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/15-20/Dem/HQ/2012-13
F. No.

आदेश की तारीख : 16/10/2012
Date of Order :
जारी करने की तारीख : 16/10/2012
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 : 27/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 (I) (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 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 जाए । 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 जहॉ 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 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. Mepro Pharmaceuticals Pvt. Ltd. (Unit-I)
1003, GIDC, Phase-III,
Wadhwan City, Distt: Surendranagar– 363 035

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notices (i) F. No. V/15-20/Dem/HQ/2012-13 dated 02.05.2012 issued to M/s. **Mepro Pharmaceuticals Pvt. Ltd(Unit-I),1003, GIDC, Phase-III, Wadhwan City, Distt: Surendranagar – 363 035**

Brief Facts of the Case

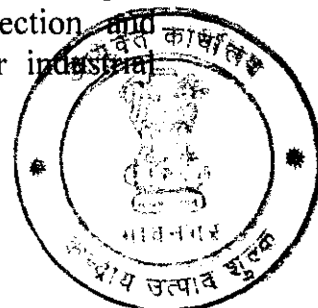
1. M/s. Mepro Pharmaceuticals Pvt. Ltd. (Unit-I) (hereinafter referred to as the "Noticee"), 1003, GIDC, Wadhwan City are engaged in the manufacturing activities of various P & P Medicaments falling under chapter No.30 of Central Excise Tariff Act, 1985, for their own product as well as for their loan licensee & others and are holding Central Excise Registration No. AABCM4177G XM001. They are also availing Cenvat Credit on inputs/ packing materials, capital goods and on input services as provided under the Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004").

2. Whereas, during the course of scrutiny of Central Excise Records & other private records of the said Noticee by the officers of Central Excise (Audit), Bhavnagar, it was observed that they have availed the Cenvat Credit of full amount of Service-tax paid on input services viz., CHA Services, Security Services, GTA Service, Man Power Recruitment and Supply Agency Services & CA Services. On enquiry with the said Noticee, it was found that they were not maintaining any separate account for taking credit on input services used commonly in the manufacture of both dutiable and exempted medicines as required under the provision of Rule 6 of CCR, 2004. It was also noticed that they have also taken Cenvat Credit of full amount of duty involved on some of the inputs used commonly in the manufacture of exempted goods and have not discharged their liability for payment of amount equal to 10% or 5% (as the time period may be) of value of clearance of exempted goods during the material period i.e. 01.04.2007 to 31.10.2011.

3. Whereas, as per the provisions of Rule 6 of CCR, 2004, it is obligatory on the part of manufacturer of both dutiable and exempted goods and provider of taxable and exempted services to maintain separate account for receipts, consumption and inventory of inputs and input services meant for use in the manufacture of dutiable goods on which duty is payable. Whereas, when separate account as stated above is not maintained as required under Sub Rule (2) of Rule 6 of CCR, 2004, they shall pay an amount equal to 10% or 5% (10% up to July 2009) of value of clearance of exempted goods or the manufacturer of exempted goods shall pay an amount equivalent to the Cenvat credit attributed to inputs and input services used in relation to the manufacture of exempted goods subject to the conditions and procedure as specified in Sub-Rule (3A) of Rule 6 of CCR, 2004. Sub Rule 3A of Rule 6 of CCR, 2004 specified that the manufacturer of both dutiable and exempted goods is required to file an option as prescribed under the said sub-Rule before the Superintendent, Central Excise in writing in advance for availment of these facilities and to follow procedure as prescribed under the said Sub Rule (3A) of Rule 6 of CCR, 2004.

4. Whereas, there is an exception of above provision in the form of Rule 6(5) of CCR, 2004 which was in existence up to 31.03.2011 and deleted w.e.f. 01.04.2011 and the said rule allowed credit of following 16 input services specified in the sub clause, if the same are used in both dutiable and exempted goods and there services were:-

"Service as specified in sub-clause (g) Consulting Engineer, (p) Architect, (q) Interior decorator, (r) Management/ business consultant, (v) Real Estate Agent, (w) Securiry agency, (za) Scientific or Technical consultancy, (zm) Banking and other financial services, (zp) omitted, (zy) Insurance auxiliary services, (zzd) Commissioning or installation service, (zzg) Management, Maintenance or Repair service (zzk) Foreign Testing and analysis, (zzi) Technical inspection and certification, (zzk) Foreign exchange broker, (zzq) Commercial or industrial



construction, and (zzr) intellectual property service, of clause (105) of Section 65 of the Finance Act, 1994."

It was further observed that the Noticee have taken Cenvat Credit on various common input services (apart from the above said 16 services) viz. Chartered Accountant Services, GTA Services, Man-Power Recruitment and Supply Agency Services, Custom House Agent Services etc., for the period prior to 01.04.2011 and also on some of the inputs (Packing materials) used in the manufacture of exempted goods and have failed to discharge their liability for payment of amount equal to 10% or 5% of value of clearance of exempted goods as per Rule 6(3) of CCR, 2004.

5. Whereas, from the facts stated above, it appeared that the said Noticee has deliberately taken the full credit on some of the various input services commonly used in the manufacture of both dutiable and exempted medicines and have suppressed the facts from the department for taking credit on some of the inputs (Packing Materials) and input services used in the manufacture of exempted goods with an intent to evade payment of amount equal to 10% (Up to July 2009) or 5% (from August 2009), on the value of exempted goods cleared during the period from 01.04.2007 to 31.10.2011 in as much as neither they have maintained separate account of input services meant for use in the manufacture of exempted goods as required under sub Rule (2) of Rule 6 of CCR, 2004 nor they have filed any option as prescribed under the provisions of Sub Rule (3A) of Rule 6 of CCR, 2004. Therefore, the said company have not paid the amount of 10% or 5% (as the case may be) of value of clearance of exempted goods, amounting to Rs.3,45,06,332/-, as detailed in Annexure – A to show cause notice. Further, the said Noticee have paid the amount of Rs.13,58,855/- by reversing the credit on 16.01.2012 and also paid the interest of Rs.4,28,305/- from PLA on 16.01.2012 as per their letter dated 19.01.2012 addressed to the Superintendent C.Ex AR-II, Surendranagar with a copy to the Assistant Commissioner, Central Excise Division, Surendranager.

6. It, therefore, appeared that the amount equal to 10% / 5% of value of the exempted goods payable under Rule 6(3)(i) of CCR, 2004 but not paid by the said Noticee by reason of suppression of facts and contravention of provisions of CCR, 2004 with intent to evade payment of said amount, as discussed above, was recoverable from the Noticee. Accordingly Show cause Notice was issued to the Noticee requiring them to show cause as to why the said amount should not be recovered from them under Rule 14 of CCR, 2004 read with Section 11A(1) of Central Excise Act, 1994 (herein after referred to as CEA, 1944) by invoking extended period of five years as provided under proviso to Sec. 11A(1) of CEA, 1944, along with interest at applicable rate as provided under Rule 14 of CCR 2004 read with Sec.. 11AB/ 11AA of CEA, 1944, and that the aforesaid acts of non-payment of amount equal to 10% / 5% of value of exempted goods by reason of suppression of facts and contravention of provisions of CCR, 2004 with intent to evade payment of said amount, the said Noticee appeared to have rendered themselves liable to penalty as provided under Rule 15 of CCR, 2004 read with Sec. 11AC of CEA, 1944.

Defence Reply

7.1 The Noticee vide their letter dated 03/07/2012 submitted that as per Rule 6 of the Cenvat Credit Rules, 2004, the manufacturer of the finished goods is not entitled to the credit of service tax paid on the input services and excise duty paid on inputs to the extent it has been used in manufacture of exempted goods. The company is engaged in manufacture of the excisable medicines falling

under chapter 30 of the CETA, 1985 as well as medicines which are exempted under serial no. 47 & 59 of notification 4/2006-CE dated 01.06.2006 as amended and that the company has availed the ineligible CENVAT credit of the following

a. Excise duty paid on packing material used in the packing of exempted goods.

b. Service tax paid on common services of the input services used in the manufacture of the dutiable as well as exempted goods.

7.2 The Noticee further submitted that in such case, the company has the option to reverse the excise duty paid on said packing materials and proportionate credit which is attributable to the credit of input services used in manufacture of exempted goods and that such contention is supported by the following submissions.

a) The Finance Act 2010 has retrospectively amended the rule 57CCC and other rules which make similar provisions. As per the amended rule, the manufacturer or provider of output service was given an option to reverse the proportionate credit with interest @ 24%. On such payment, the demand for payment of amount of percentage of value of exempted goods was set aside. The retrospective amendment made vide section no. 69,70,71,72,73 from 1996 substantiate that the legislative intention is to recover the proportionate amount of credit of excise duty paid on inputs & service tax on input services which is attributable to exempted goods.

b) The Tribunal has consistently held that once the proportionate credit which is attributable to use of inputs & input service in exempted goods has been reversed, the demand for payment of amount on the value of exempted goods shall not be made. In this connection, the Noticee relies upon the judgment in the case of

(i) Maan Pharmaceuticals 2011 (263) E.L.T. 661 (Guj.)

Cenvat/Modvat - Reversal of credit - Common inputs used in dutiable and exempted goods - Tribunal order holding credit reversal as right instead of payment of 8% amount - High Court in Maize Products case [2009 (234) E.L.T. 431 (Guj.)] upheld similar Tribunal order holding credit reversal as sustainable - Impugned Tribunal order relying on decision of High Court, sustainable - Question of law not arises - Appeal dismissed - Rule 6 of Cenvat Credit Rules, 2002/2004. *[paras 1, 7, 8]*

(ii) Maize Products 2009 (234) ELT 431 (Guj)

Cenvat/Modvat - Inputs, common inputs used in dutiable and exempted final products - Impugned Tribunal order directed redetermination of credit taken on common inputs after assessee undertaking to reverse credit taken on such inputs used in non-dutiable goods - Order passed by Tribunal as per statutory requirement - Matter remanded by Tribunal to adjudicating authority to re-determine credit amount - Substantial question of law not arises - Rule 57AD of erstwhile Central Excise Rules, 1944 - Rule 6 of Cenvat Credit Rules, 2004. *[paras 1, 3, 4, 6, 7, 9]*

(iii) CCE v ETA Technologies Pvt. Ltd. [2010-TIOL-569-HC-Kar]

Central Excise – CENVAT Credit – exempted and dutiable goods – Once Credit is reversed, it is deemed that Credit is not taken – Revenue Appeal Dismissed: Tribunal has considered all the relevant material on record and has afforded reasonable opportunity and by placing reliance on the notification and also the judgment of the Apex Court in the case of Chandrapur Magnet Wires Pvt. Ltd., Vs. CCE, Nagpur (2002-TIOL-41-SC-CX) and applying the ratio of the said case to the facts in hand, has reversed theorder passed by the assessing authority and held that assessee is not liable to pay 8% of the price of the exempted goods and consequently, allowed the appeal.

Finance Act 2010 applied: Another reason the appeal filed by Revenue is liable to be dismissed as rightly pointed out by the counsel appearing for the assessee is that, in view of the Finance Act, 2010, the period of effect of amendment to Rule 6 of the CENVAT Credit Rules. 2002, the period is extended from 1st day of March, 2002 to the 9th day of September 2004 (both days inclusive). In the instant case, the date of removal of friction welding machines is on 1.1.2004 and the said date comes within the extended period of September 2004 as per the Finance Act. Therefore, on this ground also, the appeal filed by the appellants is liable to be dismissed..

(iv) GLOBAL PHARMATECH PVT. LTD. Versus COMMISSIONER OF C. EX., CHENNAI 2011 (274) E.L.T. 413 (Tri. - Chennai)

Demand - Cenvat credit - Reversal - Non-maintenance of separate account for inputs used for dutiable goods and exempted goods - Subsequent reversal of availed credit in accordance with Rule 6(3A) of Cenvat Credit Rules, 2004 - Demand for period upto 31-3-2008 not sustainable as prior to 1-4-2008, assessee covered under amended Section 73(1) of Finance Act, 1994 - For the period after 31-3-2008, as assessee reversed credit under Rule 6(3A) of Cenvat Credit Rules, 2004 it is deemed that credit not been availed - Demand set aside - Section 11A of Central Excise Act, 1944. *[para 2]*

(v) Colgate Palmolive 2012 (25) STR 268 (T)

c) It may be mentioned that rule 6(3) was amended with effect from 1st April 2008 and a specific option was provided to manufacture of finished goods. One of the option provided in the rule is that the proportionate amount of credit attributable to use of inputs & input service in exempted goods shall be reversed. The Tribunal has in the case of Food Fats and Fertilisers 2011 (22) STR 484 (T) & JB Mangalam Food Pvt. Ltd. 2011 TIOL 133 CESTAT has held that the rule 6(3A) is not a substantive provision. It is a procedural provision and therefore it will have a retrospective effect. Thus rule 6 (3A) will apply for the prior period also.

In view of above, it is submitted that the Noticee is only required to reverse the proportionate credit of the inputs and input services used in manufacture of the exempted goods and is not required to pay the amount of the value of exempted clearances.

7.3 The Noticee further submitted that it was alleged in para 2 of the show cause notice that the company have also taken cenvat credit of full amount of the duty involved on some of the input services commonly used in the manufacture of the exempted goods and that the Said allegation is factually incorrect and that no cenvat credit of packing materials is availed by the Noticee and that it is requested to kindly provide us the basis on which such conclusion is reached based on which the said allegation in show cause notice.

7.4 The Noticee further stated that it will be evident from the submission made in point no. 1 above that the Noticee can reverse the proportionate amount of CENVAT credit of services tax used in the exempted goods and that accordingly the Noticee has reversed the same as per the formula prescribed under Rule 6 (6A) of the CCR.
The summary of the CENVAT credit reversed by the company is reproduced below.

Sr. No.	Year	Proportionate Service Tax Reversed	Service Reg. Tax entry no.	Interest amount paid	PLA Entry No. (indicating the payment of interest)
1	2007-08	3,30,613/-	E.No.15 Dt.16.01.12	18,0651/-	E.No.157 Dt.16.01.12
2	2008-09	1,92,600/-	E.No.15 Dt.16.01.12	86,669/-	E.No.157 Dt.16.01.12
3	2009-10	3,01,393/-	E.No.15 Dt.16.01.12	87,859/-	E.No.157 Dt.16.01.12
4	2010-11	3,75,587/-	E.No.15 Dt.16.01.12	61,341/-	E.No.157 Dt.16.01.12
5	2011-12	1,58,662/-	E.No.15 Dt.16.01.12	11,785/-	E.No.157 Dt.16.01.12
	Total	**13,58,855/-**	**Total**	**4,28,305/-**	

The Noticee further submitted that they have reversed the said ineligible CENVAT credit of Rs.13,58,855/-,along with interest of Rs.4,28,305/- and had informed the department vide letter dated 19-01-2012. The Noticee also explained the manner in which the said amount reversed is ascertained.

7.5. The Noticee further submitted that even subsequent reversal of credit amounts to non availment of credit, that on such reversal, the demand under rule 6(3)(b)(i) shall not be made. The Noticee relies upon the following judgments to substantiate that reversal of credit amounts to non reversal of credit.

a. In similar case of COMMISSIONER OF SERVICE TAX, AHMEDABAD V/s M/s AMOLA HOLDINGS PVT LTD 2009-TIOL-1000-CESTAT-AHM, the respondent has availed the credit on inputs, capital goods and input services after taking benefit notification 1/2006 which provides for abatement of 67%, and subsequently respondent has voluntarily reversed the entire cenvat credit with interest and therefore benefit of the notification no. 1/2006 was allowed to him. The relevant para of the judgment are reproduced as follows:

"4. We have considered the submission made by both the sides. We find that the decision of the Hon'ble Supreme Court in Bombay Dyg. & Mfg. Co. is not applicable to the present facts of the case. As rightly pointed out by Shri Devan Parik, Ld. Advocate on behalf of the respondents, since the advocate submitted that the credit was never utilized and question as to whether availment of credit and subsequent reversal would dis-entitle the assessee from exemption was not considered by the Hon'ble Supreme Court. However, we find that the decisions

cited by the Ld. Advocate are applicable to the facts of the case directly and the relevant paragraphs are reproduced :-

Para 3 of PRECOT MILL LTD. Vs. CCE, TIRUPATI - 2006 (201) ELT 356 (Tri. - Chennai)

"3. We have given a careful consideration to the submissions. The only allegation raised in the show cause notice against the appellants for denying the benefit of the above Notification to them in respect of final product cleared from their factory during March to June, 1999 is that they had availed and utilized input duty credit and capital goods credit in the previous years (1997-98 & 1998- 99). It has been pointed out by learned counsel that an amount of Rs.4,16,161/- equivalent to the total credit availed and utilized during 1997- 98 & 1998-99 was paid on 10.1. 2005. If it were to be held that, in respect of finished goods removed from the factory in a given financial year, the benefit of concessional rate of duty In terms of Sl No. 133 of the Table annexed to the above Notification would not be available on account of input duty credit and capital goods credit having been availed and utilized in the previous financial year, the appellant's right to claim the benefit of the Notification for the period first -above- mentioned stood restored to them with the above payment of duty subsequently made for the period second-above-mentioned (1997-98 & 1998-99). This contention is apparently supported by the decisions cited by learned counsel. In the case of Franco Italian Co. Pvt. Ltd. (supra) the Tribunal's Larger Bench allowed SSI benefit under Notification No. 1/93-CE to the assessee in respect of specified goods subject to the condition that the Modvat credit taken on the inputs utilized in the manufacture of such specified goods be reversed. This view was followed, with approval, by the Allahabad High Court in the case of Hello Minerals Water (P) Ltd. (supra). Similarly, in the case of Bharath Earth Movers Ltd. (supra), the benefit of Notification No. 452/86-CE was allowed to the assessee, subject to reversal of credit on inputs. In the instant case also, we are of the considered view that, if the aforesaid payment of Rs.4,61,161/- by the appellants is found to have compensated the availment and utilization of input duty credit and capital goods credit for the periods 1997-98 & 1998- 99, the benefit of Notification No. 5/99- CE can be allowed to them in respect of the finished goods cleared during the period of dispute. In such a context, any particular word or expression used in Condition No. 21 of the Notification does not arise for interpretation."

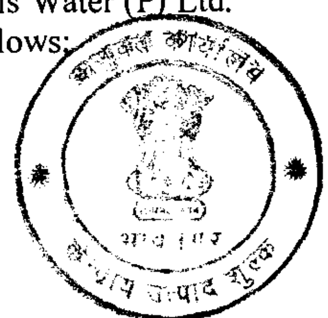
Para 26 of ***HELLO MINERALS WATER (P) LTD. Vs. UOI - 2004 (174) ELT 422 (ALL) = (2004-TIOL-57-HC-ALL-CX).***

"26. Thus all the Division Benches of the Tribunal have been following the Larger Bench decision and have taken a consistent view that reversal of the credit can be made even subsequent to the clearance of the final products. The impugned order dated 01.10.2003 appears to be the consistent view taken so far.

5. In view of the fact that the precedent decisions of Tribunal and decision of the Hon'ble Allahabad High Court are in favour of the assessee, we find no merits in the appeal filed by the Revenue and reject the same."

Thus, the tribunal has allowed the benefit of notification 1/2006 as respondent has reversed the credit with interest.

b. The observation of High Court in the case of Hello Minerals Water (P) Ltd. 2004 (174) ELT 422 is relevant in the present case, which is as follows:



17.The question as to whether manufacturer can be treated as not having taken credit on the inputs used in the manufacture of final product, even though it was originally taken but subsequently reversed, has been decided by a five Member Bench of the Tribunal in the case of Franco Italian Company Pvt. v. CCE, 2000 (120) E.L.T. 792. The aforesaid five members Bench of the Tribunal after taking into account the ratio laid down by the Supreme Court in the case of Chandrapur Magnet Wire (P) Ltd. v. CC, Nagpur, 1996 (81) E.L.T. 3 has held as under :-
"6. Drawing similar analogy we consider that subject to the reversal of Modvat credit taken with regard to the inputs which were utilised in the manufacture of duty free goods, the manufacturer could avail of the Modvat credit as well as full duty exemption under applicable small scale exemption notification with regard to some specified goods. Reference is answered accordingly.
7. As a result the impugned order-in-appeal dated 28-1-1999 passed by the Central Excise is set aside and the appeal of Franco Italian Company (supra) is allowed subject to the conditions that Modvat credit taken of the duty paid on the inputs which were utilised in the manufacture of duty free goods, is reversed."

18. In view of the above decision we are of the opinion that reversal of Modvat credit amounts to non-taking of credit on the inputs. Hence the benefit has to be given of the notification granting exemption/rate of duty on the final product since the reversal of the credit on the input was done at the Tribunal's stage.

Thus, from the above judgment it is evident that once the credit has been reversed even at the Tribunal stage it is considered that the credit has not been taken.

c. The company also relies on the following judgments:

Sr. No.	Citations	Gist/Ratio of judgments
1.	B.G. Shirke Construction Tech. P. Ltd 2009 (13) S.T.R. 686 (Tri. - Mumbai)	Cenvat credit of Service tax - Abatement under Notification No. 1/2006-S.T. - Cenvat credit of Service tax paid on input service which was received prior to 1-3-2006 but payment thereof made subsequently - Credit utilized for discharging Service tax liability on Construction service rendered by them prior to 1-3-2006 - For an amount of credit of Rs. 19.62 lakhs, no assessee would like to forgo the benefit of 67% of abatement under Notification ibid - Credit on input services already reversed - Prima facie case made out for waiver of pre-deposit - Recovery stayed
2.	Ashima Dyecot Ltd. 2008 (232) ELT 580 (Guj. HC)	Cenvat/Modvat - Reversal of credit whether equal to non-availment - Exemption under Notification Nos. 29/2004-C.E. and 30/2004-C.E. availed - Notification No. 30/2004-C.E. specific about non-availment of Cenvat credit on inputs when exemption availed - Respondent availed exemptions simultaneously under both notifications

		but not maintained separate accounts - Impugned notifications clarified by C.B.E. & C. as independent and simultaneous availment permissible if separate account maintained - Ratio of Supreme Court decision in 1996 (81) E.L.T. 3 (S.C.) applicable and maintenance of separate accounts initially not a pre-condition for claiming exemption - Reversal of credit amounts to non-availment as per High Court ruling in 2004 (174) E.L.T. 422 (All.)
3.	PepsiCo India Holdings Ltd. 2008 (228) ELT 452	Cenvat/Modvat - Common inputs used in dutiable and exempted goods - Requirement to pay a percentage of sale price of exempted goods in terms of Rule 57CC of erstwhile Central Excise Rules, 1944 ceases once assessee reverses the entire credit availed
4.	Tata Chemicals Ltd. 2008 (232) ELT 737	Cenvat/Modvat - Common inputs used in dutiable and exempted goods - Pet coke and furnace oil used to manufacture steam and electricity - Electricity used in exempted final product of iodized/vacuum salt - Demand on the ground that separate accounts for receipt, consumption and inventory for common inputs not maintained - Proportionate credit on inputs used for exempted goods reversed by assessee - Assessee offering to pay amount of 8% or 10% of cost of either steam or electricity - Electricity comes after steam but before final product - Amount payable to be calculated taking value cf steam and paid accordingly - Statutory requirement satisfied
5.	Franco Italian Co. 2000 (120) E.L.T. 792 (LB)	SSI Exemption vis-a-vis Modvat - Subject to the reversal of the Modvat credit taken with regard to the inputs which were utilised for the manufacture of duty free goods, the manufacturer could avail of the Modvat credit as well as the full duty exemption under the applicable small scale exemption Notification with regard to the same specified goods - Notification No. 175/86-C.E.

In this case, the company has reversed the entire credit of duty paid on inputs & service tax paid on input services as explained in point no. 2 and therefore it is submitted that in view of the above submission the same should be considered as a sufficient compliance with rule 6(3).

7.6 The Noticee further stated that it will be evident from the para 6 of the show cause notice that the extended period has been invoked on the ground that the company has willfully suppressed the fact. It is submitted that the company is regularly filling ER-1 return wherein the amount of the service tax credit is specifically indicated in column no. 5. Thus the company disclose the department of the availment of CENVAT credit availed in the input services. Thus it will be evident that the company did not suppress any facts to the department. Therefore it is submitted that the grounds on which the extended period is invoked is completely erroneous.

It is submitted that the Delhi tribunal in the case of **IDEA CELLULAR LTD.** *Versus* **COMMISSIONER OF CENTRAL EXCISE, ROHTAK 2009 (16) S.T.R. 712 (Tri. - Del.) has** held that the is hit by limitation since the company regularly filled ST-3 Return providing details of Service tax paid through Cenvat credit and cash. Thus no suppression can be alleged against the company. Thus allegation on utilization of credit in excess of 20% not sustainable. Demand beyond normal period of one year, not sustainable. - Penalty not imposable - Sections 73 and 78 of Finance Act, 1994. ***[paras 5, 5.1]***

The provision of section 73 of the Finance Act, 1994 is pari mataria to the provision of section 11AB of the CEA, 1994. Thus the ratio of the above case is applicable to the present case.

The Hon. Supreme Court has consistently held that provision of section 11A applies only when the manufacturer had mala fide intention in non-payment of duty. Therefore, the extended period of 5 years unless the manufacturer has malafide intention.

The Noticee relies upon the following judgments:

Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC). The court held that 'intent to evade duty must be proved for invoking proviso to section 11A(1) of the Central Excise Act, 1944' which deals with the provisions for extended period of limitation. In this case, it was held that mis-state ment or suppression of fact in the SSI declaration cannot be called wilful, unless it is proved that it was done willfully with an intent to evade duty, for the purpose of invoking the extended period of limitation.

The Supreme Court has observed in the above case that –

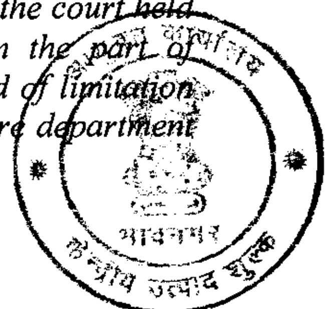
-Intent to evade duty is built in to the expressions 'fraud' and 'collusion'

- 'mis-statement' and 'suppression' have been qualified by immediately preceding words 'wilful'

-contravention of any of the provisions of this Act or rules' has been qualified by the immediately following words 'with intent to evade payment of duty'.

Thus to invoke the proviso to the section and the extended period of limitation it should be proved that the assessee made a misstatement or suppression which is 'wilful' or has acted with 'intent to evade payment of duty'

In CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SC), the court held that something positive, rather than mere inaction or failure on the part of manufacturer, has to be proved before invoking the extended period of limitation as per proviso under section 11A(1). Also it has been held that where department



has full knowledge about the facts and the manufacturer's action or inaction was based on the belief that they were required or not required to carry out such action or inaction, the extended period cannot be made applicable.

In Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC) is important in construing the meaning of the words 'suppression of facts' as used in the proviso to section 11A(1) of the Act. The gist of the judgment is as follows :-

The expression 'suppression of facts' has been used in the company of strong words such as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet in the surroundings in which it has been used, it has to be construed strictly. It does not mean any omission. The act must be deliberate. It taxation, it can have only one meaning and that is 'that the correct information was not disclosed deliberately to escape from payment of duty'.

The assessee cannot be held guilty on the mere 'suppression of facts' when the law itself is not clear or there are conflicting judgments or when the position is not settled in law, unless it can be proved that the intention of the assessee was to evade payment of duty.

In this case, the company had completely disclosed the facts to the department by filling regularly filling the ER-1 return. The show cause notice is served on 04.05.2012. Therefore, the demand up to March 2011 is time barred.

7.7 The Noticee further stated that no penalty under section 11AC is leviable that the Show Cause Notice proposes to levy penalty under Rule 15 of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act, 1944.It is submitted that the said rule has no application to levy of penalty for the amount recoverable under rule 6(3). The amount recoverable under rule 6(3) is neither credit nor duty which the amount specified under rule 6(3). Therefore, for recovery of the said amount, special provision has been made in the Explanation to rule 6(3). The said explanation only provides for recovery of amount and interest. It does not make any provision for levy of penalty. Therefore, it is submitted that no penalty shall be levied. We rely on the following case laws :

The Hon'able Tribunal in the case of Switz Foods Pvt. Ltd. Vs C.C.Ex., 2006 (206) E.L.T. 293 (Tri. - Kolkata) with regard to interest and penalty has observed in para 2 as follows:-

"2. Section 11AC and Section 11AB can be invoked by the authority only in respect of the duty and not in respect of the non-payment of the amount of 8% of the value of exempted goods which is recovered under Rule 57CC. It is clear from the clear wordings of Sections 11AB and 11AC, the interest and penalty can be imposed only in respect of the amount of duty not paid, not levied, short paid and short levied. The issue has been clarified by the Board that the amount payable in terms of Rule 57CC is not duty. After the board having itself admitted that the amount payable is not duty, in that case, the penalty and duty imposable on the appellants under Sections 11AB and 11AC does not arise."

The Hon'able Tribunal in the case of C.C.Ex. Vs Sangrur Agro Ltd., 2006 (202) E.L.T. 835 (Tri. - Del.) with regard to penalty as observed in para 1 as follows

"The Revenue filed this appeal against the Order-in-Appeal passed by the Commissioner whereby penalty under Section 11AC of Central Excise Act is set aside on the ground that the provisions of Section 11A is applicable to recovery to

duty of excise whereas the issue in the present case is of payment of amount equal to 8% of the value of exempted goods as provided under Rule 6(3)(b) of Cenvat Credit Rules. As the provisions of Section 11AC of Central Excise Act are applicable only in respect of short payment of duty whereas the payment under Rule 6(3)(b) of Cenvat Credit Rules is not duty but an amount, therefore, we find no merit in the appeal. The appeal is dismissed. The stay petition is also dismissed."

b. No penalty can be levied if the issue relates to interpretation of statute/ rule: The issue involved in the instant case involves interpretations of complex provision of rule 6 of the CENVAT credit Rules 2004. The Hon. Tribunal has consistently held that the penalty should not be imposed where the question of interpretation of any statutory provision are involved. The company relies upon the following judgments for the above proposition.

(a) Sonar Wires Pvt. Ltd. Vs. CCEx. 1996 (87) ELT 439 (T)
(b) Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T)
(c) Man Industries Corporation 1996 (88) ELT 178 (T)
(d) Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT 490
(e) Aquamall Water Solutions Ltd. 2003 (153) ELT 428
(f) Blue Cross Laboratories Ltd. vide order no. A/1529/C-IV/SMB/2007
(g) SUJANA METAL PRODUCTS LTD reported in 2011 (273) E.L.T. 112 (Tri-Bang).

Personal Hearing

8.1. Personal Hearing in the matter was held on 07/09/2012 which was attended by Shri Mehul Jivani, CA, and Shri Nilesh M Chauhan, authorized representative of the Noticee wherein they reiterated their written submission made vide letter dated 03/07/2012.The Noticee also cited various case laws point wise in their favour as shown below during the course of hearing:

a. Proportionate Reversal of credit made---Demand of adhoc amount of exempted goods not sustainable:

- ETA Technologies Pvt Limited 2010 TIOL 69 HC KAR
- Global Pharma Tech 2011 274 ELT 413 (Tri-Chennai)
- Unimed Technologies Ltd 2012 278 ELT 461(Tri-AHD)
- Colgate Palmolive 2012 25 STR 268 (Tri-Mum)
- Himalyan Drug Company 2012 27 STR 95(KAR)
- Maan Pharmaceuticals 2011 263 ELT 661 (GUJ)
- Maize Products 2009 234 ELT 431 (Guj)
- Anil Products LTD 2010 260 ELT 54(GUJ)

c. Rule 6 of CCR 2004 is Procedural:

- JB Mangram 2011 TIOL 133 CESTAT-DEL
- Food Fats 2011 22 STR 484(Tri-Bang)

d. Subsequent reversal amounts to non availment of Credit:

- Hellow minerals Water Pvt Ltd 2004 174 ELT 422
- Sagar Twisters 2005 188 ELT 497(Tri-Mum)
- Amola Holdings 2009-TIOL-1000-CESTAT AHM
- Pepsi India Holdings Ltd 2008 228 ELT 452
- Franco Italian Co Pvt Ltd 2000 120 ELT 792(Tri-LB)
- BG Shirke Construction 2009 13 STR 686(Tri-Mum)
- Ashima Dyecot Ltd 2008 232 ELT 580(GUJ)

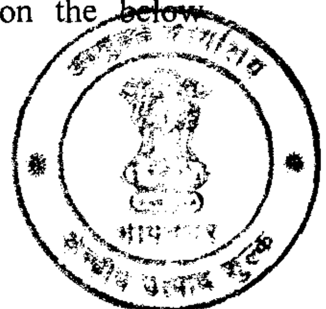
e. Penalty---Section 173 does not apply to reversal of credit under Rule 6(3) of CCR,2004:
- Switz Foods Pvt Ltd 2006 206 ELT 293 (Tri-Kol)
- Sangarur Agro Ltd 2006 202 ELT 835 (Tri-Del)
- Pushpaman Forgings 2002 149 ELT 490 (Tri-Mum)
- Pushpaman Forgings 2003 153 ELT A89 (SC)

f. The assessee has the right to Choose any option at the time of reopening of assessment:
- Gurupriya Tele Auto(P) Ltd 1992 (58) ELT 361 (Kar)
- Lili Foam Industries Pvt Ltd 1990 46 ELT 462

8.2 During the course of Personal Hearing, the Noticee sought further time of 10 days for submission of additional submission and further stated that no further hearing is required after filing the said additional submission. The Noticee filed additional submission vide letter dated 14/09/2012 wherein it was inter alia contended that :

8.2.1 Raising of demand under section 11A of the Central Excise Act amounts to re-opening of assessment and therefore assessee wants to exercise the option as given under Rule 6(3A) of the Cenvat credit Rules w.e.f. 01.04.2007 that the the show cause notice demands amount of Rs.3,45,06,332/- under Rule 14 of the Cenvat credit Rules read with Section 11A of the Central Excise Act. It alleges that the assessee has not filed the declaration under Rule 6(3A) for opting option under Rule 6(3A) and therefore said option can not be availed at this stage and therefore demand has been made as per Rule 6(3) of the Cenvat credit rules and that whenever the demand is raised for recovery of service tax under section 11A of the Central Excise Act, the entire assessment is re-opened, Therefore, assessee can raise any point.

8.2.2 whenever the demand is raised under Section 11A of the Central Excise Act, it re-open the entire assessment. Therefore it is open to the assessee to make alternative submission for the purpose of determining the quantum of duty if any payable by the company. Therefore, it can adopt different method of valuation for determining the value of amount payable as a duty. The demand for payment of amount under Rule 14 of the Cenvat credit Rules read with Section 11A of the Central Excise Act. The Section 11A of the Central Excise Act empowers the Central Excise officer to serve the show cause notice within stipulated time for duty which has not been levied or short levied, short paid or non levy on the person chargeable with service tax requiring him to show cause for payment of service tax. The Hon. Karnataka High Court in the case of Gurupriya Tele Auto Pvt. Ltd. 1992 (58) ELT 361 has observed in para 12 that the recovery of tax under section 11A of the Central Excise Act provides power to reopen assessment and any procedure adopted in fixing liability to the tax and its quantification is part of the process of assessment. The said proposition was also laid down in Lili Foam Industries (P) Ltd. v/s CCE 1990 (46) E.L.T. 462 (Tribunal) wherein tribunal observed that raising of demand amounts to Re-opening of assessment and Assessee entitled to question rate of duty originally applied when assessment re-opened and differential duty demanded and relied upon the below Judgements:



a) The Hon. Karnataka High Court in the case of Gurupriya Tele Auto Pvt. Ltd. 1992 (58) ELT 361 has held that Section 11A should not to be confined to recovery of tax alone but covers adjudication to determine duty payable and further held that Section 11A of the Act empowers the reopening of an assessment and this power to reopen an assessment would necessarily include reopening of any other matter which is essential to the making of an order of assessment and Since approval of the list under Rule 173B is a step necessary for leading to the making of an order of assessment, this approval could be a subject of modification, while reopening the assessment under Section 11A. Further Hon'ble tribunal in the case of Lili Foam Industries (P) Ltd. v/s CCE 1990 (46) E.L.T. 462 (Tribunal) has held that Even though an assessee may not contest the correct rate of duty on a commodity cleared by him earlier, whenever the Department seeks to reopen the assessment and demands differential duty for whatever reasons, it is open to the assessee to contest the demand of the higher differential duty with an argument that the rate of duty originally applied was wrong. Even if the allegations against them in the proceedings are found to be correct, the quantum of differential duty to be paid by them can be questioned. The Tribunal simply cannot shut out such an argument of the appellant on the ground that he has not raised the dispute regarding the rate of duty until the proceedings are initiated against him. After all the Department seeks to rely on Section 11A of the Central Excises and Salt Act for demanding differential duty. The demand of differential duty can arise only when the Department correctly determines the duty payable by an assessee and the duty actually paid by him earlier. The correct quantum of duty payable by assessee, in cases where the goods are subjected to ad valorem rate of duty, depends on the value of the goods and also the rate of duty. Therefore, determination of the correct rate of duty for the goods on which differential duty is demanded is the first step before quantifying the demand.

As the entire assessment has been re-opened assessee can choose the option of paying of amount under Rule 6(3A) instead of under Rule 6(3) of Cenvat Credit Rules:

If separate records of common input or input services has not been maintained than company has following two options for payment of amount as duty:

- Payment of 8%/5% on the value of clearance of exempted goods as provided under Rule 6(3).
- Reversal of proportionate credit attributable to exempted goods as provided under Rule 6(3A)

The SCN alleges that the assessee has not filed the declaration under Rule 6(3A) for opting option under Rule 6(3A) and therefore said option can not be availed at this stage and therefore demand has been made as per Rule 6(3) of the Cenvat credit rules.

As the department has issued the SCN under section 11A of Central excise Act, entire assessment as re-opened and now assessee can choose the either of the option, as the same affects the determination of the duty. As the entire assessment has been re-opened and assessee is free to avail the option, it wants to exercise the option as envisaged under Rule 6(3A) w.e.f. 01.04.2007. Though said rule has come w.e.f. 01.04.2008, the tribunal in the case of FOODS, FATS & FERTILISERS LTD 2011 (22) S.T.R. 484 (Tri. -

Bang.) has held that Rule 6(3A) ibid not a substantive provision but a procedural provision and therefore amendment having retrospective effect. The assessee has already reversed the credit as per the said rule along with the interest. The details of the same has been already given in our reply to SCN vide letter dated 03.07.2012.

Without prejudice to the same, it is submitted that in the case of J B MANGHARAM FOODS PVT LTD 2011-TIOL-133-CESTAT-DEL, tribunal has held that Sub-rule (3) of Rule 6 clearly gives option to the manufacturer in this regard and once the said option is given, it will be for the manufacturer to make the choice and department can not thrust upon the assessee.

8.2.3 once the credit is reversed on exempted goods, it is deemed that credit has not been taken and therefore provision of Rule 6(3) read with Rule 6(2) of the Cenvat Credit Rules does not apply:

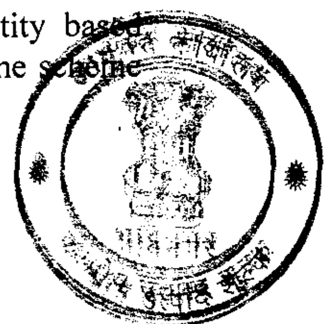
The Hon'ble Karnataka High Court in the case of *CCE* v *ETA Technologies Pvt. Ltd.* [2010-TIOL-569-HC-Kar], has held that once the credit is reversed on exempted goods, it is deemed that credit has not been taken and demand under Rule 6(3) is not sustainable. The assessee has already reversed the credit as per Rule 6(3A) and therefore same amounts to non-availement of credit and therefore provision of Rule 6(3) should not be apply and demand should not be made.

Without prejudice to the above, Lex Non Cogit ad impossibilia' - law does not compel a person to do that which is impossible, is a well settled legal principle applied even in taxation matters:

The condition in Rule 6(2) of Cenvat Credit Rules of maintaining separate account relating to input services meant for dutiable final products and inputs meant for exempted final products and taking Cenvat Credit only in respect of the input services meant for dutiable final products. For some of the common services it is impossible to maintain the separate records for e.g. services obtained at head offices like Audit fees. Lex Non Cogit ad impossibilia' - law does not compel a person to do that which is impossible, is a well settled legal principle applied even in taxation matters. Hon'ble Allahabad High Court in case of *Commissioner of Income Tax vs. Premkumar reported in 2008 (214) CTR 452 (All)* while dealing with the question whether an assessee can be faulted for not declaring the amount of capital goods on acquisition of land when the amount of compensation itself is not determined, held as follows :

"Lex Non Cogit ad impossibilia' is an age old maxim meaning that the law does not compel a man to do which he cannot possibly perform. Requiring the assessee to file a proper and complete return by including the income under the head 'Capital gain' would be impossible for the assessee, in cases of the nature referred above."

A larger bench of the Tribunal in para 37 of its judgement in case of *Hico Enterprises vs. Commissioner of Customs reported in 2005 (189) ELT 135 (Tri.LB),* following the legal maxim Lex Non Cogit ad impossibilia held that the transferee of a quantity based advance license issued by the Licensing Authority under the scheme



of exemption Notification No.204/92-Cus, cannot be denied the benefit of this exemption, if subsequently it is found that the original licence holder (transferer) had obtained the license by fraud and misrepresentation and the condition of notification that in respect of the goods exported in discharge of the export obligation, Cenvat Credit had not been availed, had not been fulfilled, as the condition which is required to be fulfilled by the transferer cannot be expected to be fulfilled by the transferee. The Tribunal in case of *Narmada Gelatines Ltd. vs. CCE, Bhopal reported in 2009 (233) ELT 332 (Tri.Del)*, where by the use of a common Cenvat Credit availed import -Hydrochloric Acid in the manufacture of Gelatine, a dutiable final product, an inevitable by product Di-Calcium Phosphate, an exempted item calcium also emerged, observing that when there is an impracticability of maintenance of account and the exercise of option for maintaining separate account and inventory of the inputs for dutiable and exempted final product was inconceivable, levy of 8% of the value of Di-Calcium phosphate is unwarranted (para 17 of the order). Same view has been taken by Hon'ble Bombay High Court in case of *Rallis India Ltd. vs. UoI reported in 2009 (233) ELT 301 (Bom.)* and by Hon'ble Gujarat High Court in the case of *CCE, Vadodara-I vs. Sterling Gelatin reported in 2011 (270) ELT 200 (Guj.).*

In view of the above discussion, since in this case, it is impossible for the Appellants to maintain separate account of common input services Rule 6(3)(b)/6(3)(i) read with Rule 6(2) of Cenvat Credit Rules, cannot be invoked.

8.2.4. they have not availed any credit on packing material used in the exempted goods. The SCN has made allegation that assessee has availed the credit on packing material used in the exempted goods, such allegation is without any basis. The Supreme Court in the case of BRINDAVAN BEVERAGES (P) LTD 2007 (213) E.L.T. 487 (S.C.) has held that SCN is foundation on which the Department has to build up its case, If allegations in show cause notice not specific and on the contrary vague, lack details and/or unintelligible, sufficient to hold that noticee not given proper opportunity to meet allegations indicated in show cause notice and therefore same is laible to be set aside. It is submitted that SCN to the extent of making allegation that it has availed the credit on packing material used in the exempted goods is vague and liable to set a side.

8.2.5 Penalty can not be levied for non-payment or reversal of credit under Rule 6(3) of the Cenvat Credit Rules and that there is no provision or mechanism for collection or imposing penalty under Rule 6(3) of the Cenvat Credit Rules:

During the period 2007-08, Rule 6(3) of the Cenvat Credit rules is read as follows:

(3)Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely :-

(a) if the exempted goods are"

(i) goods falling within (heading 2207) of the First Schedule to the Excise Tariff Act (hereinafter in this rule referred to as the said First Schedule);

(ii) Low Sulphur Heavy Stock (LSHS) falling within Chapter 27 of the said First Schedule used in the generation of electricity;

(iii) Naphtha (RN) falling within Chapter 27 of the said First Schedule used in the manufacture of fertilizer;

(iv) Naptha (RN) falling within Chapter 27 of the said First Schedule used for generation of electricity;

(v) (newsprint, in rolls, sheets or reels, falling within chapter 48) of the said First Schedule;

(vi) final products falling within Chapters 50 to 63 of the said First Schedule;

(vii) goods supplied to defence personnel or for defence projects or to the Ministry of Defence for official purposes, under any of the following notifications of the Government of India in the Ministry of Finance (Department of Revenue), namely:-

(1) No.70/92-Central Excise, dated the 17th June, 1992, G.S.R. 595 (E), dated the 17th June 1992;

(2) No.62/95-Central Excise, dated the 16th March, 1995, G. S. R. 254 (E), dated the 16th March, 1995;

(3) No.63/95-Central Excise, dated the 16th March, 1995 G.S.R. 255 (E), dated the 16th March, 1995;

(4) No.64/95-Central Excise, dated the 16th March 1995, G.S.R.256(E), dated the 16th March 1995,

[(viii) Liquefied Petroleum Gases (LPG) falling under tariff items 2711 12 00, 2711 13 00 and 2711 19 00 of the said First Schedule;]

(ix) Kerosene falling within heading 2710 of the said First Schedule, for ultimate sale through public distribution system.]

the manufacturer shall pay an amount equivalent to the CENAT credit attributable to inputs and input services used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory; or

the manufacturer shall pay an amount equivalent to the CENAT credit attributable to inputs and input services used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory; or

(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 the factory;

(c) the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.

Explanation I - The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.

Explanation II - If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 14, for recovery of CENVAT credit wrongly taken.

Explanation III - 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.