# आयुक्त(अपील )काकार्यालय,

**Office of the Commissioner (Appeal),**

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद

**Central GST, Appeal Commissionerate, Ahmedabad**

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136


NATION TAX MARKET

**DIN :20211064SW0000222CCD**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/228/2021 / 4000 TO 4004

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-40/2021-22**
दिनाँक Date : **08-10-2021** जारी करने की तारीख Date of Issue 21.10.2021

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No.**DC/D.Khatik/16/CEX/Kadi** दिनाँक:**13.10.2020** issued by Deputy Commissioner, CGST& Central Excise, Division Kadi, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s Electrotherm India Ltd
Survey No. 72, Village Palodia,
Tal. Kalol

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 शुल्कअधिनियम, 1994 की धाराअततनीचेबताए गए मामलों के बारेमेंपूवोक्त धाराको उप--धारा के प्रथमपरन्तुक के अंतर्गतपुनरीक्षणआवेदन अधीनसचिव, भारतसरकार, वित्तमंत्रालय, राजस्वविभाग, चौथीमंजिल, जीवन दीपभवन, संसदमार्ग, नईदिल्ली : 110001 को की जानीचाहिए।

(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) यदिमालकीहानि के मामलेमेंजब ऐसीहानिकारखानेसेकिसीभण्डागार या अन्य कारखानेमें या किसीभण्डागारसेदूसरेभण्डागारमेंमाललेजातेहुए मार्गमें, या किसीभण्डागार या भण्डारमेंचाहेवहकिसीकारखानेमें या किसीभण्डागारमेंहोमालकीप्रकिया के दौरानहुईहो।

(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.

(क) 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।

(A) 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.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जोडयूटीकेडिटमान्य की गईहैऔर ऐसेआदेशजोइस धारा एवंनियम के मुताबिकआयुक्त, अपील के द्वारापारित वो समय पर या बादमेंवित्तअधिनियम (नं.2) 1998 धारा 109 द्वारानियुक्तकिए गए हो।

(c) 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 अंतर्गतविनिर्दिष्टप्रपत्र संख्या इए–8 मेंदोप्रतियोंमें, प्रेषितआदेश के प्रतिआदेशप्रेषितदिनाँकसेतीनमास के भीतरमूल–आदेश एवंअपीलआदेश की दो–दोप्रतियों के साथउचितआवेदनकियाजानाचाहिए।उसकेसाथ खाता इ.कामुख्यशीर्ष के अंतर्गत धारा 35–इ मेंनिर्धारितफी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रतिभीहोनीचाहिए।

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) रिविजनआवेदन के साथजहाँ संलग्नरकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीसभुगतान की जाए औरजहाँ संलग्नरकम एक लाख सेज्यादाहोतो 1000/– की फीसभुगतान 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 एवंसेवाकरअपीलीय न्यायाधिकरण के प्रतिअपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्कअधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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

(क) उक्तलिखितपरिच्छेद 2 (1) क मेंबताए अनुसार के अलावा की अपील, अपीलो के मामलेमेंसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबादमें2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 होत हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको ऍक आवेदन किया जातां 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रू.6.50 पैसेकान्यायालय शुल्कटिकटलगाहोनाचाहिए।

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

(5) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(18) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

(i) *(Section)* खंड 11D केतहतनिर्धारितराशि;
(ii) लियागलतसेनवैटक्रेडिटकीराशि;
(iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

⇨ **यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(xxxvii) amount determined under Section 11 D;
(xxxviii) amount of erroneous Cenvat Credit taken;
(xxxix) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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।

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

The present appeal has been filed by M/s. Electrotherm (India) Ltd, Survey No.72, Village: Palodiya, Kalol-Godhavi, Gandhinagar, Gujarat-382115 (hereinafter referred to as the appellant) against Order in Original No. DC/D.KHATIK/16/CEX/KADI dated 13-10-2020 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST & Central Excise, Division-Kadi, Commissionerate Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant was having Central Excise Registration No. AAACE2669LXM001 for manufacturing of excisable goods viz. Induction Melting Furnace and Transformers falling under Chapter 85 of the Central Excise Tariff, 1985. During the course of CERA Audit of the records of the appellant, it was found that they, as a part of a group of companies located under different jurisdiction, including one unit at Kutch (hereinafter referred to as Kutch Unit) which manufactures 'Yo-Bike' and were availing exemption under Notification No. 39/2001-CE dated 31.07.2001 which provides for refund of duty paid through PLA. The appellant had received spares/parts of 'Yo-Bike' from the Kutch Unit, who had originally imported the same, and cleared as such to the appellant under the provisions of Rule 3 (5) of the Cenvat Credit Rules, 2004. The appellant cleared the spares/parts, after re-packing, on payment of duty under Section 4A of the Central Excise Act, 1944. During the F.Y. 2010-11 & 2011-2012, the Kutch Unit had passed on the credit amounting to Rs.16,53,556/- to the appellant, which constitutes approximately 40% portion of SAD availed on the spares/parts. It appeared to the audit officers that the said goods had been transferred to the appellant with an intention to pass on maximum Cenvat Credit from Kutch Unit so that the whole Cenvat Credit can be utilized and subsequently maximum refund of duty paid through PLA also can be claimed.

2.1 The Cenvat Credit of the duty or service tax paid on the inputs or services used in the manufacture of final products cleared after availing exemption under Notification No. 39/2001-CE dated 31.7.2001 shall be utilized only for payment of duty on final products in respect of which exemption under the said notification is availed. It appeared that the appellant had wrongly cleared inputs as such despite the provision of the said notification being known to them that such clearance was barred. Therefore, the appellant was issued a notice dated 29.04.2015 seeking to recover the Cenvat Credit amount of Rs.16,53,656/-, wrongly availed by them, under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 by invoking the extended period of limitation under Section 11A of the Central

Excise Act, 1944. The notice also proposed imposition of penalty under Rule 15 (2) of the CCR, 2004 read with Section 11AC of the CEA, 1944.

3. The said Show Cause Notice was adjudicated vide the impugned order wherein :

I. The demand of Rs.16,53,656/- was confirmed under Rule 14 of the CCR, 2004 read with Section 11A (4) of the CEA, 1944;

II. Interest was ordered to be recovered under Rule 14 of the CCR, 2004 read with Section 11AA of the CEA, 1944;

III. Penalty of Rs.16,53,656/- was imposed under Rule 15 (2) of the CCR, 2004 read with Section 11AC of the CEA, 1944;

4. Being aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

A. The impugned order refers to Notification No. 39/2001-CE without showing what is the point arising out of this notification. They have never claimed this notification nor was it available to them.

B. Rule 12 of the CCR, 2004 has been referred and it is stated that this rule restricts the credit. This is the enabling rule permitting credit despite exemption. How this rule is read to imply restriction is beyond comprehension.

C. It is stated in the impugned order that Kutch Unit cannot clear inputs as such. This observation has no basis in law. The entire area based exemption nowhere provides any such restriction.

D. It is also stated in the impugned order without any basis in law that the appellant is not supposed to avail credit. It is also stated, by relying upon Rule 9 (5) of the CCR, 2004 that the appellant was aware that Kutch Unit was availing area based exemption; the inputs was meant for use by the Kutch Unit and it is concluded that there was incorrect refund benefit. However, inputs removed as such are never subject to refund under area based notification.

E. The notice issued to them refers to the provisions of CCR, 2004 particularly with reference to Notification No. 39/2001. The benefit of the said notification was availed by their Kutch Unit to whom the notice is not addressed. Though the grounds of the notice appears that the Kutch Unit had wrongly cleared the inputs as such by utilizing the credit, the notice is not issued to Kutch Unit but to them. They had neither claimed the benefit

of Notification No. 39/2001 nor is there any allegation of wrong removal or utilization of spare parts.

F. The notice has not given grounds or basis for demand qua Palodiya Unit. The error, if any, at Kutch Unit cannot be the basis for demand at Palodiya unit. The Palodiya unit had received the goods under proper excise invoices and nothing is shown as to why the credit is incorrect or inadmissible at Palodiya unit. Thus, the very basis for demand is absent.

G. The observation on merit even in respect of the Kutch unit is incorrect. The CCR, 2004 provides for utilizing the credit for payment of duty. This condition is conditional as it is only in respect of credit paid on inputs utilized in the manufacture of final products cleared after availing exemption. The proviso to Rule 3 (4) of the CCR, 2004 applies only to credits relating to those inputs utilized in the manufacture of goods. In the present case the inputs were cleared as such and the CCR, 2004 clearly permits removal of inputs as such and also permits utilizing credit for reversing the credit availed on inputs removed as such. The inputs removed as such never go in to manufacture of goods under exemption and therefore, the condition of utilizing credit on such inputs does not apply.

H. The Kutch unit was availing exemption under Notification No. 39/2001 dated 31.7.2001 and as per clause (vi) of the said notification, the benefit was only for a period of five years from the date of commencement of commercial production by the unit. The Kutch unit had commenced production on 11.04.2005. Accordingly, it has stopped availing benefit of the said notification upon expiry of five years on 10.4.2010, whereas the demand is for the period 2010-11 and 2011-12. Thus, the very basis even for the Kutch unit is not correct. This fact was also disclosed in reply to the audit objection.

I. They are recipient of the inputs under proper duty paying documents. The inputs after repacking and MRP fixation were cleared on payment of duty under Section 4A. There appears to be no objection in the notice regarding availment of credit other than the presumed incorrect removals by their supplier Kutch Unit.

J. If there is any objection regarding payment of duty by the supplier unit it has to be taken at the supplier's end and not at the receiver's end. However, there is no objection at the supplier's end.

K. The objection is restricted to 4% SAD and no reason is shown why the credit of SAD is incorrect. In the absence of any such reason, no demand can be confirmed.

L. The notice dated 29.04.2015 is barred by limitation as it covers the period 2010-11 and 2011-12 which is beyond the normal period of limitation. The disclosures required by law were made. There was no suppression.

M. When the demand cannot be sustained and barred by limitation, penalty could not be imposed.

5. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri S.J.Vyas, Advocate, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum and in the course of the personal hearing as well as evidences available on record. I find that the issue to be decided is the admissibility of Cenvat Credit availed by the appellant in respect of the spares/parts cleared as such by their Kutch Unit.

6.1 I find that one of the grounds on which the impugned order has denied the Cenvat Credit to the appellant is that the Kutch Unit is availing the benefit of exemption under Notification No. 39/2001-CE dated 31.07.2001. In this regard, I find that benefit of exemption under the said notification was for a period not exceeding five years from the date of commencement of commercial production by the unit. I further find that the appellant have contended that their Kutch Unit commenced production on 11.04.2005 and had stopped availing the benefit of the said notification upon expiry of five years on 10.04.2010. However, the adjudicating authority has in the impugned order not recorded any finding in this regard and nor has this fact been controverted in the impugned order. Therefore, I am of the view that the adjudicating authority has erred in ordering denial and recovery of Cenvat Credit on this very ground itself.

6.2 I also find force in the contention of the appellant that even if the Kutch Unit was availing exemption under the said Notification No. 39/2001-CE dated 31.07.2001 and the clearance of inputs as such was not proper, the corrective action would have to be taken at the end of the Kutch Unit and there is no cause for action at the appellant's end.

7. I further find that Cenvat Credit is sought to be denied to the appellant on the strength of Rule 12 of the CCR, 2004. The said rule provides for a special dispensation in respect of inputs manufactured in factories located in specified areas of North East region, Kutch district of Gujarat, State of Jammu and Kashmir and State of Sikkim. In terms of the said rule, Cenvat Credit is admissible on inputs and capital goods as if no portion of the duty paid on such inputs or capital goods was exempted under any of the

notification referred to in the said Rule. Simply stated, in terms of this rule, Cenvat Credit is fully admissible to the receiving unit even if the manufacturer is getting the benefit of exemption by way of refund of some part of the duty paid thereon.

7.1 I find that the said Rule 12 of the CCR, 2004 has no applicability to the issue involved in the present case. However, the adjudicating authority has in the impugned order, erroneously concluded that the said rule restricts the availment of cenvat credit on inputs or capital goods when any exemption of duty was availed. This conclusion of the adjudicating authority is unjustified and not legally tenable.

8. I find that the fact of the appellant receiving duty paid spare/parts from the Kutch Unit under proper duty paying documents is not under dispute and neither is there any dispute regarding their entitlement to Cenvat Credit, other than on the grounds recorded in the impugned order. I am, therefore, of the considered view that the adjudicating authority has erred in denying Cenvat Credit to the appellant

9. In view of the above discussions, I set aside the impugned order for being not legal and proper and allow the appeal filed by the appellant.

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

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

( Akhilesh Kumar )
Commissioner (Appeals)

8th October, 2021.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

Date: .10.2021.

BY RPAD / SPEED POST

To
M/s. Electrotherm (India) Ltd,
Survey No.72, Village: Palodiya
Kalol –Godhavi,
Gandhinagar, Gujarat – 382 115.

Appellant

The Assistant Commissioner,
CGST, Division : Kadi
Commissionerate : Gandhinagar

Respondent

Copy to:

1) The Chief Commissioner, Central GST, Ahmedabad Zone.
2) The Commissioner, CGST, Gandhinagar.
3) The Assistant Commissioner (HQ System), CGST, Gandhinagar.
   (for uploading the OIA)
4) Guard File.
5) P.A. File.