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/15-25/Dem/HQ/2011-12 | आदेश की तारीख : 22/08/2012
F. No. | Date of Order :
जारी करने की तारीख : 22/08/2012
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 : 22 TO 23/BVR/Commissioner/2012

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 issued 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 सेवा 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, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of 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 shall lie 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 जाए ।

आयुक्त कार्यालय भावनगर केंद्रीय उत्पाद शुल्क

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 ।

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 Rs. 50,00,000/- (Rupees Fifty Lakhs), Rs. 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 Rs. 5,00,000/- (Rupees Five Lakhs) but not exceeding Rs. 50,00,000/- (Rupees Fifty Lakhs), Rs. 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 Rs. 5,00,000/- (Rupees Five Lakhs) or less, Rs. 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 Rs. 5/-.

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

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

To,

M/s. Pipavav Shipyard Limited [100% EOU],
Post Ucchaiya, Tal. Rajula,
Distt. Amreli – 365 560

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notices (i) F. No. V/15-25/Dem/HQ/2011-12 dated 03.11.2011 and (ii) F. No. V/15-40/Dem/HQ/2011-12 dated 07.02.2012, issued to M/s. Pipavav Shipyard Limited, 100% EOU, At Pipavav Port, Post Ucchaiya, Tal. Rajula, Distt. Amreli – 365 560.

आयुक्त कार्यालय भावनगर केंद्रीय उत्पाद शुल्क

BRIEF FACTS OF THE CASE :-

M/s. Pipavav Shipyard Limited (100% EOU), at Pipavav Port, Post Ucchaiya, Ta: Rajula, Distt.: Amreli (hereinafter referred to as the "said Noticee"), are engaged in the manufacturing of Ship falling under CETH No. 89.01 at Pipavav Port and having Central Excise Registration (ECC No. AABCP1491LXM001) in terms of provisions of Rule 9 of the Central Excise Rules, 2002 (hereinafter referred to as "CER, 2002"). The said Noticee is also availing CENVAT credit on inputs, capital goods and input services in terms of the provisions of the CENVAT Credit Rules, 2004 (hereinafter referred to as "CCR, 2004"), read with the provisions of the CER, 2002, to be utilised in or in relation to their manufacturing activities of ship building.

2. Further, the Noticee is an Export Oriented Unit established in view of the Letter of Permission F. No. KASEZ/100%EOU/II/39/2005-06 dated 04/04/2006 issued by the Development Commissioner, Kandla Special Economic Zone, Ministry of Commerce, Gandhidham. The said Noticee is required to export their entire production, except the reject and sales in domestic tariff area to the extent which is permitted by the Development Commissioner, Kandla Special Economic Zone, Gandhidham.

3.1 The said Noticee has filed monthly return for the month of October-2010 to December-2010, in the form of ER-2, with the jurisdictional Superintendent of Central Excise Range Office declaring that they have availed CENVAT Credit as per the following details.

Sr. No.	Month	Amount of CENVAT Credit availed (Rs.)			Total CENVAT Credit availed (Rs.)
		Inputs	Capital Goods	Input Services	
1	Oct.-2010	5,887/-	7,103/-	81,65,774/-	81,78,764/-
2	Nov.-2010	NIL	29,320/-	30,03,539/-	30,32,859/-
3	Dec.- 2010	8,052/-	41,720/-	2,09,59,616/-	2,10,09,388/-
	Total	**13,939/-**	**78,143/-**	**3,21,28,929/-**	**3,22,21,011/-**

3.2 The said Noticee has further filed monthly return for the month of January-2011 to February-2011, in the form of ER-2, with the jurisdictional Superintendent of Central Excise Range Office declaring that they have availed CENVAT Credit as per the following details.

Sr. No.	Month	Amount of CENVAT Credit availed (Rs.)			Total CENVAT Credit availed (Rs.)
		Inputs	Capital Goods	Input Services	
1	Jan.-2011	NIL	NIL	2,13,77,174/-	2,13,77,174/-
2	Feb.-2011	NIL	NIL	2,33,27,459/-	2,33,27,459/-
	Total	NIL	NIL	**4,47,04,633/-**	**4,47,04,633/-**

Thus, the Noticee had taken the CENVAT credit of Rs. 13,939/- on the Inputs, Rs. 78,143/- on the Capital Goods and of Rs. 7,68,33,562/- on Input Services aggregating to Rs. 7,69,25,644/- during the aforesaid period from October, 2010 to February, 2011.

4.1 The Noticee was requested by the Central Excise, Range Office, Mahuva to provide the documents on the basis of which CENVAT credit was taken by them during the period from October-2010 to December-2010. In reply, the Noticee provided the documents on the basis of which CENVAT credit was taken by them. On scrutiny of the documents, it was found that the Noticee had taken the CENVAT credit of Rs. 13,939/- on the Inputs, Rs. 78,143/- on the Capital Goods and of Rs. 3,21,28,929/- on Input Services.

4.2 The Noticee was also requested by the Central Excise, Range Office, Mahuva to provide the documents on the basis of which CENVAT credit was taken by them during the period from January-2011 to February-2011. In reply, the Noticee provided the documents on the basis of which CENVAT credit was taken by them. On scrutiny of the documents, it was found that the Noticee had taken the entire CENVAT credit of Rs. 4,47,04,633/- on Input Services

5. Subsequently, two show cause notices viz (1) Show Cause Notice F.No. V/15-25/Dem/HQ/2011-12 dated 03.11.2011 for Rs. 3,22,21,011/- and (2) F.No. V/15-40/Dem/HQ/2011-12 dated 07.02.2012 for Rs. 4,47,04,633/- were issued to the said Noticee asking them as to why (i) the CENVAT Credit should not be recovered from them under Rule 14 of the CCR, 2004 read with Section 11A of Central Excise Act, 1944 (herein after referred to as "CEA, 1944"), (ii) interest should not be charged on the above said demands amount at applicable rate and recovered from them under Rule 14 of the CCR, 2004 read with Section 11AB of the CEA, 1944, and (iii) Penalty should not be imposed on them under Rule 15 of the CCR, 2004 for the contravention of provisions of Rule 6, 7 and 9 of CCR, 2004.

5.1 It had been alleged in the Show Cause Notice F. No. V/15-25/Dem/HQ/2011-12 dated 03.11.2011 that they had wrongly availed CENVAT Credit on inputs, capital goods and input service on the following grounds :-

5.2 The said Noticee is exclusively engaged in manufacturing of final products which are chargeable to NIL rate of duty. The final product intended to be manufactured by the Noticee is "ship" which is classifiable under CETSH 8901 2000, 8901 3000 and 8901 9000 and chargeable to "Nil" rate of duty. Thus, the final product is exempted goods in view of Rule 2(d) of the CCR, 2004. Sub-rule (1) of Rule 6 of the CCR, 2004 does not allow Cenvat Credit of input or input service if used in the manufacture of exempted goods or for provisions of exempted services. Further, sub-rule (2) and sub-rule (3) of Rule 6 of the CCR, 2004 are not applicable to the Noticee in the instant case, as the final products intended to be manufactured by the Noticee are only "Ship" and falling under CETH 8901 2000, 8901 3000 and 8901 9000 which are chargeable to "NIL" rate of duty and therefore, fall under the category of "exempted goods" as per the definition given in Rule 2 (d) of the CCR, 2004 ibid and therefore, the provisions of Sub-rule (1) of Rule 6 of the CCR, 2004 are applicable to the said Noticee.

5.3 The Noticee had availed CENVAT Credit on the goods which have been utilised for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT Crane etc. and which have been produced within the factory of production and which are basically not the excisable goods being immovable in nature. Sub-rule 4 of Rule 6 of the CCR, 2004 provides that "No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year".

5.4 The said Noticee had availed CENVAT Credit on capital goods received in factory and also availed CENVAT credit on goods which have been utilised for manufacturing of certain other capital goods viz. goliath crane etc. within the factory of production which are basically not the excisable goods being immovable in nature. Further, the Noticee has also availed CENVAT credit on the "Input Service" as per Annexure-III to SCN. As per the provisions of sub-rule 1 and 4 of Rule 6 of the CCR, 2004, the said Noticee is not eligible to avail CENVAT credit on these goods and services as the final product Ship is chargeable to "NIL" rate of duty by tariff itself and thereby are exempted goods as per the dentition of exempted goods provided in CCR, 2004 as discussed above.

5.5 The said Noticee had also availed CENVAT Credit on the basis of invoices issued by the 'Input Service Distributor'. As per Rule 2(m) of CCR, 2004, the 'Input Service Distributor' means an office of the manufacturer or producer of final products or provider of output service and may distribute the credit of service tax paid on the said services to such manufacturer or producer or provider. Rule 7 of the CCR, 2004 imposes restriction upon 'Input Service Distributor' for distribution of credit of Service Tax to a unit exclusively engaged in manufacture of exempted goods or providing of exempted service. The Noticee is engaged in the manufacture of ship which is exempted from Central Excise duty, as such, the Input Service Distributor cannot distribute the Credit of Service Tax to the Noticee. Thus, the Cenvat Credit has been wrongly availed by the Noticee on the basis of invoices issued by the "Input Service Distributor".

5.6 The Noticee appeared to had wrongly availed CENVAT Credit in contravention of the provisions of Rule 6, 7 and 9 of the CCR, 2004 as well as provisions of CER, 2002 and CEA, 1944 with sole intention to encash the same by way of filing refund claim for which they are not eligible and rendered themselves liable for penalty under Rule 15 of the CCR, 2004 and Interest thereupon under Rule 14 of the CCR,2004 read with section 11 AB of the CEA,1944.

6. It has been alleged in the second Show Cause Notice F. No. V/15-40/Dem/HQ/2011-12 dated 07.02.2012 that they had wrongly availed CENVAT Credit on input services amounting to Rs.4,47,04,633/- for the period from January -2011 to February-2011 on the following grounds:-

6.1 The said Noticee is exclusively engaged in manufacturing of final products which are chargeable to NIL rate of duty. The final product intended to be manufactured by the Noticee i.e. ship is classifiable under CETH 8901 2000, 8901 3000 and 8901 9000 and chargeable to "Nil" rate of duty. Thus, the final product is exempted goods in view of Rule 2(d) of the CCR, 2004. Sub-rule (1) of Rule 6 of the CCR, 2004 does not allow Cenvat Credit of input or input service if used in the manufacture of exempted goods or for provisions of exempted services. Further, sub-rule (2) and sub-rule (3) of Rule 6 of the CCR, 2004 are not applicable to the Noticee in the instant case, as the final products intended to be manufactured by the Noticee are only "Ship" and falling under CETH 8901 2000, 8901 3000 and 8901 9000 which are chargeable to "NIL" rate of duty and therefore, fall under the category of "exempted goods" as per the definition given in Rule 2 (d) of the CCR, 2004 ibid and therefore, the provisions of Sub-rule (1) of Rule 6 of the CCR, 2004 are applicable to the said Noticee.

6.2 Wheres the said Noticee had availed CENVAT Credit on the basis of invoices issued by the 'Input Service Distributor' which is again sought to be denied in the Notice. As per Rule 2(m) of CCR, 2004, the 'Input Service Distributor' means an office of the manufacturer or producer of final products or provider of output service and may distribute the credit of service tax paid on the

said services to such manufacturer or producer or provider. Rule 7 of the CCR, 2004 imposes restriction upon 'Input Service Distributor' for distribution of credit of Service Tax to a unit exclusively engaged in manufacture of exempted goods or providing of exempted service. The Noticee is engaged in the manufacture of ship which is exempted from Central Excise duty, as such, the Input Service Distributor cannot distribute the Credit of Service Tax to the Noticee. Thus, the Cenvat Credit has been wrongly availed by the Noticee on the basis of invoices issued by the "Input Service Distributor" amounting to Rs.17,15,821/- as detailed in Annexure-IV of the Show Cause Notice.

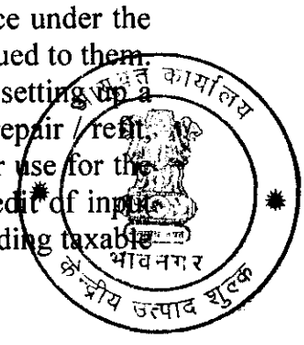
6.3 It has also been alleged that address of the head office of the Noticee has been mentioned as "904, Sukan Tower, Nr. Judges Bungalow, Police Chowkey, Bodakdev, Ahmedabad-380 054" as per LOP issued from F. No. KASEZ/100% EOU/II/39/2005-06 dated 04.04.2006 issued by the Development Commissioner, Kandla Special Economic Zone, Gandhidham. The Noticee had availed Cenvat Credit on the basis of invoices issued by the office situated at "209, SKIL House, Bank Street, Cross Lane, Fort, Mumbai" which is the office of "M/s. Pipavav Shipyard Ltd., a unit in the Special Economic Zone developed by M/s. E. Complex Pvt. Ltd., Village Rampara & Lunsapur, as per LOP granted for setting up of a unit in the SEZ.

6.4 The Noticee appeared to had wrongly availed CENVAT Credit in contravention of the provisions of Rule 6 and Rule 7 of the CCR, 2004 as well as provisions of CER, 2002 and CEA, 1944 with sole intention to encash the same by way of filing refund claim for which they are not eligible and rendered themselves liable for penalty under Rule 15 of the CCR, 2004 and Interest thereupon under Rule 14 of the CCR,2004 read with section 11 AB of the CEA,1944.

DEFENCE REPLY :-

7. The Noticee submitted written reply to Show Cause Notice No. V/15-25/HQ/Dem/2011-12 dtd. 03.11.2011 vide letter dated 18.04.2012 wherein they inter-alia denied all the allegations and stated that the credit has been correctly availed. They submitted that the show cause notice did not give the quantum of inadmissible credit under each of two heads. They also submitted that their records have been scrutinized and Cenvat Credit of Rs.11,76,39,024/- have been correctly taken.

7.1 With regard to denial of credit on the ground that the unit is exclusively engaged in the manufacture of final products which are exempted, it is submitted that the allegation is based on the assumption that their shipyard is engaged in the manufacture of ships which are chargeable to nil rate of duty. The fact of them being registered as the service provider under the category of 'Ship Management Service' / 'Ship Repair Service' has been completely lost sight of while issuing the notice. Since, the shipyard is engaged in providing above mentioned taxable output service, they are entitled to avail Cenvat credit of inputs services, goods and inputs required for providing such output service. They are not hit by the prohibition under sub-rule (1) and sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004 on account of credit availed in respect of inputs and services used in manufacture of exempted goods as made out in the show cause notice in view of the fact that they are also engaged in providing taxable service under the head "Ship Management Service" for which a registration has been issued to them. Input services in question have been used entirely for the purpose of setting up a shipyard, which is necessary for rendering the output service of ship repair / refit, the entire quantity of input services is to be considered as required for use for the purpose of rendering a taxable output service. No part of Cenvat Credit of input service is liable to be disallowed only for the reason that besides providing taxable



service, the same shipyard will be used for producing ships and vessels attracting nil rate of duty.

7.2 It is submitted that 100% Export Oriented Unit (EOU) has been established for the purpose of exporting the entire finished goods and prohibitions under Rule 6(1), 6(2), 6(3) and 6(4) are not applicable in view of sub-rule (6) of Rule 6 of the CCR, 2004. They quoted sub-rule (6) of Rule 6 of Cenvat Credit Rules, 2004 to say that the provisions of sub-rule (1), (2), (3) & (4) shall not be applicable in case the excisable goods removed without payment of duty are either – cleared to a unit in a Special Economic Zone; or – cleared for export under bond in terms of the provisions of Central Excise Rules, 2002. Thus, it is clear that credit cannot be denied in respect of the goods which are cleared for export under Bond and even exempted goods can be cleared under Bond. Accordingly, the credit in respect of inputs used in the manufacture of finished exempted goods meant for export cannot be denied. In support of this argument, they placed reliance on decision of Hon'ble Bombay High Court in the case of Repro India Ltd. Vs. Union of India [2009 (235) ELT 614 (Bom)] wherein it was held that even under provisions of CCR, 2004, the exempted goods can be exported under Bond and credit of inputs used in the manufacture of such exempted export goods cannot be denied.

7.3 As regards the Credit taken on the basis of invoices issued by the Input Service Distributor, it is submitted that the ISD has been provided by their Head office to them which is not only into manufacture of ships but also granted permission for ship repairs and refit. The said services / manufacture are taxable and hence Cenvat Credit for the ISD cannot be denied.

7.4 With regards to the allegation for denial of the Credit taken on the goods viz. HR plates, MS Flats, MS Coils, Wire Ropes, Rail, Welding Electrode utilized for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT Crane etc. produced within the factory of production on the ground that they are immovable in nature being embedded to the earth, it was submitted that the contention is clearly untenable and cannot be a basis for denying Cenvat Credit. They submitted that Cenvat Credit Rules do not contain any bar against availment of cenvat on goods which are used for manufacture / fabrication of capital goods which ultimately become immovable / embedded to the earth. Thus, the notice for denying credit on this reason is factually untenable and devoid of merits. It is settled law laid down by Tribunal in the following amongst other decisions that Modvat / Cenvat Credit Rules neither explicitly nor by implication provide that credit would not be permissible if the goods in respect of which credit has been availed become immovable property. The concept of goods is movable or not is relevant only for determination of their liability to duty and not eligibility to cenvat credit. Thus, the proposal to deny credit on the ground that the crane becomes immovable goods is clearly untenable. They relied on following decisions :-

(i) United Prosperous Ltd. Vs. CCE [2002 (15) ELT 650]
(ii) Mahalaxmi Glass Works Vs. CCE [1999 (113) ELT 358]
(iii) CCE Vs. Nava Bharat Ferro Alloys [2004 (166) ELT 72]
(iv) KCP Ltd. Vs. CCE [2009 (237) ELT 500].

8. The Noticee submitted written reply to Show Cause Notice No. V/15-40/HQ/Dem/2011-12 dtd. 07.02.2012 vide letter dated 26.04.2012 wherein they inter-alia denied all the allegations and stated that the credit has been correctly availed.

8.1 With regard to denial of credit on the ground that the unit is exclusively engaged in the manufacture of final products which are exempted, it is submitted that the allegation is based on the assumption that their shipyard is engaged in the manufacture of ships which are chargeable to nil rate of duty. The fact of them being registered as the service provider under the category of 'Ship Management Service' / 'Ship Repair Service' has been completely lost sight of while issuing the notice. Since, the shipyard is engaged in providing above mentioned taxable output service, they are entitled to avail Cenvat credit of inputs services, goods and inputs required for providing such output service. They are not hit by the prohibition under sub-rule (1) and sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004 on account of credit availed in respect of inputs and services used in manufacture of exempted goods as made out in the show cause notice in view of the fact that they are also engaged in providing taxable service under the head "Ship Management Service" for which a registration has been issued to them. Input services in question have been used entirely for the purpose of setting up a shipyard, which is necessary for rendering the output service of ship repair / refit, the entire quantity of input services is to be considered as required for use for the purpose of rendering a taxable output service. No part of Cenvat Credit of input service is liable to be disallowed only for the reason that besides providing taxable service, the same shipyard will be used for producing ships and vessels attracting nil rate of duty.

8.2 It is submitted that 100% Export Oriented Unit (EOU) has been established for the purpose of exporting the entire finished goods and prohibitions under Rule 6(1), 6(2), 6(3) and 6(4) are not applicable in view of sub-rule (6) of Rule 6 of the CCR, 2004. They quoted sub-rule (6) of Rule 6 of Cenvat Credit Rules, 2004 to say that the provisions of sub-rule (1), (2), (3) & (4) shall not be applicable in case the excisable goods removed without payment of duty are either – cleared to a unit in a Special Economic Zone; or cleared for export under bond in terms of the provisions of Central Excise Rules, 2002. Thus, it is clear that credit cannot be denied in respect of the goods which are cleared for export under Bond and even exempted goods can be cleared under Bond. Accordingly, the credit in respect of inputs used in the manufacture of finished exempted goods meant for export cannot be denied. In support of this argument, they placed reliance on decision of Hon'ble Bombay High Court in the case of Repro India Ltd. Vs. Union of India [2009 (235) ELT 614 (Bom)] wherein it was held that even under provisions of CCR, 2004, the exempted goods can be exported under Bond and credit of inputs used in the manufacture of such exempted export goods cannot be denied.

8.3 As regards the Credit taken on the basis of invoices issued by the Input Service Distributor, it is submitted that the ISD has been provided by their Head office to them which is not only into manufacture of ships but also granted permission for ship repairs and refit. The said services / manufacture are taxable and hence Cenvat Credit for the ISD cannot be denied.

8.4 With regard to denial of Cenvat Credit of Service Tax distributed on the basis of invoices issued by Input Service Distributor on the ground that the address mentioned on LOP is of their Ahmedabad office whereas ISD invoice has been issued by the Mumbai office, it has been submitted that the address mentioned on LOP dated 04.04.2006 is of their Ahmedabad Office and same is managed by Ahmedabad instead of Mumbai office and Cenvat Credit of Rs. 17,15,821/- availed based on ISD issued from Mumbai office is not admissible, it has been submitted that the point raised is true. However, they informed that address on LOP have been amended vide Development Commissioner, Kandla's letter No. KASEZ/100%EOU/II/39/2005-06 dtd. 21.12.2007 to read as M/s Pipavav Shipyard Ltd., Pipavav Port, Part of Survey No. 42, Post Ucchaiya, Via

Rajula, Distt. Amreli, Gujarat and the address of the Mumbai Corporate Office is also incorporated in Importer-Exporter Code (IEC) at Branch Code No. 04 on IEC certificate from where ISD (Input Service Distributor) is being issued. They submitted copies of relevant documents in this regard. Thus, the allegation of wrong availment of Cenvat Credit on ISD invoices for Rs. 17,15,821/- is not sustainable and cannot be disallowed.

PERSONAL HEARING :-

9.1 The issue involved is similar in both the Notices and therefore, common personal hearing in the matter was held on 06.06.2012 wherein Shri Dharmesh Shah, Manager-Regulatory Affairs, of the Noticee remained present and reiterated their written submission already filed by them and filed further written submission dated 18.06.2012 subsequent to the personal hearing.

9.2 The Noticee vide letter dated 18/06/2012 submitted copy of the letter Ref KASEZ/100% EOU/II/39/2005-06 dated 21/12/2007 issued by the Deputy Development Commissioner, Kandla Special Economic Zone, Gahdhidham, Kutch. The Deputy Development Commissioner, Kandla Special Economic Zone, Gahdhidham, Kutch vide said letter dated 21.12.2007 allowed the amendment in the address mentioned in the Letter of Permission No. KASEZ/100%EOU/II/39/2005-2006/58 dated 04.04.2006 issued in favour of M/s. Pipavav Shipyard Ltd. to read as Pipavav Port, Part of Survey No. 42, Post Uchaiya, Via-Rajula, Dist.-Amreli (Gujarat) keeping all others terms and conditions stipulated in the said Letter of Permission dated 04.04.2006 as un-altered.

DISCUSSION & FINDINGS :-

10.1 I have carefully gone through the subject two show cause notices, submissions made by the Noticee in their written reply to show cause notice as well as submission made during the course of personal hearing and subsequent to personal hearing. Since the issue involved in both the show cause notices is similar and hereby taken up for common Order. I have also perused other evidences available on record.

10.2 It is observed that the show cause notices propose, on the following grounds, to deny the Cenvat Credit as shown in the below Table:

(1) Show Cause Notice No. V/15-25/HQ/DEM/2011-12 Dated 03.11.2011 :-

Sr. No.	Month	Amount of CENVAT Credit availed (Rs.)			Total CENVAT Credit availed (Rs.)
		Inputs	Capital Goods	Input Services	
1	Oct.-2010	5,887/-	7,103/-	81,65,774/-	81,78,764/-
2	Nov.-2010	NIL	29,320/-	30,03,539/-	30,32,859/-
3	Dec.- 2010	8,052/-	41,720/-	2,09,59,616/-	2,10,09,388/-
	TOTAL	13,939/-	78,143/-	3,21,28,929/-	3,22,21,011/-

(2) Show Cause Notice No. V/15-40/HQ/DEM/2011-12 Dated 07.02.2012 :-

Sr. No.	Month	Amount of CENVAT Credit availed (Rs.)			Total CENVAT Credit availed (Rs.)
		Inputs	Capital Goods	Input Services	
1	Jan.-2011	NIL	NIL	2,13,77,174/-	2,13,77,174/-
2	Feb.-2011	NIL	NIL	2,33,27,459/-	2,33,27,459/-
	TOTAL	NIL	NIL	4,47,04,633/-	4,47,04,633/-

11.1 The show cause notices propose to deny aforesaid amount of Cenvat credit availed by the Noticee on the ground that they are exclusively engaged in the manufacture of exempted final products in as much as their final product "Ship" was classifiable under CETSH Nos. 8901 2000, 8901 3000 and 8901 9000 and was chargeable to NIL rate of duty during the period covered by the show cause notice.

11.2 The definition of "exempted goods" as per Rule 2(d) of CCR, 2004 is as follows :-

> **Rule 2(d) :- "exempted goods"** *means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;*

11.3 As the final products viz. "Ship" was chargeable to Nil rate of duty during the relevant period, the same was "exempted goods" as provided under Rule 2(d) of CCR, 2004.

11.4 I observe that sub-rule (1) and (4) of Rule (6) of CCR, 2004 restrict availment of Cenvat Credit on Input, Input Service or Capital Goods which is used in the manufacture of exempted goods. The text of relevant portion of Rule 6 of CCR, 2004 reads as under :-

> ***RULE 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services :-***
>
> *(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).*
>
> *(2)* *** *** ***
>
> *(3)* *** *** ***
>
> *(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.*

11.5 I observe that Rule 6(1) of CCR, 2004 stipulates that the Cenvat credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2). Rule 6(4) of CCR, 2004 stipulates that the Cenvat credit shall not be allowed on capital goods which are

used exclusively in the manufacture of exempted goods or in providing exempted services.

11.6 Further, I observe that following explanation has been inserted in Rule 6(3) of the CCR, 2004 vide Notification No. 27/2005-C.E. (N.T.) dated 16.05.2005.

> *"**Explanation III**. – For the removal of doubts, it is hereby clarified that the credit shall not be allowed on inputs and inputs services used exclusively for the manufacture of exempted goods or exempted services."*

11.7 Thus Explanation III in Rule 6(3) of CCR, 2004 clarifies that the credit shall not be allowed on inputs and inputs services used exclusively for the manufacture of exempted goods or exempted services. I find that these provisions are already contained in the main provisions of Rule 6 of CCR, 2004.

11.8 I also find that the issue of admissibility of Cenvat Credit on inputs used in exempted products has been considered by the Hon'ble CESTAT in the case of Aurobindo Pharma Ltd. V/s. Commissioner of Central Excise, Visakhapatnam – I [2011 (265) E.L.T. 358 (Tri. Bang.)]. The relevant portion of the said decision is reproduced below :-

> *"5.2 .....*
>
> *Though Rule 3 of CCR allows credit of duties specified in the sub-rule (1) and paid by a manufacturer, the scheme also places certain restrictions on the above right. As per Rule 6(1) of CCR, credit shall not be allowed on such quantity of input or input service used in the manufacture of exempted goods or for provision of exempted services, except in circumstances specified in sub-rule (2). As per sub-rule (2), where a manufacturer or provider of output service avails of CENVAT credit and manufactures such final products or provides such output services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable. As per sub-rule (3) the manufacturer or provider of output service opting not to maintain separate accounts shall follow either of the following two conditions, as applicable to him, namely :-*
>
> *(a) if the exempted goods are.....*
>
> *(b) if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to ten percent 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 their factory;*

Condition (c) restricts the CENVAT credit that can be utilized by a service provider to 20% of the service tax payable on the output service

Explanation I to this sub-rule (3) lays down that the amount payable as per conditions (a) and (b) can be paid from the CENVAT credit or otherwise. Explanation II lays down that in case of failure of the assessee to pay the amount as prescribed under conditions (a) and (b), the same shall be recovered as provided under Rule 14 along with interest. Explanation III clarifies that no credit shall be allowed on inputs and input services used exclusively for the manufacture of exempted goods or services. The Explanation reads as follows :

> *For the removal of doubts, it is hereby clarified that credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted services.*

We find that the explanation does not say anything inconsistent with the CENVAT scheme of allowing credit of duty paid on inputs that go into production of goods or services that suffer duty so that there is no cascading effect of goods or services having to suffer double taxation. A position that informed the legislative policy all along is reiterated by expressly denying credit where the final products or services are not subject to tax. We note that the Explanation has been issued for the removal of doubts. The Explanation is in the nature of a clarification and so applies retrospectively. Exceptions to the Rule 3 are specified in sub-rule (6) of Rule 6 of CCR. Therefore an assessee which uses inputs exclusively for the manufacture of exempted goods and services but makes clearances in any manner specified in sub-rule (6) of Rule 6 shall be entitled to credit on exclusive inputs used for the production of exempted final products or provision of exempted services. However, in cases not covered by such exceptions, taking of credit on inputs by such assessees shall be irregular in view of the sub-rule (3) of Rule 6 of CCR. Such credit involved can be recovered along with interest as provided in Rule 14 of CCR.....

11.9 As the Noticee has been engaged in the manufacture of exempted goods viz. ships, Cenvat credit on input, input services and capital goods is not admissible to the Noticee in view of the provisions of sub rule (1) and (4) of Rule 6 of CCR, 2004 and Explanation III of Rule 6(3) of CCR, 2004.

12.1.1 It is the contention of the Noticee that prohibitions under Rule 6(1), 6(2), 6(3) and 6(4) is not applicable to them in view of sub-rule (6) of Rule 6 of CCR, 2004. They have also relied upon the judgement of Hon'ble Bombay High Court in the case of Repro India Ltd. V/s. Union of India [2009 (235) ELT 614 (Bom.)] wherein it is held that even though Rule 6(1) of the CCR, 2004 provides that no Cenvat credit will be available in respect of the inputs used in the manufacture of exempted products, Rule 6(6)(v) of the Cenvat Credit Rules creates an exemption, inter alia, in respect of the excisable goods removed without payment of duty for export under bond in terms of Central Excise Rules, 2002.

12.1.2 I find that the contention of the Noticee is not tenable in as much as during the period covered by the SCN, the Noticee has not made any removal of their finished excisable goods viz. Ships [CETH. No. 89.01] without payment of duty either to a unit in a SEZ, or to an EOU, or to a unit in an EHTP or STP, or supplied under Notification No. 108/95-CE dated 28.08.1995, or for export under bond etc. as provided under Rule 6(6) of CCR, 2004.

12.1.3 The judgement of Hon'ble Bombay High Court in the case of Repro India Ltd. V/s. Union of India (supra) relied upon by the Noticee is also not applicable in the facts of the present case in as much as in the case of Repro India Ltd., the unit was manufacturing both dutiable as well as exempted final products

whereas in the present case, the Noticee is engaged in the manufacture of final products viz. ships [CETH. No. 89.01] which are chargeable to NIL Tariff rate of Central Excise duty during the period covered in the above SCNs.

12.1.4 I further find that the eligibility of Cenvat Credit has to be determined with reference to the time of receipt of inputs, input service or capital goods by the assessee. The period covered by this SCN is from October - 2010 to February - 2011 during which "ship" were chargeable to Nil rate of duty and hence were exempted goods.

12.1.5 I rely on the decision of Hon'ble CESTAT in the case of Commissioner of Central Excise, Indore V/s. Surya Roshni Ltd. [2003 (155) E.L.T. 481 (Tri. – Del.), wherein it has been held as follows :-

> ***5.*** *We have considered the submissions of both the sides. Rule 57Q(2) of the Central Excise Rules, 1944 provides that the manufacturer of the final product shall be allowed credit of the duty paid on the capital goods. Sub-rule (1) of Rule 57Q mentions that the provisions of sub-section "AAAA" shall apply to goods described in the Table given below the sub-rule. Rule 57R(1) bars the availment of credit of the duty if the capital goods are used in the manufacture of final products on which no excise duty is payable. The credit is availed of as and when the capital goods are received by the manufacturer. When the impugned machine was received, it has been used in the manufacture of bulbs which were exempted from the payment of whole of the duty of excise leviable on them. The classification list may contain details of goods which are liable to pay duty. But it cannot be claimed therefrom that the machine was also meant to be used in the production of final goods chargeable to duty. The declaration mentioned in sub-rule (2) of Rule 57T to the effect that the capital goods in question shall not be used exclusively for production of an exempted final product has not been brought on record. The availability of Modvat credit is to be looked into at the time of receipt of the capital goods. If the capital goods are exclusively used in the manufacture of exempted products, Modvat credit will not be available to the manufacturer. Subsequently, the exempted product becomes dutiable on account of withdrawal of exemption or the manufacturer puts the capital goods to other use would not revive the question of Modvat credit which stands determined at the time the capital goods was received. The decision of the single Bench of the Tribunal in Kailash Auto Builders case is not applicable to the facts of the present matter as the Appellants therein "have made their intention clear that they would be using the said capital goods in the manufacture of excisable final products once the factory starts working to its full capacity." Further, the facts are also different in the case of Bhaskar Industries Ltd. inasmuch as in the said matter the Respondents "had a project to set up a composite mill for spinning, weaving and processing" meaning thereby for manufacture of excisable goods which are chargeable to duty. We observe that the Respondents therein "kept the option of availing the Modvat credit on capital goods in abeyance for about a year, till implementation of the third phase, namely, the fabric processing. The assessee submitted the required declaration under Rule 57T of the Central Excise Rules with the clear intention that it shall be availing the credit on implementation of the third phase as the final product of third phase was dutiable." In view of this, the Respondents are not entitled to Modvat credit. Accordingly, we set aside the impugned Order and allow the Appeal filed by the Revenue.*

12.1.6 The above decision of Hon'ble CESTAT has been maintained by Hon'ble Supreme Court [2003 (158) E.L.T. A273 (S.C.)]. Similar view has been held by the Larger Bench of Hon'ble CESTAT in the case of Spenta International Ltd. V/s. Commissioner of Central Excise, Thane [2007 (216) E.L.T. 133 (Tri.–LB)].

12.1.7 The above decisions have been rendered in the context of eligibility of Cenvat Credit on capital goods which have been used exclusively in manufacture of exempted goods. The ratio laid down therein is applicable with greater force in case of Cenvat Credit availed on inputs and input services which are immediately consumed whereas capital goods can be used for a longer period of time.

12.2.1 The Noticee has submitted that the show cause notice has overlooked the fact that various input services availed would also be used for rendering taxable services under the head of ship management service/ ship repair service and they have obtained necessary registration with the Service Tax authorities for this purpose.

12.2.2 I have also gone through the definitions of input, input service and capital goods, relevant portion of which are reproduced below :-

Rule 2(k) of CCR, 2004 :-

"input" *means –*

(i) *all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final products or not and includes lubricating oils, grease, cutting oils, coolants, accessories of the final products cleared along with the final products, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;*

(ii) *all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;*

Explanation 1. – .....
Explanation 2. – .....;

Rule 2(l) of CCR, 2004 :-
"input service" *means any service, -*
(i) used by a provider of taxable service for providing an output service, or
(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,
and includes .....;

Rule 2(a) of CCR, 2004 :-
"Capital Goods" means –
(A) *the following goods, namely :-*

(i) .....;

(ii) .....;
(iii) .....;
(iv) .....;
(v) .....;
(vi) .....; and
(vii) .....,

used –

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service;

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of Section 65 of the Finance Act;

12.2.3 From the above definitions, it is observed that in the context of excisable goods, the definition of "input" provides that "input" means goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. Similarly, definition of "input service" provides that "input service" means any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal. In the context of output service, the definition of "input" provides that "input means goods used for providing any output service. Similarly, the definition of "input service" provides that "input service" means any service used by a provider of taxable service for providing an output service.

12.2.4 Thus, the 'manufacturer' can avail Cenvat Credit of Central Excise duty and Service Tax paid on inputs and services used in or in relation to the manufacture of final products whether directly or indirectly. As against this, the 'output service provider' can avail Cenvat Credit of Central Excise duty and Service Tax paid on inputs and services used for providing output service. The definitions of "input" and "input service" reveal that inputs and input services used in or in relation to the manufacture of final products whether directly or indirectly are eligible for Cenvat credit. However, in case of "output service", there should be direct nexus of "input" and "input service" with the "output service" as the phrase 'in or in relation to" and "whether directly or indirectly" are absent in those portions of definitions of "input" and "input service" which pertain to "output service". It would therefore mean that "input" and "input service" should have direct nexus with 'output service' so far as eligibility for Cenvat Credit is concerned. In other words, "input" or "input service", to be eligible for Cenvat credit, should be utilized directly for providing 'output service'.

12.2.5 In the instant case, the Noticee has shown the Cenvat credit availed on "input services" in their ER-2 return indicating that those services have been used by them in or in relation to manufacture of final products whether directly or indirectly. Had those services been used for providing 'output services', the Noticee would have shown the Cenvat credit of Service Tax paid on such "input services" in their respective ST-3 returns. As already discussed, the criteria to qualify the services used as "input service" are different in case of Manufacturer and Output Service Provider. Therefore, if the service received were qualified as 'input service' for providing 'output service' viz. Transport of Goods by Road or Ship Management Service, the Noticee should have shown the same as Cenvat Credit in the relevant ST-3 returns filed with the jurisdictional Service Tax authorities.

12.2.6 The above contention is even otherwise not useful to the Noticee for the reason that in case it is considered that the 'input service' is for providing taxable output service, the Cenvat Credit is to be availed / taken separately in the capacity of 'output service provider' and disclosed the same before the jurisdictional Service Tax authority in as much as they are separately registered with the Service Tax Department.

13. I, therefore hold that the Noticee is exclusively engaged in the manufacture of exempted final products and hence Cenvat credit on inputs, capital goods and input services is not available to them. Therefore, the entire Cenvat credit of Rs. 7,69,25,644/- availed during the period from October-2010 to December-2010 and January-2011 to February-2011 has been wrongly taken by the Noticee, which is required to be recovered from them.

14.1.1 The Show Cause Notice No. V/15-25/HQ/DEM/2011-12 Dated 03.11.2011 also proposes to deny Cenvat Credit taken on the goods utilized for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT crane etc. produced within the factory of production on the ground that these goods being immovable in nature, are not excisable goods.

14.1.2 The Noticee has not disputed the fact that the goods have been utilized for fabrication of Goliath Crane, Jib Crane, Gantry Crane, EOT crane etc. which become immovable and embedded to the earth. However, it is their contention that Cenvat Credit Rules neither explicitly nor by implication provide that credit would not be permissible if the goods in respect of which credit has been availed become immovable property. It is also submitted that the concept of goods being movable or not is relevant only for determination of their liability to duty and not for eligibility to Cenvat credit.

14.2.1 I find that the definition of "input" and "input service" envisages that goods and services should be used in the manufacture of final products. Definition of "capital goods" also envisages that the specified goods should be used in the factory of the manufacture of the final products. Therefore, it would be useful to look into the definition of "final products" which has been defined under Rule 2(h) of CCR, 2004 as follows :-

"Rule 2(h) of CCR, 2004 –

***"final products"** means excisable goods manufactured or produced from input, or using input service;*

14.2.2 The expression "excisable goods" has not been defined under CCR, 2004. However, as per Rule 2(t) of CCR, 2004, words and expressions used in these rules and not defined but defined in the Excise Act or the Finance Act shall have the meanings respectively assigned to them in those Acts. The expression "excisable goods" has been defined under Section 2(d) of CEA, 1944 as follows :-

"Section 2(d) of CEA, 1944

***"excisable goods"** means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;*

14.2.3 Therefore, I find that it is not only relevant but essential to determine whether the goods manufactured from input or using input service are excisable goods or not to determine the eligibility of Cenvat credit. The Cenvat credit of Central Excise duty can be taken only if the inputs have been used in the manufacture of excisable goods.

14.3.1 The C.B.E.C. vide Circular No. 98/1/2008-S.T. dated 04.01.2008 has clarified this issue in respect of eligibility of Cenvat credit of Service Tax paid on services used for an immovable property, as follows :-

Reference Code	***Issue***	***Clarification***
(1)	*(2)*	*(3)*
096.01/ 4-1-08	*Commercial or industrial construction service [section 65(105)(zzq)] or works contract service [section 65(105)(zzzza)] is used for construction of an immovable property. Renting of an immovable property is leviable to service tax [section 65(105)(zzzz)].* *Whether or not, commercial or industrial construction service or works contract service used for construction of an immovable property, could be treated as input service for the output service namely renting of immovable property service under the Cenvat Credit Rules, 2004?*	*Right to use immovable property is leviable to service tax under renting of immovable property service.* *Commercial or industrial construction service or works contract service is an input service for the output namely immovable property. Immovable property is neither subjected to central excise duty nor to service tax.* *Input credit of service tax can be taken only if the output is a 'service' liable to service tax or a 'goods' liable to excise duty. Since immovable property , is neither 'service' or 'goods' as referred to above, input credit cannot be taken.*

[emphasis supplied]

14.3.2 It is well settled that Central Excise duty is levied and collected on excisable goods produced or manufactured in India. The word 'goods' includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. Thus, the 'goods' should be known to the market as such and can ordinarily come to the market for being bought and sold. In this context, the issue of excisability of plant and machinery assembled at site has been decided by Hon'ble Supreme Court in catena of judgements. Hon'ble Supreme Court of India in case of Triveni Engg. & Inds. Ltd. Vs. Commissioner [2000 (120) ELT 273 (SC)] has held that the machine or plant should be moveable as such and not in parts to pass the test of 'goods' for the purpose of levy of Central Excise duty. The articles embedded to earth, structures, erections, installations and turnkey projects are also not 'goods' being immovable property cannot ordinarily come to the market to be bought and sold as held by Hon'ble Supreme Court in case of Quality Steel Tubes (P) Ltd. Vs. Collector [1995 (75) ELT 17 (SC)]. Central Board of Excise and Customs has also issued instructions on the excisability of plant and machinery assembled at site vide Order No. 58/1/2002-CX dated 15.01.2002 issued under Section 37B of the CEA, 1944.