केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

वस्तु एवं सेवा कर भवन
सातवीं मंजिल,पोलिटेकनिक के पास
आम्बावाडी, अहमदाबाद 380015

GST Building, 7th Floor,
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Ambavadi, Ahmedabad-
380015

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टेलेफैक्स : 079 - 26305136

क फाइल संख्या :File No : **V2/133 & 134/GNR/2018-19 & V2/34/RA/GNR/2018-19** / 10804

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-04-06-19-20** to 10808

दिनाँक Date :**23-05-2019** जारी करने की तारीख Date of Issue: 30/05/2019

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

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

G. file

ग **अपर** आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश **:AHM-CEX-003-ADC-AJS-002-18-19** दिनाँक : **10-07-2018** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-AJS-002-18-19,** Date: **10-07-2018** Issued by: Additional Commissioner,CGST, Div:RRA, HQ, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Prem Conductors 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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER IN APPEAL

Three appeals have been filed by the below mentioned appellants against OIO No. AHM-CEX-003-ADC-AJS-002-18-19 dated 10.7.2018, passed by the Additional Commissioner, CGST and Central Exicse, Gandhinagar Commissionerate [for short –'adjudicating authority'], the details of which are as follows:

Sr. No.	Name of the appellant	Appeal No.
1	M/s. Prem Conductors Private Limited, Block No. 210, Santej Vadsar Road, Santej, Gandhinagar.	V2/133/GNR/18-19
2	Shri Pradip A Mehta, Director M/s. Prem Conductors Private Limited, Block No. 210, Santej Vadsar Road, Santej, Gandhinagar.	V2/134/GNR/18-19
3	The Assistant Commissioner, CGST, Kalol Division, Gandhinagar Commissionerate.	V2/34/RA/GNR/2018-19

2. Briefly, consequent to audit by CERA a show cause notice dated 5.9.2017 was issued to the appellant mentioned at Sr. No. 1 & 2 above, *inter alia,* alleging that the appellant had failed to include the cost of transportation in the Transaction Value and thereby evaded central excise duty on such value, in violation of Rule 5 of the Central Excise (Determination of value of excisable goods) Rules, 2000 read with Section 24 of the Sale of Goods Act, 1930, and Section 4 of the Central Excise Act, 1944. The notice, further alleged that the appellant had also wrongly availed CENVAT credit in respect of inputs which had been cleared to their sister unit via commercial invoices without reversing CENVAT credit in terms of Rule 3(5) of the CENVAT Credit Rules, 2004.

3. The aforementioned show cause notice was decided vide the impugned OIO dated 10.7.2018, wherein the adjudicating authority dropped the demand in respect of valuation matter. However, in respect of the CENVAT credit wrongly availed, he confirmed the demand along with interest and imposed penalty equivalent to duty on both the appellants mentioned at Sr. No. 1 and 2, above.

4. Feeling aggrieved, all the appellants mentioned in the table above have filed this appeal on the below mentioned grounds:

Appellant mentioned at Sr. No. 1 and 2 above.

- that the appellant do inter unit transfer of raw materials during the year which is squared off at the end of financial year by raising commercial invoices;
- that there was excess supply of raw materials from Santej to Silvassa unit; that to square up the transactions the purchase was booked in the account of Silvassa unit by raising commercial invoice; that no goods were physically removed from Santej to Silvassa unit and hence the question of reversal of CENVAT credit does not arise;
- that they had received the goods on valid duty paying invoices which were in the name of Santej factory; that the goods on receipt were entered in the RG 23A part I register; that the goods were issued for production purpose; that the finished goods produced were cleared on payment of duty;
- that when two units of the same manufacturer, they cannot have malafide intention by not raising excisable invoices; that it is absolutely illogical to suggest that a manufacturer would transfer material so as to not allow their other unit to avail CENVAT credit;
- that they had also produced invoices wherein they had physically transferred goods to their other units on reversal of CENVAT credit;

- that merely relying on endorsement on the back of L/R to presume that goods were physically transferred, is not correct;
- that the transporters have given certificates of supply of goods to Santej unit; that the Chartered Accountant has also certified in this regard;
- that the department has not produced any evidence that the goods were transferred to Santej unit;
- that as the goods had to be purchased by Silvassa unit and delivered to Santej unit, the goods were directly received at Santej unit and were transferred in the account of Silvassa unit by raising commercial invoices;
- that the adjudicating authority has failed to give a finding on revenue neutrality;
- that extended period is not invocable;
- that demand for clandestine removal cannot be confirmed under excise law if some transactions are recorded on paper for availing higher loans from bank;
- that both the units are paying central excise duty substantially through PLA.

Appellant mentioned at Sr. No. 3[Departmental appeal]

- that the adjudicating authority erred in holding that that the facts are dis-similar to the facts of M/s. Roofit & Emco Limited;
- that the adjudicating authority erred in holding that it becomes property of buyer once it is embossed when there is a specific clause which prescribes that the goods shall be subject to approval /acceptance by the concerned consignee at the stores at site;
- that in the contracts it is specifically clear that the property is transferred at the buyers premises when the goods are accepted by the buyer and that is the point of sale;
- that place of removal is buyers premises & freight charges collected from the buyer for the transportation of goods from the factory to the buyers place is part of Transaction Value and therefore, requires to be included in the assessable value of the goods for payment of central excise duty;
- that the adjudicating authority erred in holding that the place of removal is factory gate and freight charges collected from the buyer is not includible in the assessable value.

5. Personal hearing in the case was held on 8.5.2019 and 13.12.2018 wherein Shri Nirav Shah, Advocate, along with Shri Pradip Mehta, appeared on behalf of the appellant mentioned at Sr. No. 1 and 2. The Learned Advocate reiterated the grounds of appeal. He explained the case and also pleaded revenue neutrality and non imposition of penalty and limitation. The learned Advocate also filed a written submission reiterating the grounds and relying on a catena of judgments to substantiate their case. The learned Advocate refered to para 22, 23, 32 and 33 of Ispat Industries Limited [2015(324) ELT 670(SC)]. He also referred to the case of Shashi Cables Ltd [2017(357) EKT 937 (Tri All)] wherein transportation charges are shown and collected separately. He also referred to page 23/24 to show the freight charges are separately shown. He further pleaded limitation being valuation matter which was in the knowledge of the department. He relies upon their own case Bharat Aluminium Corporation [old name] CESTAT Order No. A/2246-2249/WZB/AHD/2008 dated 29.9.2008 and submits the copy of the same and copy of OIA No. 183-187/2004. The Learned Advocate further submitted the copy of OIO No. 69/AC/SLV-II/OA/2004 dated 31.10.2004 passed by AC, Div II, Silvassa and copies of OIO No. 41-42/D/2008 dtd 12.3.2009, and 42/D/2008-09 dated 9.4.2009 passed by AC, Kalol Division, Ahmedabad-III. The appellant mentioned at Sr. No. 1 has also submitted written submissions dated 12.5.2019 with reference to the departmental appeal mentioned at Sr. No. 3 of the table above.

6. I have gone through the facts of the case, the grounds filed by the appellants and the oral submissions during the course of personal hearing. Two issues have to be decided. The first issue to be decided is whether the appellant has wrongly availed CENVAT credit of Rs. 18,65,514/- and whether he is liable to reverse the same in terms of Rule 3(5) of the CENVAT Credit Rules, 2004, along with interest. Further, I would also be examining whether the appellant mentioned at Sr. No. 2 is liable to for penalty or otherwise. The second issue in terms of the departmental appeal is the valuation aspect. Let me delve into the issue one after the other.

Wrong availment of CENVAT Credit on inputs

7. The allegation revolves around Rule 3(5) of the CENVAT Credit Rules, 2004, which states as follows:

> *Rule 3 CENVAT credit. —*
> *(5) When **inputs** or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 : Provided that such payment shall not be required to be made where any inputs [or capital goods] are removed outside the premises of the provider of output service for providing the output service :*
> *[Provided further that such payment shall not be required to be made where any inputs are removed outside the factory for providing free warranty for final products :]*

8. The adjudicating authority in para 8.4 has clearly mentioned that on the reverse side of LR consignment note there was an endorsement made to deliver material to Prem Conductors as the same has been sold to them by transfer documents; that there was another endorsement by Prem Conductors, Santej to deliver the materials to Prem Conductors, Silvassa; that M/s. Prem Conductors Silvassa had on the reverse side made an endorsement that they had received the goods. On this the adjudicating authority concluded that the appellant had sold the goods purchased from M/s. Hindalco [in the case that was examined] to their unit at Silvassa through commercial invoice by making endorsement on the reverse side of LR and these goods have been duly received by the Silvassa unit as can be seen from the endorsement made on the back side of the LR.

8.1 The appellant in his grounds has contested this finding by stating that there was excess supply of raw materials from Santej to Silvassa unit; that to square up the transactions, the purchase was booked in the account of Silvassa unit by raising commercial invoice; that no goods were physically removed from Santej to Silvassa unit and hence the question of reversal of CENVAT credit does not arise; that goods were received on valid duty paying invoices in the name of Santej factory; that the goods on receipt were entered in the RG 23A part-I register; that the goods were issued for production purpose; that the finished goods produced were cleared on payment of duty. This is exactly contrary to what is found in the LR wherein the adjudicating authority states that the appellants sister concern has on the reverse side made the endorsement that they had received material quantity of goods. If it was only a square off as is being stated by the appellant what was the necessity to make these endorsements in the LRs. If so be the case, the question of endorsements on LRs seems amusing.

8.2 The appellant has further stated that since two units of the same manufacturer are involved, they cannot have malafide intention by not raising excisable invoices; that it is absolutely illogical to suggest that a manufacturer would transfer material so as to not allow their other unit to avail CENVAT credit. The appellant has also very strongly stated that the adjudicating authority has ignored the certificates given by the transporter and the certificate issued by the Chartered Accountant. Had the appellant explained how the endorsements were made in the LR by their unit at Silvassa, the certificate could have been relied upon as corroborative evidence to substantiate their claim. This not being the case, I find that the adjudicating authority has correctly dealt with the issue.

8.3 The appellants in his additional written submissions dated 24.12.2018 received on 27.12.2018, has further stated that it is a well settled law that duty is required to be paid only in certain cases wherein there is actual removal of goods and not on accounting adjustment. The entry by M/s. Prem Conductors, Silvassa, on the reverse side of the LR that they had received the goods, negates the claim of the appellant that the goods were not removed. Further, the appellant has relied upon three judgements. Since the fact mentioned stands unsubstantiated and incorrect, I do not understand how the said case laws would help the appellant.

8.4 But after having said so, I find that the appellant has stated that the demand itself is **revenue neutral** because had the excisable invoices been issued by their sister concern they would have been eligible for availing the CENVAT Credit. The appellant has quoted four case laws to substantiate his claim of revenue neutrality. One of the cases relied upon by the appellant, M/s. Anglo French Textiles [2018(360) ELT 1016], states as follows:

> *5. On considering the fact that the goods are cleared to the sister unit and also the fact that the appellant is eligible for credit on the duty paid, the entire exercise is a revenue neutral situation as contended by the Learned Counsel for the appellant. This being the case, even if the appellant is directed to pay duty, other sister unit would be eligible for the credit. In the case of Jay Yuhshin Ltd. (supra), in a similar situation, the Larger Bench of the Tribunal has held that when there is revenue neutrality, the demand of duty is unsustainable.*

This judgement was appealed by the department before the Hon'ble Supreme Court of India. While dismissing the appeal, the Supreme Court passed the following order:

> *"1. Delay condoned.*
> *2. Heard the Learned Counsel for the appellant.*
> *3. Having perused the order of the Customs, Excise and Service Tax Appellate Tribunal, we are of the view that the finding on point of revenue neutrality has been correctly arrived at by the learned Tribunal. We, therefore, do not entertain the present appeal. The appeal is accordingly dismissed."*

The issue is no longer *res integra*. Following the directions of the Hon'ble Supreme Court in Kamlakshi Finance Corporation Ltd. [1991 (55) ELT 433 (SC)] and Lubi Industries LLP [2016 (337) ELT 179 (Guj.)], I find that the impugned OIO disallowing the CENVAT credit, and demanding it along with interest and further imposing penalty on the appellants mentioned at Sr. No. 1 and 2 of the table in para 1, needs to be set aside. Accordingly, the appeal filed by the appellants mentioned at Sr. no. 1 and 2 is also allowed.

Valuation Aspect [Departmental appeal]

9. The next issue to be decided is the **valuation aspect**. CERA's objection as mentioned in the impugned OIO [para 2.1] is that for the period from 2011-12 to 2017-18, the appellant mentioned at Sr. No. 1 of the table supra, had collected Rs. 4,20,03,969/- from various buyers as freight charges for delivery of goods at their doors; that the orders were of FOR destination; that the appellant mentioned at Sr. No. 1, recovered the cost of transportation on the excise invoice from such customers separately; that since the place of removal were the door of the customers, freight charges would form part of transaction value and duty should have been discharged accordingly; that duty of Rs. 49,76,818/- leviable on freight so collected, was not paid.

9.1 The adjudicating authority dropped the demand by relying on [a]circular no. 1065/4/2018-Cx dated 8.6.2018, and [b]para 13 of the judgement of the Hon'ble Supreme Court in the case of M/s. Roofit Industries[2015(319)ELT 221(SC)], and [c] by examining the contract on 8 parameters to ascertain whether the contract for sale is an FOR contract in the circumstances identical to the judgment in the case of Roofit Industries Ltd, Ispat Industries Ltd [2015(324) ELT 670(SC)]. The adjudicating authority further concluded that in the present dispute, the contract is FOR contract but the terms and conditions of the contract were not identical /similar to the terms & conditions of contact discussed in the case of Roofit Industries and Emco Ltd and there were many dissimilarities such as test report of goods were to be supplied before commencement of supply, the goods were to be inspected prior to its dispatch and embossed/engraved with the remarks as buyers property which stipulate that the goods were under the ownership of the buyer at the time of dispatch itself; that transportation charges were not part of ex-works price; that 80% payment were to be made by the buyer within 30 days against TRC and remaining 20% of the payment within 45 days after receipt of goods in correct order and in good condition at site duly inspected and certified; that these conditions clearly distinguish the present case with the case of Roofit Industries Ltd and Emco Ltd; that in the present case the sale of goods take place in the factory gate of the appellant and not at the place of the buyer; that transportation charges were charged separately in the invoice as per the purchase order ; that the allegation that the goods were sold under section 24 of the sale of goods act, 1930 is also not correct; that transportation charges actually incurred on such sales should form part of the Transaction Value in terms of explanation 2 of Rule 5 of the Central Excise Valuation (Determination of price of excisable goods) Rules, 2000 is not sustainable.

9.2 The departmental appeal on the other hand states that:

- the adjudicating authority committed gross errors in referring to only one sample copy of contact whereas there are two sample contracts involved in the present case; that both are similar worded;
- that in respect of contract dated 16.7.2015, Para 48. which deals with prices clearly states that prices are inclusive of packing and forwarding charges and that prices are inclusive of inland road freight charges and that goods shall be dispatched freight paid. Further, as far as payments are concerned, it is clear that inspection and certification at site is a precedent condition for making the payment which is very identical to the circumstances in case of M/s. Roofit;

- that in terms of PGVCL clause no. 17 and UGVCL clause no. 19, the acceptance of material at site is concerned, the conditions of the present case are identical to the facts of M/s. Roofit Industries Ltd;
- that adjudicating authority erred in holding that property is transferred to the buyer once the embossing or engraving is done; that the embossment is an instruction for marking goods during manufacture and therefore it cannot be concluded that when such marking has been made during manufacturing the goods property in the goods have been transferred to the buyer from that point of time;
- that on going through the clauses of contract it is evident that the property is transferred at the buyers premises when the goods are accepted by the buyer and that is the point of sale.

10. On going through the extracts of contract reproduced in the Review Order, I find that contract agreement dated 16.7.2015, under clause 26 read with clause 48, it is clearly stated that the prices are **inclusive of inland road freight.** However, this not considered [refer table in para 7.10 of the impugned OIO]. The departmental appeal does not enclose the contract agreement and therefore, I am not in a position to consider the grounds raised in the same. Even otherwise, the demand is not bifurcated on the basis of contract. Therefore, in the interest of justice it would be appropriate to remand back the matter to the adjudicating authority to pass an appropriate order in the **Valuation matter** after following the principles of natural justice and taking the clauses of both the sample contracts into account. Needless to state, the grounds raised in the departmental appeal should also be addressed while deciding the issue. The appellant mentioned at Sr. No. 1 is free to produce all the relied upon judgements submitted with the appeal papers before the adjudicating authority. The adjudicating authority while giving his findings will considering the defence and all the relied upon cases relied upon by the appellant.

13. The impugned order of the adjudicating authority is set aside, in so far the impugned OIO sets aside of the demand of Rs. 49,76,818/- and the matter is remanded to the adjudicating authority for compliance of directions as mentioned *supra*.

14. In view of the foregoing the appeals filed by the appellant mentioned at Sr. No. 1 and 2 is allowed and the departmental appeal is ~~partly~~ allowed by way of remand.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

15. The appeal filed by the appellants stands disposed of in above terms.

(उमा शंकर)
प्रधान आयुक्त (अपील्स)

Date : 23 .5.2019
Attested

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

M/s. Prem Conductors Private Limited, Block No. 210, Santej Vadsar Road, Santej, Gandhinagar.
Shri Pradip A Mehta, Director M/s. Prem Conductors Private Limited, Block No. 210, Santej Vadsar Road, Santej, Gandhinagar.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Gandhinagar Commissionerate.
3. The Assistant Commissioner, Central Tax Division- Kalol, Gandhinagar Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Gandhinagar Commissionerate.
5. Guard File.
6. P.A.