केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
वस्तु एवं सेवा कर भवन, सातवी मंजिल,पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015
GST Building, 7th Floor, Near Polytechnic, Ambavadi, Ahmedabad-380015
सत्यमेव जयते
079-26305065
टेलेफैक्स : 079 - 26305136

क फाइल संख्या :File No : **V2/132/GNR/2017-18** S681 to S685

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-05-18-19**

दिनाँक Date :**27-04-2018** जारी करने की तारीख Date of Issue: 16/8/2018

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)Ahmedabad

C. file

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-CEX-003-ADC-AJS-011-17-18** दिनाँक : **29.11.2017** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-AJS-011-17-18,** Date: **29.11.2017** Issued by: Additional Commissioner, Service Tax, Div:O &A, HQ, Gandhinagar, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Hellios Tube Alloys Pvt Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।
Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s. Hellios Tube Alloys Pvt. Ltd., Survey No. 68/55, Bileshwarpura, Chhatral Mehsana Highway, Tal- Kalol, Dist- Gandhinagar (hereinafter referred to the as '*the appellants*') have filed an appeal against the Order-in-Original number AHM-CEX-003-ADC-AJS-011-17-18 dated 29.11.2017 *(*hereinafter referred to as '*impugned order')* passed by the Additional Commissioner, Central Excise and CGST, Gandhinagar *(*hereinafter referred to as '*adjudicating authority')*.

2. The facts of the case, in brief, are that the appellants were holding Central Excise Registration No. AALCS1837MXM001and are engaged in the manufacture of S. S. Welded Pipe, S. S. Seamless Pipe, C. S. Seamless Pipe falling under the Chapter 73 of Central Excise Tariff Act, 1985. They were also holding the Service Tax Registration Certification No. AALCS1837MST001, to pay Service Tax under Section 68(2) of the Finance Act, 1994. The appellants had availed Cenvat credit under Cenvat Credit Rules, 2004. During the course of audit conducted by the Central Excise officers, it was noticed that the appellants had wrongly availed Cenvat credit under the head of Additional Duty, Education Cess and Higher Education Cess. On further verification, it was observed that they had wrongly availed Cenvat credit in respect of Customs Education Cess and Customs Secondary and Higher Secondary Education Cess. It was also observed that the appellants had availed Cenvat credit of input services viz. "Banking & Finance Service, Practicing Chartered Accountant, legal & professional Service and Advertisement Service" and used in both excisable as well as exempted goods and services viz. trading. Also, on verification of indirect income ledgers under the head of 'Income from Testing Charges, Radiography Charges and Testing Charges', it was revealed that the appellants had collected testing charges and from their customers but did not include the charges in the transaction value and had not discharged duty thereon. Further, on verification of sales register, it was seen that the appellants had cleared their finished products to their inter-divisional trading unit at Mumbai but could not provide any document to establish the fact that the selling price at Mumbai was the same at the time of removal from factory. Finally, they auditors noticed that the appellants did not file ER-4 returns as per the provisions of Rule 12(2)(a) of the Central Excise Rules, 2002. On the basis of the issues raised in audit, a show cause notice dated 02.09.2016 was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, disallowed the Cenvat credits of ₹1,36,897/- and ₹70,284/- under Rule 14 of the Cenvat Credit Rules, 2004 along with interest and penalty. He further upheld the demand of ₹72,37,770/-, ₹67,125/- and ₹82,392/- under Rule 6(3) of Cenvat Credit Rules, 2004 and Section 11A(4) of the Central Excise Act, 1944 respectively along with interest and penalty. Also, the adjudicating

authority imposed late fee of ₹40,000/- for non-filing of ER-4 returns under the provisions of Rule 12(6) of the Central Excise Rules, 2002.

3. Being aggrieved by the impugned order, the appellants preferred the present appeal on the following grounds listed below;

- Vide invoice no. 08 dated 08.08.2011, they have purchased the 17,748 Kg. of goods from M/s. SLS Stainless Pvt. Ltd., Ahmedabad who had imported 37008 Kg. of said goods from M/s. Hyosung Corporation, Gangnag-Gu-Seol on the payment of 4% ACD of ₹2,79,165/-; that the appellants have availed the proportionate 4% ADC of ₹1,33,880/- (17,748 Kg. x 2,79,165/37008). Hence, they are entitled for availment of addl. duty of ₹1,33,880/-.
- Since, the inputs have suffered duty and used in the factory for the intended purpose, the appellants are of the view that the non-mention of the duty payable in the invoice cannot be the defensible ground for denial of Cenvat benefit in terms of the Rule 9(2) of the Cenvat Credit Rules.
- The appellants relied on the cases of Steel Authority of India reported in 2010 (255) E.L.T. 129 (Tri. - Kolkata), Expo International reported in 2009 (247) E.L.T. 705 (Tri. - Del.) and In Re : Track Equipment & Engineering Co. reported in 2008 (229) E.L.T. 476 (Commr. Appl.),
- In respect of excess Cenvat credit of Edu. Cess of ₹2,011/- and SHE of ₹ 1,006/- vide invoice no. EX025/2013-14 dated 16.05.2013; they claimed that this was done by mistake by the excise clerk of the appellants. The appellants relied in the case of M/s. Gary Pharmaceuticals (P) Ltd. Vs. Commissioner of C. Ex, Luthiana reported in 2013 (297) E.L.T. 391 (Tri. - Del.), in which the Tribunal held that there was no mala fide on the part of the assessee i.e. inviting any penal action against them; that *mala fides* cannot be attributed to them, justifying imposition of penalty.
- They urged that they are not challenging the confirmation of demand of Cenvat credit in respect of Customs Education Cess and Customs Secondary and Higher Secondary Education Cess, but challenged the penalty imposed under aforesaid Rule/Section; that the clerk of the appellants was taking the Cenvat credit paid on inputs and input services; that he had no knowledge of Cenvat credit in respect of Customs Education Cess and Customs Secondary and Higher Secondary Education Cess; that after having realized, the appellants stopped taking credit on such cesses; that there was no *mala fide* intention on their part to do so and it was a pure clerical error inasmuch as entire facts are reflected in their records as also in their monthly returns; that the appellants relied in the case of M/s. Gary Pharmaceuticals (P) Ltd. Vs. Commissioner of C. Ex, Luthiana reported in 2013 (297) E.L.T. 391 (Tri. - Del.); that the audit officers have checked all the books of accounts including ledger accounts and found no suppression of facts or mis-statement and

hence the impugned order may set aside in respect of the imposition of penalty.

- In respect of common inputs credit, the appellant submits that the manufacturing unit has been registered under Central Excise, Kalol Division, Gandhinagar whereas the trading unit at Mumbai has been registered under Central Excise department as a dealer. Both the units are separate entities. Therefore, they have maintained the separate records of the inputs and input services.
- The manufacturer of the goods opting not to maintain separate accounts shall follow any of one of the options as applicable to them as per Rule 6(3) and as per the formula prescribed in Sub-Rule (3A) of Rule 6 of CCR, 2004
- The appellants relied on the case of Mercedes Benz India (P) Ltd. Vs. Commissioner of C. Ex, Pune-I reported in 2015 (40) S.T.R. 381 (Tri. - Mumbai), wherein the Tribunal observed that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee.
- In respect of the testing/radiography, same is conducted at the specific request of some of their buyers and the said charges are paid initially by the appellants and later reimbursed by the buyers. This is a case where the third party testing and radiography are carried out at the instance of the buyers and afterwards the buyers meet the expenses for the same. Such additional charges cannot be included in the transaction value. The appellants relied in the cases of COMMISSIONER OF CENTRAL EXCISE, JAIPUR-II V/s. A. INFRASTRUCTURE LTD. reported in 2003 (160) E.L.T. 549 (Tri. - Del.) and IDCOL KALINGA IRON WORKS LTD. Versus COMMR. OF C. EX., BHUBANESWAR-II reported in 2007 (214) E.L.T. 511 (Tri. - Kolkata).
- In respect of inter-divisional sale, the duty was demanded on the value by adding notional profit @ 10% on clearance value at the factory as per Rule 9 above whereas the said Rule 9 does not speak of the value by adding notional profit @ 10% on clearance value at the factory.
- Rule 9 speaks of the value at which the goods are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail. Hence, The Rule 9 does not speak of notional profit @ 10%; that the Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is not attracted in the present case as it does not speak of notional profit @ 10%.
- As per Rule 7, where the goods are transferred to depot, a consignment agent or any other place from where the goods are to be sold, the value shall be the normal transaction value of such goods sold from such other place i.e the value of such goods sold and not the value by adding notional profit @ 10% on the clearance value at the factory; that the trading unit at Mumbai is a dealer and not a depot.

- As per the law, the appellants had kept the records of the manufacturing activity in the unit at Billeshwarpura, Kalol whereas records of trading activity in the trading unit at Mumbai. Hence, demanding duty by taking the recourse under Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, is unlawful.
- The appellants argued that they are not liable to pay duty; that they have no intention to evade duty; that there is no suppression of facts, mis-declaration, fraud etc and therefore, penalty cannot be imposed under Section 11AC of Central Excise Act, 1944.

4. Personal hearing in the matter was conducted on 26.04.2018 and Shri K. A. Nagar, Tax Consultant appeared on behalf of the appellants and reiterated the grounds of appeals.

5. I have carefully gone through the impugned order, the appeal memorandum, additional submission dated 04.04.2018, an application for condonation of delay and contention made at the time of personal hearing.

6. Before entering into the main subject of dispute, I find that the appellants have requested for condonation of delay of 24 days beyond the 60 days specified in Section 35 of Central Excise Act, 1944 in filing the appeal. In this regard, I hold that the delay is not fatal and falls within the period of 30 days after the initial 60 days, which this appellate authority is competent to condone. Hence, in terms of the proviso to Section of Central Excise Act, 1944, I condone the delay in filing the above mentioned appeal.

7. Before proceeding to the discussion and verifying the merits and demerits of the case, I would like to list down, point wise, the issues of the case;

(i) Cenvat credit worth ₹1,36,897/- under the head of Additional Duty, Education Cess and Higher Education Cess availed by the appellants. Adjudicating authority alleges that the said amount did not form the part of the duties of Excise depicted on the face of concerned invoices.

(ii) The appellants had taken Cenvat credit worth ₹70,284/- i.r.o. Customs Education Cess and Customs Secondary & Higher Secondary Education Cess. Adjudicating authority alleges that the said cess are not specified for the purpose of taking Cenvat credit.

(iii) An amount of ₹72,37,770/- was demanded from the appellants as they had utilized common Input credits in both dutiable manufacturing activity as well as trading activity.

(iv) The appellants had collected testing charges, radiography charges & testing charges from their clients but did not pay Central Excise duty worth ₹ 67,125/-.

(v) The appellants cleared their final products to their inter-divisional trading unit at Mumbai but could not show whether the selling price at Mumbai was

the same at the time of removal from the factory and thus not paid Central Excise duty worth ₹82,392/-.

(vi) Late fee of ₹40,000/- demanded for non-filing of ER-4 returns for the FY 2013-14 and 2014-15.

7.1. I find from paragraph 8.1 of the impugned order that the appellants have availed excess Cenvat credit of Education Cess of ₹2,011/- and SHE Cess of ₹ 1,006/- in respect of invoice no. EX025/2013-14 dated 16.05.2013. I find that the issue of excess credit of Cess has attained finality as the appellants did not challenge the confirmation of demand.

It is also alleged in paragraph 8.1 to 8.7 of the impugned order that the appellants had taken excess credit of additional duty of ₹1,33,880/-on the basis of the invoice number 08 dated 08.08.2011 as the duty payable is not shown in the invoice as per Rule 11(2) of the Central Excise Rules, 2002 which requires all the particulars to be contained in invoice as per CER, 2002. In this regard, I find that the appellants have argued that they had purchased 17748 Kgs of goods from M/s. SLS Stainless Pvt. Ltd., Ahmedabad who had imported 37008 Kgs of the said goods from M/s. Hyosung Corporation, Gangnag-Gu-Seol on payment of 4% ACD of ₹2,79,165/-. The appellants further contended that they had availed proportionate 4% ADC of ₹ 1,33,880/- (17748 Kgs x 2,79,165/37008) and they are entitled for availment of duty of ₹1,33,880/- and in support of their claim, they have submitted invoice number 08 dated 08.08.2011. However, I find that no particulars are appearing in the said invoice and also no supporting evidence, other than the said invoice, has been submitted by the appellants. I find that the appellants further contended that the duty payment character of the goods covered under the disputed invoice, their receipt and utilization in the factory of manufacture of the final product, are not in dispute; that since the inputs have suffered duty and used in the factory for the intended purpose, the non-mention of the duty payable in the invoice cannot be the defensible ground for denial of Cenvat benefit in terms of the Rule 9(2) of the Cenvat Credit Rules. Their argument could be accepted only when their verbal argument has been accompanied by supporting evidence. In the absence of any supporting proof, the undersigned is not in a position to accept the verbal argument of the appellants. The appellants must understand the fact that as they have filed the appeal against the impugned order, the onus is on the part of the appellants to establish that the adjudicating authority has erred in his verdict.

So far as the penalty is concerned, I find that the appellants had availed excess Cenvat credit of Edu. Cess of ₹2,011/- and SHE of ₹1,006/- in respect of invoice number EX025/2013-14 dated 16.05.2013. The appellants submitted that this happened by mistake of their excise clerk. However, as the word goes that ignorance cannot be treated as excuse, mistakes committed unknowingly too, cannot be pardoned. Thus, I consider that penalty should be imposed on the

amount of excess Cenvat credit of Edu. Cess of ₹2,011/- and SHE of ₹1,006/- in respect of invoice number EX025/2013-14 dated 16.05.2013.

7.2. Regarding the second issue, in respect of paragraphs 9.1 to 9.6 of the impugned order, I find that the appellants had taken Cenvat credit of Customs Education Cess and Customs SHE Cess, which is not admissible to them under Rule 3(1) of Cenvat Credit Rules, 2004. I find that the same has attained finality as the appellants did not challenge the confirmation of demand. I find that the adjudicating authority imposed penalty of ₹70,284/- under Rule 15(2) of Cenvat Credit Rules, 2004. In this regard, the appellants contended that the clerk of the appellants used to take Cenvat credit paid on inputs and input services; that he had no knowledge of Cenvat credit in respect of Customs Education Cess and Customs SHE Cess; that after having realized, the appellants stopped taking credit on such cess. The appellants further stated that there was no *mala fide* intention on their part and it was a pure clerical error inasmuch as entire facts are reflected in their records as also in their monthly returns so filed by the appellants. However, once again I proclaim that ignorance of law cannot be treated as excuse from being penalized. Therefore, I consider that the adjudicating authority has very rightly imposed penalty on them.

7.3. Regarding the third issue, as per paragraphs 10.1 to 10.11 of the impugned order, I find that the appellants are engaged in the manufacture of excisable goods and also engaged in trading activity. They have also cleared the goods under the exemption Notification No. 10/1997 C. Ex. dated 01.03.1997. The appellants have availed Cenvat credit of input services of ₹4,95,223/- in respect of banking and finance service, practicing chartered accountant service, legal and professional service and advertisement service. It is alleged that the said services are commonly received and used in excisable goods and exempted goods as well as exempted services viz. trading; that the appellants had not maintained separate records for input services used in trading activity and manufacturing activity under Rule 6(2) of CCR, 2004, nor filed an option under Rule 6(3A). I find that the adjudicating authority has held that the appellants had failed to maintain separate records for input services in respect of the dutiable/exempted goods and exempted services, thereby violated the provisions of Rule 6(2) and 6(3)(iii) Cenvat Credit Rules, 2004 and demanded duty amount of ₹72,37,770/- along with interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(4) of Central Excise Act, 1944. The adjudicating authority also imposed penalty under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944. After considering the submissions, I find that the appellants did not maintain the separate records for common input services used in trading activity and manufacturing activity under Rule 6(2) of CCR, 2004. I further find that the appellants had cleared their finished goods under Exemption Notification number 10/97-CE dated 01.03.1997, as amended, without the payment of duty. This fact has been accepted by the

appellants and therefore it is very clear that they had indulged in simultaneous clearance of both taxable and exempted goods. Rule 6 of Cenvat Credit Rules, 2004 is very clear about the fact that separate accounts have to be maintained in respect of receipt and use of inputs and input services and allows to avail Cenvat credit only in the case where the input or the input services used in or in relation to the manufacture of dutiable final products. Now, that the appellants had utilized Cenvat credit on common input services and not maintained separate accounts for such services, the adjudicating authority has very rightly concluded that the appellants have flouted the conditions mentioned in Rule 6 of Cenvat Credit Rules, 2004. The appellants, though, have contended that they had not availed and utilized Cenvat credit on packing materials used for the goods cleared under the Exemption Notification number 10/97-CE dated 01.03.1997, they have failed to submit before me any document in support of their claim. Thus, mere verbal assertion, without any documentary evidence, has no value in the eyes of law. Further, I agree with the views of the adjudicating authority, mentioned in paragraph 10.4 of the impugned order, that the Cenvat credit availed on services like Banking & Professional Services, practicing Chartered Accountant, Legal & Professional Service and Advertisement Service are common services and cannot be segregated or availed separately for manufacturing as well as trading activity. Further, the adjudicating authority has claimed, in the same paragraph, that even the balance sheet of the appellants is common reflecting both manufacturing and trading activity. Thus, I consider that the adjudicating authority has rightly demanded the amount of ₹72,37,770/- in terms of Rule 6(3) of Cenvat Credit Rules, 2004.

7.4. Now comes the fourth issue where, I find, from paragraphs 11.1 to 11.9 of the impugned order, that it is alleged that the appellants had collected the testing charges and radiography charges & testing charges from their buyers but did not include the said charges in the transaction value; that the additional consideration received by the appellants is required to be added in the transaction value as per Sec. 4(b) of Central Excise Act, 1944. In this regard, the appellants argued that the testing/radiography are conducted at the specific request of some of their buyers/customers and the said charges are paid initially by the appellants and later reimbursed by the buyers; that this is a case where the third party testing and radiography are carried out at the insistence of the buyers and afterwards the buyers meet the expenses for the same. Such testing charges and radiography charges & testing charges conducted at the request of the buyers/customers, cannot be included in the transaction value. The appellants relied upon the case of Commissioner of Central Excise, Jaipur-II vs. A. Infrastructure Ltd., reported in 2003 (160) E.L.T. 549 (Tri. - Del.), in which the Tribunal held as under:

"Valuation (Central Excise) - Inspection charges - Initially paid by manufacturer and subsequently to be reimbursed by the buyer - Inspection at the instance of buyer, who meet the expenses - Not includible in the transaction value - Section 4 of Central Excise Act, 1944".

The appellants again mentioned that the Tribunal further observed that merely, because the manufacturers initially paid the amount to the inspection agency, it will not be a part of the transaction value as the amount is being reimbursed to the manufacturer by the buyer/Govt. Department.

In this regard, I find that the appellants further relied upon the case of Idcol Kalinga Iron Words Ltd. Versus Commr. of C. Ex., Bhunaneswar-II reported in 2007 (214) E.L.T. 511 (Tri. - Kolkata), in which the Tribunal observed that

"Valuation (Central Excise) - Inspection charge - Includibility of - D.G.S. & D. inspection charges contended by appellant as not includible in assessable value as inspection made as sought by buyers and charges paid on actual basis to D.G.S. & D. - Charges paid to inspection agency and recovered from buyer not part of transaction value - Impugned order set aside and appeal allowed - Section 4 of Central Excise Act, 1944"

I find that the Tribunal in paragraph 4 of the above order held that they are of the view that the present case is similar to the one decided in the case of *A. Infrastructure Ltd.* (cited supra) and hence, they also hold that the charge paid to the D.G.S. & D and recovered from the buyer cannot be a part of the transaction value.

In the present case, I find that the appellants have submitted copies of purchase orders in respect of M/s. Indian Oil Corporation Limited and M/s. Tata Projects Ltd. in which I perused the terms and conditions and I find that testing charges will initially be paid by vendor and later reimbursed by the buyer. Therefore, I conclude that the testing and radiography are not carried out as a part of the manufacturing activity but it is carried out on the specific request of the buyers and hence, the said charges cannot be included in the transaction value under Section 4(1)(b) of the Central Excise Act, 1944. Thus, I consider the arguments submitted by the appellants and allow the appeal pertaining only to this issue.

7.5. In respect of paragraphs 12.1 to 12.7 of the impugned order, it is alleged that the appellants had cleared the final products to their trading unit located at Mumbai, without arriving at the value on which duty is required to be discharged from the trading division in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Since, the appellants had not produced the invoices of sales from Mumbai, the adjudicating authority has taken the recourse of the provision of Rule 11 of the Valuation Rules by adding notional profit @ 10% on clearance value at factory in terms of Rule 9 and demanded duty along with interest under Section 11A(4) of Central Excise Act, 1944. In this regard, I find that the adjudicating authority has taken the recourse of the provision of Rule 11 of the Valuation Rules; that the value considered by adding notional profit @ 10% on clearance value at factory in terms of Rule 9 of the Valuation Rules. Further, the adjudicating authority observed that appellants had cleared the final goods to their trading unit at Mumbai; that the value for

discharging duty on such clearance should be the value in terms of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The Rule 7 is as under:

> *"Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment".*

In this regard, I understand that, as per the aforesaid rule, where the goods are transferred to depot, premises of a consignment agent etc. from where the goods are to be sold, the value shall be the normal transaction value of such goods sold from such other place i.e the value of such goods. However, as the appellants have failed to produce the sales invoices of their Mumbai unit, the adjudicating authority has rightly taken the recourse of provisions of Rule 11 of the Valuation Rules and applied the provisions of Rule 9 of the Valuation Rules by adding notional profit @ 10% on the clearance value declared at the factory gate.

7.6. Now comes the last issue as mentioned in paragraph 13.1 of the impugned order that the appellants had not filed the ER-4 returns of the annual financial information for the years 2013-14 and 2014-15 and therefore, the adjudicating authority imposed late fee of ₹40,000/- under Rule 12(6) of Central Excise Rules, 2002. I find from the records available that the appellants had submitted a copy of the ER-4 return for the year 2014-15, which I have perused. However, I find that the appellants did not file the ER-4 return of the annual financial information for the year 2013-14. For the said non-filing of the ER-4 return for the year 2013-14, the appellants contended that the audit of the account records of the appellants factory was undertaken and no substantial amount of short payment or non-payment of excise duty or service tax was found; that the appellants requested to waive the delayed payment amount/late fees for non-filing of ER-4. I observed that the appellants have agreed to have not filed the ER-4 return for the year 2013-14. Therefore, I consider that the adjudicating authority has rightly imposed late fee of ₹40,000/- under Rule 12(6) of Central Excise Rules, 2002.

8. Accordingly, as per the above discussion, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants except to the extent discussed in paragraph 7.4 above, where I have allowed the appeal considering the arguments of the appellants to be genuine.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeal filed by the appellants stands disposed off in above terms.

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

To,

M/s. Hellios Tube Alloys Pvt. Ltd.,

Survey No. 68/55,

Bileshwarpura, Chhatral Mehsana Highway,

Tal- Kalol,

Dist- Gandhinagar.

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad.
2) The Commissioner, Central Tax, Gandhinagar.
3) The Dy./Asst. Commissioner, Central Tax, Kalol Division, Gandhinagar.
4) The Asst. Commissioner (System), Central Tax, Hq., Gandhinagar.
5) Guard File.
6) P. A. File.