 28.11.2014
मूल आदेश सं. : BHV-EXCUS-000-ADC-021-14-15 DT. 28.11.2014

1. This copy is granted free of charge for private use of the person(s) to whom it is sent.
यह प्रति जिनको भेजा है , उन व्यक्ति (ओं) को निजी उपयोग के लिए नि: शुल्क दी जाती है.

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.
इस आदेश से किसी भी व्यक्ति (ओं) पीड़ित होने पर आदेश के संचार की तारीख से 60 दिनों के भीतर आयुक्त केन्द्रीय उत्पाद शुल्क (अपील), राजकोट, केन्द्रीय उत्पाद शुल्क भवन, रेस कोर्स, रिंग रोड, राजकोट 360 001 के सामने इस आदेश के खिलाफ अपील कर सकते हैं. अपील पर 2.50 रुपये की एक अदालत शुल्क स्टाम्प लगानी रहेगी.

3. 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, 2001. 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, 2001.
केंद्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35(1)) के प्रावधानों और केंद्रीय उत्पाद शुल्क (अपील) नियम, 2001 के नियम 3 के साथ पढने के अनुसार अपील दो प्रतियों में फार्म इए - 1 में दर्ज किया जाना चाहिए. केंद्रीय उत्पाद शुल्क (अपील) नियम, 2001 के नियम 3 के उपनियम के प्रावधानों (2) के अनुसार अप्पेल्लंट्स के हस्ताक्षर मे होने चाहिए.

- It should be accompanied with the following:
  अपील निम्नलिखित के साथ होनी चाहिए
- Copy of appeal in duplicate
  दो प्रतियों में अपील की कॉपी

4. An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute or penalty, are in dispute or penalty, where penalty alone is in dispute.
इस मूल आदेश से असंतुष्ट होने पर आयुक्त (अपील) के पास अगर सिर्फ उत्पाद शुल्क हो तो उत्पाद शुल्क का या अगर उत्पाद शुल्क और पेनल्टी हो तो उत्पाद शुल्क और पेनल्टी का या अगर सिर्फ पेनल्टी हो तो पेनल्टी का 7.5% भरकर अपील की जा सकती है.

5. 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.
आदेश की प्रतियां, जिनमें से एक प्रतिलिपि प्रमाणित किया जाएगा अथवा 2.50 रुपये की एक अदालती शुल्क टिकट सहन करना होगा न्यायालय शुल्क स्टाम्प अधिनियम, 1870 की धारा 6 की अनुसूची 1 के अनुसार.

BY R. P. A. D.

To,
M/s. Madhu Silica Private Limited,
Plot No. 40, GIDC - Chitra,
Bhavnagar.

Sub: - Adjudication of Show Cause Notice Number F. No. V/18-19/D/2010-11 dated 01.12.2010.

1. Brief facts of the Case:

1.1 M/s. Madhu Silica Limited having factory at Plot No. 40, GIDC – Chitra, Bhavnagar (hereinafter referred to as "the Noticee") are engaged in the manufacturing and clearance of excisable goods viz. Precipitated Silica and Sodium Alumina Silicate etc. falling under the Chapter Heading No. 3824 90 25 and 2842 10 00 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as CETA – 1985) and are holding Central Excise Registration No. AABCM4381JXM001. The Noticee have been availing Cenvat Credit of Central Excise duty / Service Tax paid on Inputs, Capital Goods and Input Services under Rule 3 of the Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR-2004).

1.2 During the course of scrutiny of records of the Noticee, it was noticed that the Noticee has wrongly availed and utilized the Cenvat Credit of Service Tax paid under the category of Goods Transport Agency (hereinafter referred as "the GTA Services") for outward transportation of finished goods manufactured and cleared to their customers at their destinations which are situated beyond the place of removal as defined under Section 4(3)(C) of the Central Excise Act, 1944 (hereinafter referred to as "the Act"). As the Cenvat credit of "input service" of GTA had been taken wrongly, the subject Show Cause Notice was issued asking as to why the Cenvat Credit amounting to Rs. 3,38,016/- (Including Edu. Cess & S&H Edu. Cess) should not be denied and Interest under Rule 14 of CCR, 2004 read with Section 11AB of the Act at the applicable rate on the duty amount as well as penalty under Rule 15 of the CCR, 2004 read with Section 11AC of the Central Excise Act, 1944 should not be levied.

Now, I have taken up subject Show Cause Notice for adjudication. Copy of the SCN is enclosed as Annexure-I.

2. Defense Reply:

2.1 The Noticee submitted their written reply dated 28.12.2010 for SCN F. No. V/18-19/D/2010-11 dated 01.12.2010. (Copy of the defense reply enclosed herewith as Annexure-II) The Noticee has contended that the subject demand is not legally tenable for reasons shown in the defense reply and in support of their contention they relied upon the following case laws. (1) Hon'ble Tribunal in the case of Kuntal Granites Ltd. V/s Commissioner of Central Excise, Bangalore - 2007 (215) ELT 515 (Tribunal Bangalore), (2) ABB Ltd. V/s. Commissioner of C. Ex. & S.T. – 2009 (15) S.T.R. 23(Tri.LB),(3) Coca Cola India Pvt. Ltd. Vs. Commissioner of C.Ex., Pune-III 2009(15) S.T.R. 657 (Bom.).

3. Personal Hearing :

3.1. Personal hearing was held on 28.11.2014. Shri R. R. Dave, Consultant of the Noticee appeared in the personal hearing and submitted the further defense reply dated 29.10.2014 and requested to take the same on record while adjudicating the subject SCNs.

4. DISCUSSION & FINDINGS:

4.1 I have carefully gone through the subject Show Cause Notice, submissions made by the Noticee in their written reply as well as during Personal Hearing and other evidences available on record. I take up the subject SCN for decision for which the personal hearing was held on 28.11.2014. The SCN F. No. V/18-19/D/2010-11 dated 01.12.2010 issued by the Assistant Commissioner, Central Excise, City Division, Bhavnagar is taken up for decision. The SCN F. No. V/18-19/D/2010-11 dated 01.12.2010 issued by the Assistant Commissioner, Central Excise, City Division, Bhavnagar is taken up for decision in view of para 6 of CBECs Circular No. 752/68/2003-CX dated 01/10/2003 and Para 3 of CBECs Circular no 362/78/97-CX dated 09/12/1997. The issue to be decided in the subject SCN is that:

Whether the Cenvat credit of service tax paid on outward transportation of goods up to the point of delivery to the customer is admissible or not?

4.2 I found that the issue whether the Cenvat credit of service tax paid on outward transportation of goods up to the point of delivery to the customer is admissible or not has been decided by the Hon'ble High Court of Kolkata in the recent case of Commissioner of Central Excise, Kolkata-VI V/S Vesuvious India Ltd; [2014 (34) S.T.R. 26 (Cal)]. For easy reference, I would like reproduce relevant paras of the subject decision. The para Nos. 3 to 14 are reproduced here:

> *"3. Mr. Saraf, Learned advocate appearing for the appellant, submitted that the judgment in the case of ABB Limited rendered by the Karnataka High Court is open to questions and, therefore, the Tribunal should not have followed the judgment. The Tribunal should have instead considered the submissions advanced on behalf of the Revenue and decided the matter independently which the Tribunal did not do.*

4. Mr. Majumder, learned advocate, appearing for the respondent assessee, drew our attention to the judgment in the case of ABB Limited (supra). He relied upon the following lines appearing in paragraph 29 of the report, which reads as follows :

"29. Input service per se is not confined to pre-manufacturing stage. It also refers to post manufacturing stage. As is clear from the Circular issued by the Board on 23-8-2007, where a manufacturer/consignor may claim that the sale has taken place at the destination point because in terms of sale contract/agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door-step (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant, of such credit, that the sale and the transfer of property in goods (in terms of the definition as under Section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place. Therefore, if the service tax is paid on transportation charges, in such cases, it fell within the phrase "clearance of final products from the place of removal" and therefore, the assessee was entitled to Cenvat credit."

5. The aforesaid reasoning, we are sorry to say, has not appealed to us. 'Input service' as defined in Rule 2(l)(ii) does not include the expenses with regard to post-manufacturing stage except for the purpose of transportation of goods from one place of removal to another place of removal. It is, however, true that relaxation in that regard was made by the Circular issued by the Board on 23rd August, 2007. When the Board has made the relaxation, the assessee is entitled to take the benefit thereof. But, we are not prepared to accept that effect of the Circular would be to amend the Rules. Rules remain what they were. On the basis of the Circular issued by the Board, it cannot be said that under the Rules, 'input service' includes the transportation service made available to the customer for the purpose of delivering the goods at the destination. The finding, "Therefore, if the Service Tax is paid on transportation charges, in such cases, it fell within the phrase "clearance of final products from the place of removal" and therefore, the assessee was entitled to Cenvat credit is erroneous in any event because even the Circular issued by the Board on 23rd August, 2007 does not provide for the allowance as widely as indicated in the judgement of the Karnataka High Court quoted above. The Board in its Circular has made the relaxation in some cases having the factual background as indicated therein. On that basis it cannot be said that because in some cases the outward transportation charges or the Service Tax payable thereon is claimable as input service, in all cases such benefit may be available .

6. We have not been able to persuade ourselves to accept this reasoning given by the Hon'ble Judges of the Karnataka High Court.

7. Mr. Majumder in support of his submission also relied upon the judgment of the Hon'ble Gujarat High Court in the case of Commissioner of C. Ex. & Customs v. Parth Poly Wooven Pvt. Ltd., reported in 2012 (25) S.T.R. 4 (Guj.). He relied upon paragraphs 18, 21 and 22. Paragraphs 18 and 21 do not support the contention of Mr. Majumder as would appear from a plain reading of those two paragraphs. Paragraph 22 of the judgment relied upon by Mr. Majumder reads as follows :

"22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturers for transportation of finished goods from the place of removal up to the premises of the purchaser is covered within the definition of "input service" provided in Rule 2(1) of the Cenvat Credit Rules, 2004."

8. The Hon'ble Division Bench expressed their aforesaid opinion, but no reasons or appropriate reasons are ascertainable by us for the purpose of aforesaid proposition.

9. We are, as such, of the considered view that the opinion expressed by the Hon'ble Division Bench of the Gujarat High Court cannot be accepted. No other submission was made. We find that the Tribunal has dismissed the appeal of the Revenue only on the basis of the judgment of the Karnataka High Court. We already have discussed one reason as to why the judgment of the Karnataka High Court has not impressed us.

10. There are more reasons. In paragraph 30, the Hon'ble Division Bench of the Karnataka High Court opined that "The definition of "input service" contains both the words 'means' and 'includes', but not 'means and includes'. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of 'input service' deals with service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products, it also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service."

11. We are, with respect to the Hon'ble Division Bench, unable to see how can it be said from the restrictive part of the definition that "the services received or rendered by

the manufacturer from the place of removal till it reaches its destination falls within the definition of input service".

12. *Yet another reasoning given by the Hon'ble Division Bench is as follows :*

"Therefore, it is clear that till such amendment made effective from 1-4-2008 notwithstanding the clarification issued by the Central Government by way of their circular, transportation charges incurred by the manufacturer for 'clearance of final products from the place of removal' was included in the definition of input service."

13. *By the amendment made with effect from 1st April, 2008 substituting the word "from" by the word "upto" all that has been done is to clarify the issue. Neither the services rendered to the customer for the purpose of delivering the goods at the destination was covered by the definition of input service prior to 1st April, 2008, nor is the same covered after 1st April, 2008. If the definition provided in Section 2(l)(ii) is read a whole, if would appear that outward transportation charges or taxes paid in regard thereto is claimable only with regard to those transports which were made from one place of removal to another place of removal.*

14. *We are, as such, of the considered view that the judgment rendered by the Learned Tribunal cannot be sustained and the same is, therefore, set aside."*

Following the ratio of the above judgment, I hold that the Cenvat credit of service tax paid on outward transportation of goods up to the point of delivery to the customer is not admissible. Accordingly, I deny the Cenvat Credit amounting to Rs. 3,38,016/- (Including Edu. Cess & S&H Edu. Cess) as demanded in the subject SCN under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944.

4.3 I note that the Noticee has relied upon the decision of the Tribunal passed in the case of Kuntal Granites Ltd. V/s Commissioner of Central Excise, Bangalore - 2007 (215) ELT 515 (Tribunal Bangalore) in support of his contention. I have gone through the subject case law and found that in that case the issue of place of removal and remission of duty on account of transit loss has been decided whereas in the present case the issue of GTA service of outward transportation is involved and hence the case law is not relevant. The Noticee has relied upon the decision of the Tribunal passed in the case of ABB Ltd. V/s. Commissioner of C. Ex. & S.T. – 2009 (15) S.T.R. 23(Tri.LB) in support of his contention. I have gone through the subject case law and found that the subject case law has been examined by the Hon,ble High Court of Kalkatta in the case of the Commissioner of Central Excise, Kolkata-VI V/S Vesuvious India Ltd; [2014 (34) S.T.R. 26 (Cal)] and held that the Cenvat credit of GTA service is not admissible. The Noticee has relied upon the decision of the Tribunal passed in the case of Coca Cola India Pvt. Ltd. Vs. Commissioner of C.Ex., Pune-III 2009(15) S.T.R. 657 (Bom.) in support of his contention. I have gone through the subject case law and found that in that case the issue of Cenvat credit of advertising service used for marketing of soft drinks removed by the bottlers has been decided whereas in the present case the issue of GTA service of outward transportation is involved and hence the case law is not relevant. I further discover that the issue involved in the SCN is settled much later by the High Court as mentioned above.

4.3. Coming to the issue of imposing penalty, this issue is no more *res integra* in view of the judgments of the Supreme Court in the case of ***Dharamendra Textile Processors and Ors., 2008 (231) E.L.T. 3 (S.C.) and Rajasthan Spinning and Weaving Mills - 2009 (238) E.L.T. 3 (S.C.).*** The Apex Court has held that penalty is civil liability and the ratio of the same is applicable in all case of tax evasion. In the present case, as discussed above, it is proved beyond doubt that the Noticee has deliberately evaded payment of central excise duty and therefore they are liable for penalty under Section 11AC of the Central Excise Act, 1944 as made applicable to the service tax matter by virtue of provisions of section 83 of the Finance Act, 1994. Further as regards to imposition of penalty, I find that the said assessee has wrongly availed and utilized the Cenvat Credit of Service Tax paid under the category of Goods Transport Agency Services for outward transportation of finished goods manufactured and cleared to their customers at their destinations which are situated beyond the place of removal as defined under Section 4(3)(C) of the Central Excise Act, 1944. The Act on the part of the said assessee as discussed in foregoing paras, resulted in to non-payment / non reversal of huge amount of duty as mentioned in above table against each SCNs and rendered themselves for liable for penalty as provided under Rule 15 of the said Rules. Regarding the question of charging interest, I find that interest is statutory liability following every short-payment or non-payment of duty and wrong availment or wrong utilization of Cenvat Credit. Therefore there is no escape from the liability envisaged under the statute for the aseessee. Accordingly I hold that the assessee is liable for penalty under Rule 15 of CCR, 2004 read with Section 11AC of the Act and interest is chargeable under Rule 14 of CCR, 2004 read with Section 11AB of Central Excise Act, 1944.

4.4 In view of above discussion and findings, I pass the following order:

:ORDER:

(i) I deny the Cenvat credit amounting to **Rs. 3,38,016/-** (Rupees Three Lakh Thirty Eight Thousand Sixteen only) including education cess and higher education cess under the provisions of Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944

(ii) I order to charge and recover interest at the appropriate rate as per the provisions of Rule 14 of CCR, 2004 read with Section 11AB of the Central Excise Act, 1944 on the amount of Central Excise duty confirmed as above, which should be paid by / recovered from the Noticee forthwith.

(iii) I impose an equal amount of penalty of **Rs. 3,38,016/-** (Rupees Three Lakh Thirty Eight Thousand Sixteen only) in respect of SCN F. No. V/18-19/D/2010-11 dated 01.12.2010 under the provisions of Rule 15 of CCR, 2004 read with Section 11AC of the Central Excise Act, 1944, which should be paid by / recovered from Noticee forthwith.

This order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the Central Excise Act, 1994 or the Rules framed there under or under the provisions of any other law for the time being in force.

4/12/14

(ANIL MISRA)
Additional Commissioner

F. No. V/15-66/Dem/HQ/2010-11

Bhavnagar, Date: - 04.12.2014

By Registered Post A. D.

To,

M/s. Madhu Silica Private Limited,
Plot No. 40, GIDC - Chitra,
Bhavnagar.

Copy to:

1. Assistant Commissioner, Central Excise, City Division, Bhavnagar.
2. Superintendent of Central Excise, AR-I, Bhavnagar with a direction to ensure service of the subject Order in Original to the Noticee and report to O & A Section, HQ regarding service of the subject Order in Original.
3. Assistant Commissioner (RRA), Central Excise, HQ, Bhavnagar.
4. Guard file.