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# केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर
## OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
## प्लॉट नं. 6776–बी/1, 'सिध्धि सदन' बिल्डिंग,
## PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
## नारायण उपाध्याय मार्ग, भावनगर–364001
## NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.
दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा
**By R.P.A.D.**

फाईल सं. V/15-10/Adj/Denovo/HQ/2010
F. No.

आदेश की तारीख : 15/09/2011
Date of Order :
जारी करने की तारीख : 15/09/2011
Date of Issue :

पारितकर्ता
Passed by
**श्री एन के भुजबल**
**SHRI N. K. BHUJABAL**
आयुक्त , केन्द्रीय उत्पाद शुल्क एवम सेवा कर, भावनगर
**Commissioner , Central Excise and Service Tax, Bhavnagar**

## मूल आदेश संख्या Order-in-Original No : 35 to 38/BVR/Commissioner/2011

1. आदेश की यह प्रति जिसको जारी किया गया है उनके व्यक्तिगत उपयोग के लिए निःशुल्क भेजी जा रही है ।

1. This copy of order is granted free of charges for private use of the person(s) to whom it is issuec and sent.

2. यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है , तो इस आदेश के विरूद्व सीमा शुल्क , केंद्रीय उत्पाद शुल्क एवं सेव कर अपीलीय प्राधिकरण , ओ–20 , मेघाणी नगर , नया मानसिक अस्पताल संकुल , अहमदाबाद को केंद्रीय उत्पाद शुल्क अधिनियम की धारा 35–बी की उपधारा 1**(a)** की शर्तों के आधार पर अपील कर सकता है । धारा 35–बी (1) (परंतुक) (a) से (d) के अंतर्गत मामले जैसे कि हानि ,छूट ,बॉण्ड के अंतर्गत निर्यात , शुल्क क्रेडिट के मामले , आवेदन के पुनरीक्षण के मामलों में आवेदन भारत सरकार के संयुक्त सचिव , राजस्व विभाग , वित्त मंत्रालय , नई दिल्ली को बंधनकर्ता रहेगा ।

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghan Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) o the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1 (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shal lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. अपील फॉर्म E.A.-3 में केंद्रीय उत्पाद शुल्क (अपील) नियम , 2001 के नियम 3 के उपनियम 2 में विनिर्दिष्ट व्यक्ति द्वारा की जानी चाहिए ।

3. The Appeal should be filed in form EA.-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.

4. केंद्रीय उत्पाद शुल्क अधिनियम , 1944 की धारा 35–B के अंतर्गत अपील इस आदेश की प्राप्ति के तीन माह के अंदर दर्ज करवानी होगी ।

4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).

5. यह अपील चार प्रतियों में दाखिल की जाए और जिसके विरूद्व अपील की गई है ,उस आदेश की समान संख्या में प्रतियां संलग्न की जाए (इन में से कम से कम एक प्रति अधिप्रमाणित होनी चाहिए) । उक्त अपील के समर्थक सभी दस्तावेज चार प्रतियों में भेजे जाएं। उक्त अपील व्यक्तिगत रूप से रजिस्ट्रार के समक्ष प्रस्तुत की जाए या पंजीयक के नाम से रजिस्ट्री डाक द्वारा भेजी जाए । परन्तु उक्त रजिस्ट्रार के कार्यालय में प्राप्ति की तारीख नियत अवधि में होगी ।

आयुक्त कार्यालय भावनगर केन्द्रीय उत्पाद शुल्क

5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. फीस का भुगतान न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के पक्ष में रेखांकित बैंक ड्राफ्ट द्वारा अधिनियम के प्रावधानों के अंतर्गत करना अपेक्षित है । यह ड्राफ्ट जहाँ पीठ स्थित है , किसी राष्ट्रीयकृत बैंक की किसी शाखा के नाम पर जारी किया जाए और उस उक्त अपील प्रपत्र के साथ डिमाण्ड ड्राफ्ट संलग्न किया जाना चाहिए ।

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

(क) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 50,00,000/- (रूपए पचास लाख) से ज्यादा हो , रू. 10,000/- (रूपए दस हजार )

(a) Where the amount of duty and interest demanded and penalty is levied is more than ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);

(ख) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) से अधिक हो लेकिन , रूपए 50,00,000/- (रूपए पचास लाख) से कम हो 5,000/- (रूपए पांच हजार )

(b) Where the amount of duty and interest demanded and penalty levied is more than ₹ 5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/- (Rupees Five Thousand);

(ग) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) अथवा कम हो , रूपए 1,000/- (रूपए एक हजार )

(c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/-(Rupees One Thousand);

7. इस आदेश की प्रतिलिपि पर न्यायालय शुल्क मुद्रांक अधिनियम , 1970 की अनुसूची 1 मद 6 के अंतर्गत निर्धारित 50 पैसे का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प ) लगाया जाना चाहिए ।

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. उक्त अपील फॉर्म के साथ शुल्क / दण्ड की अदायगी का प्रमाण संलग्न किया जाना चाहिए ।

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. अपील पर रू. 5 (रूपए पांच ) का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प ) लगाया जाना चाहिए ।

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. पूर्ण जानकारी हेतु केंद्रीय उत्पाद शुल्क (अपील) नियम , 2001 एवम CEGAT (कार्यविधि) नियम 1982 देखें ।

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,

**M/s. Ultratech Cement Ltd.**
**(Gujarat Cement Works)**
**Post Kovaya,**
**Distt. Amreli – 365 541**

विषय : कारण बताओ नोटिस संख्या :
Subject: Show Cause Notice No. (i) C.EX/MHV/D-9/L&T/2000-01 dated 05.03.2002 (ii) V.BVR/AR-Mahuva/SCN-21/JC/DEM/2002 dated 13.03.2003, (iii) V.25/15-66/Dem/HQ/03 dated 30.07.2003 and (iv) V.BVR(R)/AR-MHV/SCN-20/COMMR/2004 dated 25.05.2004 issued to M/s. L & T Ltd. Now M/s. Ultratech Cement Ltd. (Gujarat Cement Works), Post Kovaya, Distt. Amreli – 365 541.

**BRIEF FACTS OF THE CASE :-**

Brief facts of the case are that M/s. Larsen & Toubro Limited (now M/s. Ultratech Cement Ltd.), Village - Kovaya, Taluka Rajula, District – Amreli (herein after referred to as the "noticee") have been engaged in manufacturing of Cement and Cement Clinker falling under Chapter Sub – Heading Nos. 2502.29 and 2502.10 respectively of the first schedule to the Central Excise Tariff Act, 1985 and have been availing Cenvat credit in respect of duty paid on Inputs and Capital Goods as provided under the Central Excise Rules, 1944 (herein after referred to as the "CER, 1944") / Cenvat Credit Rules 2001/2002 (herein after referred to as the "CCR, 2001/ 2002").

2. The noticee has been clearing Clinker manufactured by them for Home Consumption and Export as well as consuming the same in further manufacturing of Cement in their factory as Clinker is the prime raw – material for manufacturing Cement. The noticee has been claiming and availing the benefit of Notification No. 67/1995-C.E. dated 16.03.1995, as amended, and has not been paying Central Excise Duty on so much quantities of Clinker as is manufactured and captively consumed by them in manufacturing of Cement out of it.

3.1 Notification No. 67/1995-C.E. dated 16.03.1995 provides exemption from payment of Central Excise duty to specified inputs manufactured in a factory and used within the factory of production in or in relation to manufacture of specified final products. However, as per proviso to said Notification No. 67/1995-C.E. dated 16.03.1995, nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products (other than those cleared to a unit in a Free Trade Zone, or to a hundred percent Export Oriented Undertaking, or to a unit in an Electronic Hardware Technology Park, or to a unit in a Software Technology Park, or supplied to the United Nations or an International Organisation for their official use or supplied to projects funded by the United Nations or an International Organisation, on which exemption of duty is available under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 108/95-Central Excise dated the 28th August, 1995), which are exempt from the whole of the duty of excise or are chargeable to nil rate of duty

3.2 Vide Notification No. 31/2001-C.E. dated 01.06.2001, the proviso to Notification No. 67/1995-C.E. dated 16.03.1995 was substituted. As per the substituted proviso, nothing contained in the Notification No. 67/1995-C.E. dated 16.03.1995 shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or are chargeable to nil rate of duty, other than those goods which are cleared, (i) to a unit in a Free Trade Zone, or (ii) to a hundred percent Export Oriented Undertaking, or (iii) to a unit in an Electronic Hardware Technology Park, or (iv) to a unit in a Software Technology Park, or (v) under notification No. 108/95-Central Excise dated the 28th August, 1995, or (vi) by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in rule 57AD of the Central Excise Rules, 1944. Vide Notification No. 35/2001-C.E. dated 29.06.2001, in the proviso to Notification No. 67/1995-C.E. dated 16.03.1995, in para (vi), for the word, figures and letters "rule 57AD of the Central Excise Rules, 1944", the words, figures and letters "rule 6 of the CENVAT Credit Rules, 2001" were substituted.

4. From February – 2001 onwards, the noticee claimed and availed benefit of Notification No. 2/2001-C.E. dated 27.01.2001 and cleared Cement at Nil rate of duty for the relief and rehabilitation of the people affected by the earthquake in the state of Gujarat. From April – 2001 onwards, the noticee claimed and availed benefit of Notification No. 16/2001-C.E. dated 26.03.2001 and cleared Cement at Nil rate of

duty for the purposes of reconstruction, or repairs of private buildings, residential or non-residential, in the earthquake affected areas of Gujarat.

5. It was observed that as per proviso to Notification No. 67/1995-C.E. dated 16.03.1995, the benefit of the said Notification was not available to so much quantity of Clinker as was captively consumed in manufacture of Cement, which was cleared at Nil rate of duty under Notification No. 2/2001-C.E. and Notification No. 16/2001-C.E., till the said Notification No. 67/1995-C.E. was amended vide Notification No. 31/2001-C.E. dated 01.06.2001. It appeared that as per provisions of Notification No. 67/1995-C.E. dated 16.03.1995 read with erstwhile Rule 9, 49 and 173F of the CER, 1944, as made applicable by Section 38A of the Central Excise Act, 1944 (herein after referred to as CEA, 1944), the noticee was liable to pay Central Excise Duty @ ₹ 200/- per M.T. on that much quantity of Clinker manufactured as was captively consumed by them in manufacture of Cement cleared during the period from February – 2001 to May – 2001 under exemption Notification No. 2/2001-C.E. and Notification No. 16/2001-C.E. Therefore, Show Cause Notice F.No. CEX/MHV/D-9/L&T/2000-01 dated 05.03.2002 was issued to the noticee proposing demand of Central Excise Duty of ₹ 51,46,800/- on Clinker manufactured and captively consumed by them in manufacture of Cement cleared at Nil rate of duty under said Notifications No. 2/2001-C.E. and 16/2001-C.E. Interest was proposed to be recovered from them on the said amount and penalty was also proposed to be imposed on them.

6.1 Subsequently, it was observed that till March – 2002, the noticee were reversing 8% CENVAT credit under Rule 6 of the CCR, 2001/2002 on the value of Cement, excluding the cost of transportation, for the clearances made to the earthquake affected areas for the purpose of rehabilitation of Gujarat. However, after 01.04.2002, the noticee stopped reversal @ 8% on the clearance value of Cement and instead of that, they were proportionately reversing the CENVAT credit attributable to the inputs used in such exempted final product as per Rule 6 of CCR, 2002.

6.2 While going through the self assessed monthly ER1 Returns submitted by the noticee, it came to the notice that they have been availing exemption under Notification No. 16/2001-CE dated 26.03.2001 as amended, for clearance of Cement intended to be consumed for the reconstruction and repairs of private, residential/ non-residential buildings, in the earthquake affected areas of Gujarat. It was also noticed that the noticee was also availing the exemption under Notification No. 67/95-CE dated 16.3.95 as amended in respect of Clinker manufactured within their factory and utilizing the same in the further manufacture of Cement in their factory. As per proviso to Notification No. 67/1995-C.E. dated 16.03.1995, nothing contained in the Notification No. 67/1995-C.E. dated 16.03.1995 shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or are chargeable to nil rate of duty other than those goods which are cleared, (among other) by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in rule 6 of the CENVAT Credit Rules, 2001.

6.3 According to the provisions of Sub-rule (2) of Rule 6 of the CCR. 2002 where a manufacturer avails of CENVAT credit in respect of any inputs and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer is required to maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat credit only on the quantity of inputs which is intended for use in manufacture of dutiable goods. The noticee, interalia, availed of

CENVAT credit in respect of inputs viz. Explosives, Iron Ore, Naphtha, Ammonium Nitrate, Gypsum, Plastic Bags etc. and manufactured Cement, out of which, certain quantity was cleared on payment of Central Excise duty at the appropriate rate while certain quantity was cleared without payment of Central Excise duty availing exemption contained in the Notification No.16/2001. However, the noticee was not maintaining separate accounts for receipt, consumption and inventory of inputs as required under the provisions of sub-rule (2) of Rule 6 of the CCR, 2002.

6.4 According to the provisions of Sub-rule (3) (b) of Rule 6 of the CCR, 2002, the manufacturer opting not to maintain separate accounts as provided under sub-rule (2) of Rule 6, is required to pay an amount equal to eight per cent of the total price, excluding Sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory. However, as communicated by the noticee vide their letters No. GCW/COMM/CEX-EARTHQAKE/2002-03 dated 2.5.2002 and 4.5.2002, they were unable to keep separate records of inputs in terms of Sub-rule (2) of Rule 6 of the CCR 2002 and informed that they would comply with the requirements by not claiming proportionate CENVAT credit on the inputs. Accordingly, they reversed the CENVAT credit, proportionately in respect of Iron Ore Fine, Ammonium Nitrate and Explosives to be consumed in manufacture of Cement intended to be cleared under exemption on the basis of ratio arrived at as per their records. The noticee reversed CENVAT credit attributable to Naptha proportionately in respect of the quantity deemed to have been consumed in manufacture of Cement cleared under exemption as per the consumption ratio arrived at based on their experience. They were not claiming CENVAT credit of duty paid on bags (packing materials).

6.5 The proportionate reversal of CENVAT credit was governed by sub-rule (3)(a) of Rule 6 of the CCR 2002 and this facility was available only to the exempted final products specified therein. It was observed that the Cement was not specified final product, hence not eligible for reversal of CENVAT credit on proportionate basis in respect of inputs used in the manufacture of Cement cleared under exemption.

6.6 Accordingly the noticee was informed by the jurisdictional Range Superintendent (JRS) that the system adopted by them and communicated to the department was contrary to the provisions of the Central Excise Law; not acceptable and instructed either to maintain separate accounts or receipt, consumption and inventory of inputs or pay an amount equal to 8% of the total price charged by them to their Customers for sale of Cement under the exemption Notification referred to above.

6.7 Despite the specific instruction of the JRS, the noticee continued to follow the procedure already adopted by them for compliance of the provisions of Rule 6 of the CCR, 2002 with reference to Cement cleared under exemption as per the Notification No.16/2001-C.E. The JRS again informed the noticee that the system adopted by them is in violation of provisions of Rule 6 of the CCR, 2002 and the benefit of exemption under Notification 67/1995-C.E. dated 16.3.1995 to Clinker manufactured and captively used in the further manufacture of Cement cleared under exemption would not be admissible to them and they would be required to pay the duty on that much quantity of Clinker which was used in manufacture of Cement cleared at Nil rate of duty under the Notification 16/2001-C.E.

6.8 The noticee had not complied with the obligations cast upon them under Sub-rule (3) (b) of Rule 6 of CCR, 2002, as discussed. Therefore, they did not appear entitled to avail benefit of the exemption Notification No. 67/1995-C.E. dated 16.3.1995 in terms of para (vi) of proviso to Notification No. 67/1995-C.E. dated

16.3.1995 and thus they appeared to have wrongly availed the benefit of exemption Notification No. 67/1995-C.E. dated 16.3.1995 for the manufacture and clearance of Clinker to the extent of its usage in manufacture of exempted Cement cleared under Notification No. 16/2001-C.E. Therefore, the noticee appeared liable to pay Central excise duty at appropriate rate on that much quantity of Clinker which was consumed in manufacture of exempted Cement cleared under Notification No. 16/2001-C.E. On being instructed by JRS, the noticee vide their various letters informed the quantity of Clinker used in the manufacture of Cement cleared under Notification No. 16/2001-C.E. during the period. On the basis of the information provided by the noticee, the amount of duty not levied and paid by the noticee on the Clinker used in the manufacture of Cement cleared under Notification No. 16/2001-C.E. was demanded under following show cause notices.

| Sr. No | Show Cause Notice No. | SCN Date | Period covered | Amount involved (₹) |
|---|---|---|---|---|
| 01 | V.BVR/ARMHV//SCN21/JC/DEM/2002 | 13.3.2003 | 01.04.2002 to 23.07.2002 | 80,40,506/- |
| 02 | V.25/15-66/Dem/HQ/03 | 30.7.2003 | 24.7.2002 to 30.6.2003 | 1,87,09,123/- |
| 03 | V.BVR(R)/AR-MHV/SCN-20/COMMR/2004 | 25.5.2004 | 1.7.2003 to 31.03.2004 | 51,70,340/- |

**ORDER-IN-ORIGINAL :-**

7.1 After considering the reply submitted by the noticee and after following the principles of natural justice, the aforesaid four SCNs were adjudicated vide Order-in-Original No. 18 to 21/BVR/Commr/2007 dated 30.03.2007/22.05.2007 passed by the Commissioner, Central Excise, Bhavnagar.

7.2 In the said Order-in-Original, it was inter-alia held that the amendment carried out in the Notification No. 67/1995-C.E. by Notification No. 31/2001-C.E., by any stretch of imagination, cannot be held to be retrospective in operation. Consequently, in the period prior to 01.06.2001 (prior to amendment of Notification No. 67/1995-C.E.), Clinker being excisable goods arising during the course of manufacture of Cement was not eligible to exemption under Notification No. 67/1995-C.E. when the final product Cement was cleared under exemption for specified use in earthquake affected area in terms of Notification Nos. 2/2001-C.E. and 16/2001-C.E. Accordingly, the noticee was liable to discharge Central Excise duty @ ₹ 200/- per MT on such quantity of Clinker as was used in Cement cleared under exemption.

7.3 It was also inter-alia held that the facility of reversal of credit on actual basis (equal to CENVAT taken) was available only in respect of goods specified in the Rule 57AD of CER, 1944 or Rule 6 of CCR 2001/2002. Since the Clinker and Cement do not find a place in the said list of specified goods, in the instant case, there was absolutely no provision to reverse credit on actual basis (i.e. equal to CENVAT credit taken). Thus, the reversal of credit on actual basis claimed to have been done by the noticee, cannot be held as compliance to the requirement of Rule 57AD of CER, 1944 or Rule 6 of CCR, 2001/2002. Since it was a mandatory condition of the Notification to comply with the requirement of Rule 57AD of CER, 1944 or Rule 6 of CCR, 2001/2002 i.e. to reverse an amount equal to 8% of the total price of the final product cleared duty free, it was held that this requirement had not been fulfilled, as it had not been complied with by the noticee in true spirit of law.

7.4 The adjudicating authority, vide aforesaid Order-in-Original, passed the following order:-

(i) He confirmed demand of excise duty amounting to:-

(a) ₹ 51,46,800/- (Rupees Fifty One Lacs Forty Six Thousand Eight Hundred only) as raised vide SCN No. C.EX./MHV D-9/L&T/2000-01 dated 05.03.2002 under Sub-Section (1) of Section 11A of the CEA, 1944 read with Rule 9 and 49 of the erstwhile Central Excise Rules 1944 and Section 38A of the Central Excise Act, 1944 on the quantity of Clinker used in the manufacture of Cement cleared under Notification No 16/2001-C.E. without payment of duty.

(b) ₹ 80,40,506/- (Rupees Eighty Lakh Forty Thousand Five Hundred Six only) as demanded vide SCN No. V.BVR/AR-MHV/SCN 21/JC/DEM/ 2002 dated 13.03.2003 under Section 11A of the CEA, 1944 on the quantity of Clinker used in the manufacture of Cement cleared under Notification No 16/2001-C.E. without payment of duty.

(c) ₹ 1,87,09,123/- (Rupees One Crore Eighty Seven Lakh Nine Thousand One Hundred Twenty Three only) as demanded vide SCN No. V.25/ 15-66/Dem/HQ/03 dated 30.07.2003 under Section 11A of the CEA, 1944 on the quantity of Clinker used in the manufacture of Cement cleared under Notification No. 16/2001-C.E. without payment of duty.

(d) ₹ 51,70,340/- (Rupees Fifty One Lakh Seventy Thousand Three Hundred Forty only) as demanded vide SCN No. V.BVR(R)/AR-MHV/ SCN-20/COMMR/2004 dated 25.05.2004 under Section 11A of CEA, 1944 on the quantity of Clinker used in the manufacture of Cement cleared under Notification No. 16/2001-C.E. without payment of duty.

(ii) The noticee was ordered to pay interest leviable under Section 11AA of the CEA, 1944 in respect of demand of excise duty confirmed at (i)(a) above for the period up to 10.5.2001 and under Section 11AB with effect from 11.5.2001. In respect of demand of duty confirmed at (i) (b) (i) (c) and (i) (d) hereinabove, the noticee was ordered to pay interest under Section 11AB of the CEA, 1944.

(iii) He imposed penalty of:

(a) ₹ 5,00,000/- (Rupees Five Lakh only) in respect of SCN No. C.EX/MHV D-9/L&T/2000-01 dated 05.03.2002 on the noticee under sub-rule (1) of Rule 173Q of Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944.

(b) ₹ 8,00,000/- (Rupees Eight Lakh only) in respect ,of SCN No. V.BVR/AR MHV/SCN 21/JC/DEM/2002 dated 13.03.2003 on the noticee under Rule 25 of Central Excise Rules, 2002.

(c) ₹ 18,00,000/- (Rupees Eighteen Lakh only) in respect of SCN No. V.25/15-66/Dem/HQ/03 dated 30.07.2003 on the noticee under Rule 25 of Central Excise Rules, 2002.

(d) ₹ 5,00,000/- (Rupees Five Lakh only) in respect of SCN No. V. BVR(R)/AR-MHV/SCN-20/COMMR/2004 dated 25.05.2004 on the noticee under Rule 25 of Central Excise Rules, 2002.

## ORDER OF HON'BLE CESTAT :-

8. Aggrieved by the aforesaid Order-in-Original, the noticee filed Appeal No. E/970/07 with the Hon'ble CESTAT, WZB, Ahmedabad. Hon'ble CESTAT, vide Order No. A/1565/WZB/AHD/2010 dated 12.08.2010 allowed the appeal by way of remand to the original adjudicating authority. The said order of the Hon'ble CESTAT has been accepted by the department. Para 6 of the order dated 12.08.2010 of the Hon'ble CESTAT is reproduced below :-

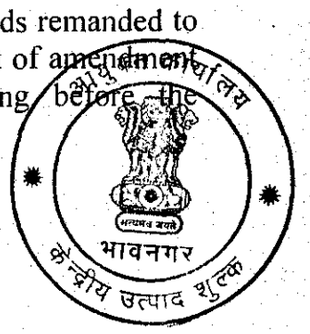
> *"6. The learned advocate on behalf of the appellants explained in detail the facts of the case and also submitted that the appellants had followed the procedure as per law and the impugned order is against several decisions on the issue of reversal of cenvat credit in respect of exempted goods before their clearance. However in view of the fact that Finance Act, 2010 provides for regularization of such cases provided, the credit taken is reversed, we find it unnecessary to go into all the details of this case. The matter is remanded to the original adjudicating authority to consider the issue in the light of the provisions of Finance Act, 2010 and also consider the correctness of the amount already reversed by the appellants. Thus the appeal is allowed by way of remand to the original adjudicating authority."*

## APPLICATION OF NOTICEE :

9.1 The noticee filed application pursuant to amendment in Finance Act, 2010 vide letter No. UTCL/GCW/C.E.S.T.A.T.ORD.A/1565/WZB/AHD/2010/10-11 dated 19.10.2010 (received on 21.10.2010).

9.2 They submitted that vide Section 71 and Section 72 of Finance Act, 2010, the provisions of Rule 6 of the CCR, 2001/2002 have been amended retrospectively up to 9th September 2004 in order to statutorily provide an option of reversing the proportionate Cenvat Credit on inputs used in the manufacture of exempted goods. The said Section 71 and 72 of Finance Act, 2010 provides that where a person opts to pay the amount in accordance with the provisions as amended by sub-section (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President. Finance Bill has received assent on 10.05.2010 and therefore the application has to be made up to 09.11.2010. The present application is within time.

9.3 It has been submitted that they filed an appeal before CESTAT bearing Appeal No. E/970/2007 against OIO No. 18-21/BVR/Commr/2007 dated 21.05.2007 passed by the Commissioner of Central Excise, Bhavnagar confirming the amount of ₹ 3,70,66,769/- for the period February 2001 to May 2001 & April 2002 to January 2004 being amount of 10% under Rule 6(3)(b) of the CCR, 2002/2002. The said appeal was pending before CESTAT on the day Finance Bill 2010 was laid down before the Parliament. The said appeal now stands disposed by the Tribunal vide Order No. A/1565/WZB/AHD/2010 dated 12.08.2010 and matter stands remanded to the Commissioner of Central Excise to decide the issue afresh in light of amendment made vide Finance Act, 2010 and thus matter is now pending before the Commissioner of Central Excise, Bhavnagar.



9.4 The noticee also submitted that they cleared some quantity of Cement during the period in question without payment of excise duty by availing exemption under the exemption Notification No. 2/2001-C.E. up to March 2001 and Notification No. 16/2001-C.E. from April 2001 onwards. Thus, during the period in question, they cleared Cement on payment of excise duty as well as without payment of duty by availing aforesaid exemption Notifications.

9.5 They further submitted that they were discharging their obligation under Rule 57AD of the CER, 1944 and Rule 6 of the CCR, 2001 up to March 2002, in as much as they were paying an amount equal to 8% of total price of Cement cleared without payment of duty availing exemption under Notification No. 2/2001-C.E. and Notification No. 16/2001-C.E. From April 2002 onwards, the noticee stopped availing credit on that quantity of inputs which are used in the manufacture of exempted Cement. They, from time to time, intimated the department that they would not be availing credit on that quantity of inputs which are used in the manufacture of Cement cleared availing exemption under Notification No. 16/2001-C.E.

9.6 The noticee submitted that proceedings were initiated against them by denying benefit of Notification No. 67/1995-C.E. dated 16.03.1995 to Clinker on the ground that they have not discharged their obligation under Rule 6 of CCR, 2002/2002, in as much as the benefit of reversal of credit/ not taking credit is available only to specified final products under Rule 6(3)(a) and not otherwise. Now, as per amended Rule 6 read with Schedule 5 and 6 provides that where a dispute relating to adjustment of credit on inputs used in or in relation to exempted final products, then notwithstanding anything contained in sub-rules (1) and (2), a manufacturer availing CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to CENVAT credit attributable to the inputs used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods. However, it is further provided that the manufacturer shall pay interest at the rate of twenty four per cent per annum from the date of clearance till the date of payment of the said amount.

9.7 The noticee submitted that they are complying with the above provision in as much as no credit is taken on that quantity of inputs which has gone into the manufacturing of exempted final product. In a case where credit was taken and stands reversed or now required to be reversed, the interest is paid @ 24% p.a. They submitted certificate from the Chartered Accountant M/s. G.P. Kapadia & Co., certifying the input attributable to the inputs used in or in relation to manufacture of exempted goods. The noticee requested to consider their application and pass appropriate order.

10. The noticee vide letter No. UTCL/GCW/OIO 18-21/BVR/Cen rev/ 11-12 dated 09.09.2011 submitted a statement showing interest payable at the rate of twenty four per cent per annum for delayed payment and also submitted that they have paid the interest amount of ₹ 15,740/- vide challan No. 00023 dated 09.09.2011.

**PERSONAL HEARING :-**

11. Personal Hearing in this case was fixed on 06.06.2011. However, on the request of the noticee, the Personal Hearing was re-scheduled and held on 16.06.2011. Shri Anand Nainawati, Advocate and Shri Satish Kumar Jain, Manager (F&A), Ultratech Cement Ltd. appeared for Personal Hearing , explained the issued and stated that they would submit a written submission in this regard within a week.

केन्द्रीय उत्पाद शुल्क भावनगर

**WRITTEN SUBMISSION :-**

12.1 The noticee submitted written reply wherein they inter-alia submitted that they are availing credit on inputs and capital goods used in the manufacture of Clinker and Cement. For the period from February 2001 to May 2001, they availed credit of duty paid on inputs and cleared Cement on payment of duty in terms of Rule 6(3)(b) of the CCR, 2001. They paid an amount equal to 8% of the sale price of Cement amounting to ₹ 32,78,168/-. The aforesaid payment was made with a belief that since they are consuming common inputs for the manufacture of dutiable and exempted products and no separate accounts were being maintained, payment under Rule 6(3)(b) is required to be made. However, no duty was being paid by them on Clinker captively consumed in the manufacture of Cement and they continued to avail benefit of Notification No. 67/1995-C.E. dated 16.3.1995 on Clinker.

12.2 They submitted that for the period April 2002 to March 2004, they instead of paying 8% on exempted Cement in terms of Rule 6(3)(b), foregone their credit on that quantity of inputs which were used for the manufacture of Cement. In other words, they did not avail any Cenvat credit on inputs, to that extent were reversing proportionate credit attributable to inputs used in the manufacture of exempted Cement in compliance to Rule 6 of the CCR, 2002.

13.1 In respect of demand for the period from February 2001 to May 2001, the noticee submitted that demand of ₹ 51,46,800/- has been raised on Clinker consumed captively for the manufacture of Cement cleared without payment of duty availing benefit of Notification No. 2/2001-C.E. and 16/2001-C.E. They submitted that during the aforesaid period, they paid ₹ 32,78,168/- as an amount equal to 8% of the sale price of the exempted goods in compliance to Rule 6(3)(b) of the Cenvat Credit Rules as they were not maintaining separate accounts for record of consumption of inputs on which credit is availed and used for the manufacture of dutiable and exempted goods. Thus, they were discharging their obligation under Rule 57AD/Rule 6(3)(b) of the Cenvat Credit Rules.

13.2 They referred to Notification No. 31/2001-C.E. dated 1.6.2001 amending Notification No. 67/1995-C.E. and submitted that the basic proviso in the Notification No. 67/1995-C.E. dated 16.3.1995 is 'substituted' by the proviso in the Notification No. 31/2001-C.E. dated 1.6.2001. The effect of the aforesaid amendment is the substitution of the proviso in earlier notification. This substitution will result in an effect, that, the substituted proviso would have effect from the date of the said Notification No. 67/1995-C.E. i.e. from 16.3.1995.

13.3 They relied upon the decision of Hon'ble Supreme Court in the case of Government of India v. Indian Tabacco Association as reported in 2005 (187) E.L.T.162 (S.C.) wherein it has been held at Para 15 and Para 23 that :-

> *"15. The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague".*

*"23.....It may, therefore, be safely concluded that by reason of the amended notification, the Central Government only intended to rectify a mistake and, thus, the same will have retrospective effect and retrospective operation".*

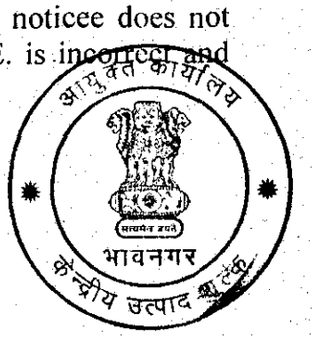
13.4 The noticee submitted that in view of the above settled position of law, the benefit of Notification No. 67/1995-C.E. cannot be denied to Clinker since Notification No. 31/2001-C.E. dated 1.6.2001 will have retrospective effect and they have complied with the requirements of the Notification.

13.5 They further submitted that in any case, in view of the decision of the Tribunal in the case of Rajashree Cement v/s. Commissioner — 2003 (160) E.L.T. 438 (Tribunal) and Toyota Kirloskar Motor Ltd. - 2009 (237) ELT 176 (T), benefit of Notification No. 2/2001-C.E./ 16/2001-C.E. is admissible to both Clinker and Cement.

14.1 In respect of demand for the period from April 2002 to March 2004, the noticee submitted that proviso to Notification No. 67/1995-C.E. dated 16.3.1995 provides that exemption contained in the said Notification shall not apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or additional duty of excise leviable thereon or are chargeable to nil rate of duty. However, there are certain exceptions to the aforesaid proviso and accordingly, if the exempted final products are cleared to a unit in a Free Trade Zone or a 100% EOU or Electronic Hardware Technology Park or a Software Technology Park or under notification No. 108/95-Central Excise, the exemption under Notification No.67/1995-C.E. is available. Vide Notification No. 31/2001-C.E. dated 1.6.2001, scope of exception to proviso were expanded and the exception was also provided to a manufacturer of dutiable and exempted final products if he discharges the obligation prescribed in rule 57AD of the CER, 1944 or Rule 6 of the CCR, 2001/2002.

14.2 They submitted that in the present case the duty has been demanded on Clinker by denying the exemption under Notification No. 67/1995-C.E. for the period from April 2002 to March 2004 on the ground that the noticee has not rightly discharged their obligation under Rule 6 of the CCR, 2002. The reasoning given in the show cause notices is that they have wrongly reversed the proportionate credit attributable to inputs used in the manufacture of exempted Cement instead of paying 8% of the total price in terms of Rule 6(3)(b). It is the case of the department that the facility of the proportionate reversal of credit is given in respect of specified exempted goods under Rule 6(3)(a) and that the Cement is not specified exempted goods under Rule 6(3)(a).

14.3 The noticee submitted that the aforesaid objection of the department in the show cause notice is not sustainable in light of the amendment made to Rule 6 of CCR, 2001/2002 vide Finance Act, 2010. They referred to section 72 of the Finance Act, 2010 which amends Rule 6 of CCR, 2002. It is submitted that the effect of the aforesaid amendment is that even if the goods are not specified under clause (a) of sub-Rule 3 to Rule 6 where the reversal is permitted for specified goods, Rule 6 will be deemed to be complied if the proportionate reversal is done in respect of inputs used in the manufacture of exempted goods. Therefore, the very basis of demand in the show cause notice that proportionate reversal of credit by the noticee does not satisfy the requirement of proviso to Notification No. 67/1995-C.E. is incorrect and proceedings are liable to be set aside.



14.4 It is further submitted that though the issue relates to denial of exemption under Notification No. 67/1995-C.E. dated 16.3.1995 to Clinker, it revolves round the question as to whether they have discharged their obligation under Rule 6 or not. It is therefore submitted that once an order is passed on application filed by the noticee pursuant to Section 72 of the Finance Act, 2010 and the reversal already done by them in respect of that quantity of inputs which has gone into the manufacture of exempted goods is verified, then subject to such verification and approval and if the quantum reversed by the noticee is found correct then benefit of Notification No. 67/1995-C.E. cannot be denied to them. Consequently, the demand of duty on Clinker would go.

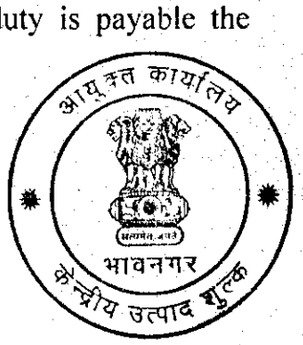
14.5 It is also submitted that the aforesaid submission is without prejudice to the submission that in view of the decision of the Tribunal in the case of Rajashree Cement v/s. Commissioner — 2003 (160) E.L.T. 438 (Tribunal) and Toyota Kirloskar Motor Ltd. - 2009 (237) ELT 176 (T), benefit of Notification No. 2/2001-C.E./ 16/2001-C.E. is admissible to both Clinker and Cement.

14.6 The noticee submitted that in any case, the entire situation is revenue neutral. In the present case the duty proposed to be demanded on Clinker, if paid, will be allowable as credit since Clinker would be an input for the manufacture of Cement. Assuming, instead of availing Notification No. 67/1995-C.E. on Clinker, had they paid duty on Clinker, they would have taken credit of duty so paid on Clinker as same is input for the manufacture of Cement. Now assuming, duty paid Clinker is used for the manufacture of dutiable and exempted goods (as is in the present case) they would have discharged their liability under Rule 6(3)(b) by paying an amount equal to 8% & by paying duty on dutiable Cement by utilizing credit of duty paid on Clinker. In other words, the entire situation is revenue neutral since they could have taken credit of duty paid on Clinker and would have utilized the same for the clearance of dutiable and exempted Cement.

14.7 It is submitted that Hon'ble Tribunal in identical circumstances have set aside the duty demand. In the following decisions, demands were raised for duty on the goods manufactured in a factory and captively consumed by the manufacturer in the manufacture of final product. The goods manufactured and captively consumed were not exempt from payment of duty. Duty was therefore required to be paid on them, but was not paid by the assessees. However, the duty payable on such goods captively consumed was available as proforma credit under Rule 56A. The Hon'ble Tribunal in the following decisions held that the demand of duty on captively consumed goods is not payable since duty has already been fully paid on the finished product and the duty payable on the goods captively consumed was available as credit.

(a) CCE Vs Sri Balaji Cable Industries – 1987 (29) ELT 77.
(b) Parmali Wallace Ltd Vs CCE – 1993 (66) ELT 619.

14.8 It is further submitted that since, they have not contravened any of the provisions of the Central Excise Act, 1944 read with Notifications issued thereunder and Cenvat Credit Rules, no penalty is imposable. Since, no duty is payable the question of paying interest does not arise.



## DISCUSSION AND FINDINGS :-

15. I have carefully gone through the subject show cause notices, Order-in-Original passed during earlier adjudication proceedings, Order of the Hon'ble CESTAT whereby the case has been remanded, submissions made by the noticee in their application, written reply as well as during personal hearing and other evidences available on record.

16. I find that this case has been remanded by the Hon'ble CESTAT with a specific direction to consider the issue in the light of the provisions of Finance Act, 2010 and to also consider the correctness of the amount already reversed by the noticee. The noticee has also made an application pursuant to amendment in Finance Act, 2010. As the issue involved is the same, the application of the noticee is also being considered and disposed off by this order.

17.1 Following four SCNs were issued to the noticee for demanding Central Excise duty on intermediate excisable product viz. Clinker, denying the benefit of Notification No. 67/1995-C.E. The benefit of Notification No. 67/1995-C.E. was denied on the ground that the said Clinker was used in the further manufacture of final product viz. Cement which was cleared without payment of Central Excise duty by availing exemption from the whole of the duty of excise leviable thereon, as provided under Notification No. 2/2001-C.E. and 16/2001-C.E.

| Sr. No | S C N | Date | Period covered | Amount involved (₹) |
|---|---|---|---|---|
| 01 | C.EX/MHVD-9/L&T/2000-01 | 5.3.2002 | Feb-2001 to May-2001 | 51,46,800/- |
| 02 | V.BVR/ARMHV//SCN21/JC/DEM/2002 | 13.3.2003 | Apr-2002 to 23rd July 2002 | 80,40,506/- |
| 03 | V.25/15-66/Dem/HQ/03 | 30.7.2003 | 24.7.2002 to 30.6.2003 | 1,87,09,123/- |
| 04 | V.BVR(R)/AR-MHV/SCN-20/COMMR/2004 | 25.5.2004 | 1.7.2003 to 31.03.2004 | 51,70,340/- |

17.2 Though the issue involved in all the above four SCNs is regarding denial of benefit of Notification No. 67/1995-C.E., there is subtle difference between show cause notice issued covering the period from February – 2001 to May – 2001 shown at Sr. No. 1 above and other three SCNs issued covering the period from April – 2002 to March – 2004 shown at Sr. No. 2 to 4 above. Proviso to Notification No. 67/1995-C.E. dated 16.03.1995 provided that exemption contained in the said Notification shall not apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise leviable thereon or are chargeable to Nil rate of duty. However, there were certain exceptions to the said proviso. Vide Notification No. 31/2001-C.E. dated 01.06.2001, the scope of exception to proviso of Notification No. 67/1995-C.E. was expanded and the exception was also provided to those goods which are cleared by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in rule 57AD of the CER, 1944/ rule 6 of the CCR, 2001.

17.3 Thus, prior to 01.06.2001, as per proviso to Notification No. 67/1995-C.E., the benefit of said Notification was not available to inputs manufactured in a factory and used within the factory of production in or in relation to the manufacture of final products which were exempt from the whole of the duty of excise or were chargeable to nil rate of duty. The exceptions to the said proviso (viz. the exemption

under Notification No. 67/1995-C.E. was available if the exempted final products were cleared to a unit in FTZ/ 100% EOU/ EHTP/ STP/ under Notification No. 108/95-C.E.) did not provide benefit of the said Notification to final products cleared by a manufacturer of dutiable and exempted final products after discharging the obligation prescribed in rule 57AD of the CER, 1944. However, with effect from 01.06.2001, the benefit of Notification No. 67/1995-C.E. was made available to inputs manufactured in a factory and used within the factory of production in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty, if such goods are cleared by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in rule 57AD of the CER, 1944/ rule 6 of the CCR, 2001.

18.1 In respect of show cause notice F. No. C.EX/MHVD-9/L&T/2000-01 dated 05.03.2002, the noticee has submitted that the basic proviso in the Notification No. 67/1995-C.E. dated 16.03.1995 is substituted by the proviso vide Notification No. 31/2001-C.E. dated 01.06.2001 and that the substitution will result in an effect, that, the substituted proviso would have effect from the date of the Notification No. 67/1995-C.E. i.e. from 16.03.1995.

18.2 I find that this contention of the noticee was already considered and decided vide Order-in-Original No. 18 to 21/BVR/Commr/2007 dated 30.03.2007/22.05.2007 wherein it was held that the amendment carried out in the Notification No. 67/1995-C.E. by Notification No. 31/2001-C.E. cannot be held to be retrospective in operation. Para 16 of the said Order-in-Original is reproduced below:-

> *"16. This would make it abundantly clear that the amendment carried out in the Notification 67/95 CE by Notification 31/2001 CE ibid by any stretch of imagination, cannot be held to be retrospective in operation; therefore contention of the Noticee in this regard cannot be accepted. Consequently, it has to be held that in the period prior to 01-06-2001 (prior amendment of 67/95-CE) clinker being excisable goods arising during the course of manufacture of cement was not eligible to exemption under Notification 67/95-CE when the final product cement was cleared under exemption for specified use in earthquake affected area in terms of Notification No. 2/2001 CE and 16/2001 CE ibid. Accordingly the Noticee was liable to discharge excise duty @ Rs. 200/- per MT on such quantity of clinker as was used in cement cleared under exemption.*

18.3 I further find that the Hon'ble CESTAT in Order No. A/1565/WZB/AHD/2010 has not altered the above view held in the Order-in-Original. Hon'ble CESTAT has remanded the case with specific direction to consider the issue in the light of the provisions of Finance Act, 2010 and also consider the correctness of the amount already reversed by the appellants. It is a settled legal position that in the remand proceedings, the adjudicating authority cannot travel beyond the specific directions contained in the remand order. Therefore, the issue, 'whether the amendment carried out in the Notification No. 67/1995-C.E. by Notification No. 31/2001-CE can be held to be retrospective in operation or otherwise', which has already been decided and attained finality, cannot be reopened in the remand proceedings.

18.4 Thus, para (vi) of the proviso to Notification No. 67/1995-C.E., which provides benefit of Notification No. 67/1995-C.E. to the exempted final products which are cleared by a manufacturer of dutiable and exempted final products after discharging the obligation prescribed in rule 57AD of the CER, 1944, has been held to