आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN: 20221164SW0000318344

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/641/2022-APPEAL /4400 – 4404

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-51/2022-23**
दिनाँक Date : **31-10-2022** जारी करने की तारीख Date of Issue 03.11.2022

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

ग Arising out of Order-in-Original No. **04/AC/DEMAND/2021-22** दिनाँक: **26.07.2021**, issued by Deputy/Assistant Commissioner, CGST, Division-I, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Ambalal Sarabhai Enterprise Ltd.,
   89-92, Naroda Industrial Estate, Naroda,
   Ahmedabad – 382330

2. Respondent
   The Deputy/ Assistant Commissioner, CGST, Division-I, Ahmedabad North ,Ground Floor, Jivabhai Mansion Building, Aashram Road, Ahmedabad - 380052

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 अजत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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) यदिं 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.

(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 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।

(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 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–बी/35–इ के अंतर्गतः–

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

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,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 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 notwithstanding 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 a court fee stamp of Rs.6.50 paise 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

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:

(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.

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. Ambalal Sarabhai Enterprise Ltd., 89-92, Naroda Industrial Estate, Naroda, Ahmedabad – 382330 (hereinafter referred to as "the appellant") against Order-in-Original Number 04/AC/DEMAND/2021-22 dated 26.07.2021 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST & Central Excise, Division I, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the fact of the case is that the appellant is engaged in the manufacturing of various Instruments and apparatus for physical or chemical analysis or measuring surface etc., Electrical Machines & Apparatus, etc. falling under Chapter 90 and 85 of Central Excise Tariff Act, 1985 and holding Central Excise Registration No. AABCA6893KXM002. They were availing Cenvat Credit of duty paid on input and input services used for the manufacture of the finished goods. During the course of audit of records of the appellant, it was observed that the appellant had taken Service Tax credit on courier services paid to courier service provider namely, M/s. XPS Courier, M/s. Gati Courier and SAFEX Express (P) Ltd. The said courier service providers took delivery of the finished goods from the factory. The audit observed that the Service Tax on outward courier services paid to the courier service provider is not admissible as per Rule 2(l) of the Cenvat Credit Rules, 2004. The jurisdiction Range Superintendent vide summons dated 20.07.2007, personal visit dated 25.07.2007 and letter dated 06.09.2007 asked them to give the details of Cenvat Credit taken on Service Tax paid on courier service, however, the appellant failed to give the details. Therefore, a Show Cause Notice No. V/18-4/Dem/07 dated 11.10.2007 was issued to the appellant proposing recovery of Cenvat Credit of Service Tax amount of Rs. 1,30,596/- and Ed. Cess on Service Tax of Rs. 3,709/- under Rule 14 of CCR, 2004 read with Sub-Section (1) of Section 11A of CEA, 2004 along with interest under Rule 14 of CCR, 2004 read with Section 11AB of CEA, 2004 and also proposing penal action under Rule 15(2) of the CCR, 2004 read with Section 11AC of the CEA, 2004.

2.1 The said SCN dated 11.10.2007 was adjudicated vide Order-in-Original No. 03/AC/D-08 dated 12.05.2008 by the Assistant Commissioner, erstwhile Central Excise, Division-I, Ahmedabad-II. who ordered for recovery of Service Tax credit of Rs. 1,30,596/- and Ed. Cess of Rs. 3,709/- along with interest at prescribed rate and also imposed the penalty of Rs. 1,34,305/- on the appellant.

2.2 Being aggrieved with the said OIO dated 12.05.2008, the appellant preferred appeal before the Commissioner, (Appeals), Ahmedabad. The Commissioner (Appeals), Ahmedabad vide OIA No. 108/2008(AHD-II)/CE/SBS/Commr(A)/Ahd dated 17/19.08.2008 dismissed the appeal filed by the appellant.

2.3 Being aggrieved, the appellant filed an appeal before the CESTAT, Ahmedabad against the order passed by the Commissioner (Appeals), Ahmedabad. The CESTAT, Ahmedabad vide

Order No. A/74/WZB/AHD/2009 dated 02.01.2009 remanded the matter to the Original Adjudicating Authority for giving the opportunity to the appellant to submit details of transactions and also to present their case.

2.4 The case was transferred to call book as department had filed Tax Appeal No. 2527/2010 and No. 2391/2010 before Hon'ble High Court of Gujarat against the order of CESTAT in the case of M/s. Macro Polymers & AIA Engineering respectively and in the case of appeal filed before Hon'ble Supreme Court in respect of M/s. Adani Enterprise, Civil Appeal No. 13853-13859/2015.The case was retrieved from Call Book as the case of M/s. Macro Polymers & AIA Engineering was dismissed by the Hon'ble High Court of Gujarat and the same has been accepted by the department on monetary limit ground. The case of M/s. Adani Enterprise Ltd., was disposed by the Supreme Court.

2.5 During the denovo proceeding, the adjudicating authority passed the impugned order and confirmed the demand and order for recovery of Cenvat Credit of Service Tax credit of Rs. 1,30,596/- and Ed. Cess of Rs. 3,709/- under Rule 14 of CCR, 2004 read with Section 11A of CEA, 2004 along with interest under Rule 14 of CCR, 2004 read with Section 11AB of CEA, 2004 and also impose penalty of Rs. 1,34,305/- under Rule 15(2) of the CCR, 2004 read with Section 11AC of the CEA, 2004.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on 21.09.2021 on the following grounds under their Appeal Memorandum:

- Under the facts and circumstances of the case, the OIO passed by the Ld. Assistant Commissioner is bad in law and deserves to be quashed and set aside

- The goods were manufactured by the Appellant at the factory of production at Ahmedabad. The manufactured goods were then cleared on payment of duty from the factory. They were either dispatched to the customer's premises or to the godown/ office of the concerned transporter/ courier situated in the particular city/ district as instructed by the customers or to the branches of the Appellant from where they were delivered to either of such places as per arrangement or understanding with the customers (In case of supply of goods on FOR basis, it is common business practice that goods are to be delivered to the office / godown of concerned transporter / courier which may be nearer to the place of business of customers or which may be convenient to customers to lift the goods.). In case the goods were transported to the concerned transporter/ courier situated in the particular city/ district, the customers had to arrange for the transportation of goods from the office/godown of the transporters/ couriers to their desired place. The place of destination of the goods was the Appellant's branches/ office /godown of concerned transporter / courier or customer's premises, as the case may be.

- In all the above cases, the supply to customers was made on FOR basis, i.e., Freight on Road basis, meaning that the price charged by the Appellant from their clients was inclusive of transportation charges (transportation till the place of destination specified by the customers). The amount of freight was not charged separately from the clients but was inbuilt in the sales price. This can be established from the sample copies of the purchase orders from customers which are submitted by the appellant and also from the sample copies of the invoices raised by the Appellant on their customers which are also submitted by the appellant along with appeal memorandum.

- In case of all the buyers including M/s. GHCL, M/s. GSR Products Limited and M/s. Shriram Rayons, the transit insurance for the journey of goods from the place of factory of production to the place of destination specified by the customers was the responsibility of the Appellant. It was taken by the Appellant at their own cost in order to protect the goods from any kind of unavoidable circumstances.

- It is mentioned in the various above-mentioned Purchase Orders itself that the contract between the Appellant and the buyer was on FOR basis. The Assistant Commissioner himself has observed that the various contracts are on FOR basis.

- Apart from the above-mentioned Purchase Orders, there are various other Purchase Orders wherein it is mentioned that the contract between the Appellant and the buyer was on FOR basis and also that the transit insurance upto the place of destination was the responsibility of, and had been borne by, the Appellant. The copies of such Purchase Orders submitted by the them along with appeal memorandum.

- Since contract of supply of goods was on FOR basis, the property in the goods was transferred to the customers only when goods were delivered to them at the place of destination specified by them and not when the goods left factory of production at Ahmedabad.

- The transit insurance for the journey of goods from the place of factory of production to the place of destination specified by the customers was the responsibility of the Appellant. It was taken by the Appellant at their own cost in order to protect the goods from any kind of unavoidable circumstances. This also clearly establishes that the ownership of the goods belonged to the Appellant till the place of destination

- A copy of declaration from a customer of the Appellant that the relevant contract was on FOR basis, no separate charges were charged by the Appellant towards transportation cost and the transit insurance for the journey of goods was the responsibility of the Appellant is enclosed along with appeal memorandum.

- Thus, the Appellant continued to be the owner of the goods till the goods were delivered at the place of destination as specified by the customers. The ownership of the goods was transferred only when the goods were delivered at the place of destination. Therefore, contract of sale of goods was complete only when the goods were delivered at the place of destination by the Appellant and not before that.

- The Appellant referred Para 3 & 4 of the Circular No.1065/4/2018-CX dated 08/06/2018 issued by the CBIC and submitted that the Place of removal is the place of destination as specified by the customers in their case.

- The Appellant referred Para 8.2 of the Circular no. 97 /8/2007-CX dated 23.08.2007 issued by the CBEC and submitted that it is a settled law that in a case where the manufacturer is contractually responsible to deliver the goods at the place of destination specified by the customer and to bear the cost of transportation, i.e., the sale is on FOR basis, the place of removal is such delivery point and not the factory of production.

- The Appellant referred the definition of the term "input service" provided under Rule 2(l) of CENVAT Credit Rules, 2004, which provides that "input service" means any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal and includes services used in relation to outward transportation upto the place of removal. The phrase "from the place of removal" in the "means" part of the definition was substituted with "upto the place of removal" with effect from 01/04/2008. They submitted that the above definition very categorically provides that input service includes services used in relation to outward transportation upto the place of removal. Had the legislature intended to exclude services of outward transportation, they would not have used the words "outward transportation upto the place of removal" in Rule 2(l). Thus, Rule 2(l) itself covers within its ambit services of outward transportation upto the place of removal as input services.

- In the instant case, cenvat credit taken by Appellant pertains to outward transportation of goods from factory to place of removal, i.e. the Appellant's branches/ office / godown of concerned transporter / courier or customer's premises, as the case may be. Therefore, having regard to provisions of Rule 2(1), Appellant is entitled to take cenvat credit of service tax paid in respect of outward transportation of goods from factory to the Appellant's branches/ office / godown of concerned transporter / courier or customer's premises, as the case may be.

- Reliance is placed on the Order dated 21/04/11 passed by the Hon'ble High Court of Gujarat in the Appellant's own case pertaining to the same matter. A copy of the said Order is submitted by the appellant along with appeal memorandum.

- The Appellant relies on the following case laws in support of their aforesaid arguments:

(a) M/S ULTRA TECH CEMENT LTD. VERSUS CCE & ST, ROHTAK 2014 (10) TMI 679 - CESTAT NEW DELHI
(b) M/S AK AUTOMATICS I, III M/S NICKS INDIA TOOLS, M/S MIRCRO TURNERS VERSUS C.C.E. & S.T. -ROHTAK, LUDHIANA 2018 (11) TMI 1603 - CESTAT CHANDIGARH
(c) COMMISSIONER OF CENTRAL EXCISE, AHEMEDABAD- II VERSUS M/S CADILA HEAL TH CARE LTD. 2013 (1) TMI 304 - GUJARAT HIGH COURT
(d) COMMISSIONER OF C. EX. & CUSTOMS VERSUS PARTH POLYWOOVEN PVT. LTD. 2011 (4) TMI 975 - GUJARAT HIGH COURT
(e) SHAILYENGINEERING PLASTICS LTD VERSUS C.C.E. & S.T. VADODARA-II 2021 (6) TMI 27- CESTAT AHMEDABAD
(f) THE COMMISSIONER, CENTRAL GOODS AND SERVICE TAX VERSUS M/S. ULTRATECH CEMENT LTD. 2020 (3) TMI 1206 - GUJARAT HIGHCOURT
(g) M/S ULTRATECH CEMENT LTD. VERSUS C.C.E. KUTCH~(GANDHIDHAM)'2019 (2) TMI 1487 - CESTAT AHMEDABAD
(h) M/S. JAYANT AGRO ORGANICS LTD. VERSUS C.C.E. & S.T., VADODARA-I 2019 (11) TMI 1123 - CESTAT AHIIEDABAD
(i) M/S RR KABEL LIMITED VERSUS C.C.E. & S.T. SILVASSA 2019 (11) TMI 1122 - CESTAT AHMEDABAD
(j) M/S ULTRATECH CEMENT LTD. VERSUS CC, CE & ST, HYDERABAD 2016 (7) TMI 594 - CESTAT HYDERABAD

- Under the OIO dated 26/07/21, the Assistant Commissioner in Para 15 relied upon the Hon'ble Supreme Court Judgment in Civil Appeal No. 11261 of 2016 in this regard the appellant submitted that after the above judgment, the CBIC had issued Circular No.1065/4/2018-CX dated 08/06/2018 and considering the said board circular vis-a-vis the Hon'ble Supreme Court judgment, the Hon'ble CESTAT Ahmedabad had passed the judgment in the case of Ultra Tech Cement M/S ULTRATECH CEMENT LTD. VERSUS C.C.E. KUTCH (GANDHIDHAIM) 2019 (2) TMI 1487 - CESTAT AHMEDABAD and the above judgement was upheld by Hon'ble Gujarat High court vide THE COMMISSIONER, CENRTAL GOODS AND SERVICE TAX VERSUS /s. UL TRATECH CEMENT LTD. 2020 (3) TII 1206 GUJARAT HIGH COURT. Therefore, the Assistant Commissioner has failed to appreciate that the view taken in the Hon'ble Supreme Court judgement in Civil Appeal No. 11261 of 2016, filed by COMMISSIONER OF CENTRAL EXCISE SERVICE TAX VERSUS ULTRA TECH CEMENT LTD. is no longer valid.

- Invocation of extended period under section 11A of the act is incorrect and bad in law. The SCN nowhere speaks about which of various acts of commissions or omissions have been committed by the Appellant justifying invocation of larger period. It is not the case of suppression offacts or any willful misstatement with any intention to evade paymentof duty.It is also significant to note that Revenue has never alleged anysuppression of facts with intent to evade payment of duty at any time.

- The Assistant Commissioner has imposed penalty under Rule15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. It is submitted that for imposing penalty, there should be an intention to evade payment of duty on the part of the Appellant supported by documentary evidences. The Appellant submits that they have always been under the bonafide belief that the relevant cenvat credit had been legitimately availed. There was no intention to avail wrong cenvat credit. Therefore, no penalty is imposable in the present case.

4. Subsequently, the appellant submitted additional submission on 12.09.2022 vide their letter dated 09.09.2022, wherein they inter alia submitted the following grounds :

- Copy of the CA certificate issued by the appellant's statutory auditor, certifies that with regard to the period under dispute, for all the transactions of the appellant with their customers pertaining to analytical instruments, freight was included in price of goods and formed integral part of assessable value.
- Copy of declaration made by customers of the appellant stating that the relevant contracts were on FOR basis, no separate charges were charged by the appellant towards transportation cost and transit insurance for the journey of goods was the responsibility of the appellant.
- The appellant requested to set aside the impugned order passed by the adjudicating authority.

5. Personal hearing in the case was held on 26.09.2022. Shri Arjun S. Akruwala, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum and submitted copies of judgement in support of his contention.

6. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum & in additional submission dated 09.09.2022 and documents available on record. The dispute involved in the present appeal relates to availment of Cenvat Credit on Service Tax paid by the appellant on courier services paid to courier service provider, viz. M/s. XPS Courier, M/s. Gati Courier and SAFEX Express (P) Ltd., for delivery of the finished goods from the factory of the appellant. The adjudicating authority had confirmed the demand observing that the appellant have not submitted any transactions details as admitted before Hon'ble CESTAT, and confirmed the demand disagreeing with the defence given by the appellant that they have transported the goods on FOR basis alone. The adjudicating authority also did not agree with the contention of the appellant that the freight and insurance have been paid by them and that the property was not transferred to the buyers and the appellant held the ownership of the goods till it reached the buyers premises. The adjudicating authority while confirming the demand also relied upon the Hon'ble Supreme Court judgment in Civil Appeal No. 11261 of 2016, in the case of the Commissioner of Central Excise Service Tax Versus Ultra Tech Cement Ltd.

7. I find that the impugned order has been passed in the remand proceeding ordered by Hon'ble CESTAT, Ahmedabad vide Order No. A/74/WZB/AHD/2209 dated 02.01.2009. In the said Order, the CESTAT has held that

"3. I find that in this case the basic issue is the determination of place of removal. According to the instructions issued by CBEC vide F.No. 137/85/2007-CX.4 dated 23.08.2007, (Circular No. 97/8/2007) the credit is available if the service tax is paid on transportation service up to the place of removal. The Board has also clarified that the determination of place of removal depends upon the nature of transaction and the stage where the property in the goods passes to the buyer. The learned C.A. fairly admitted that the primary issue that is determination of place of removal has not been made by both the sides. Branches and consignment agents, as per the provisions of Section 4 of Central Excise Act, are recognized as places of removal. In terms of Board's instruction also credit of service tax would be admissible if the price is inclusive of transportation cost up to the place of removal. This aspect has not been considered at all. With the consent of both the sides, the matter is reminded to the Original Adjudicating Authority to decide the place of removal in respect of different types of transactions and decide the admissibility or otherwise of CENVAT credit on the basis of instructions issued by the Board and other decisions as applicable. Further the learned C.A. also admitted that the appellant should be required to give details of amount involved in category wise transactions and he would be submitting the same. The Original Adjudicating Authority to decide the issue after giving an opportunity to the appellants to submit the details of transactions and also to present their case. The stay petition as well as the appeal get disposed off in the above manner."

7.1 In the present case, while confirming the demand in the denovo proceedings, the adjudicating authority has observed as under:

"I find that the assessee have stated that the sales are on FOR basis, wherein the freight is paid and included in the assessable value, as discussed above, I find that in some invoices there is a specific mention regarding the roadlines / goods carrier vide which the goods should be sent and in some cases it has been mentioned that the transit insurance need not be covered. However, notwithstanding the above claim, I disagree with the defence given by the assessee that they have transported the goods on FOR basis alone. The relevant invoices / agreements go on to establish that the goods have been transported on CIF / CFR basis. Hence, it cannot be said for sure that the freight and insurance have been paid by the assessee and hence it cannot be presumed that the property was not transferred to the buyers and that the assessee held the ownership of the goods still reached the buyers premises.

14.4 Further, I find that the assessee has not complied with the Hon'ble CESTAT order to submit the details of transactions as admitted by the CA that the appellant would give details of amount involved in category wise transactions and be would be submitting the same. During Personal Hearing they have submitted the copy of price list for the year 2007-2008, they have not submitted any transactions details as admitted before Hon'ble CESTAT.

15. Further, I rely upon the Hon'ble Supreme Court judgment in Civil Appeal No. 11261 of 2016, filed by the Commissioner of Central Excise Service Tax Versus Ultra Tech Cement Ltd. On the issue of CENVAT Credit of Goods Transport Agency Service availed for transport of goods from the "place of removal" to the buyers premises."

7.2 I find that in the impugned order, the adjudicating authority has observed that the appellant has submitted **only** Price Lists for the year 2007-2008 (effective from 01.04.2007 and effective from 01.07.2007) and the appellant has failed to submit any transactions details regarding details of amount involved in category wise transactions as admitted by the CA before the CESTAT. However, in the discussion and finding, the adjudicating authority has also referred to some purchase order as well as some invoices. Hence, there appears to be a contradiction in approach of the adjudicating authority.

7.3 I also find that the appellant along with their written submission submitted the following documents:

(i) Copy of the CA certificate dated 06.09.2022 issued by Sorab S. Engineer & Co., Chartered Accountants (Firm Registration No. 110417W), certifying that with regard to the period FY 2005-06 and 2006-07, for all the transactions of the appellant with their customers pertaining to analytical instruments, freight was included in price of goods and formed integral part of assessable value and also stated that Ambalal Sarabhai Enterprises Ltd. had paid appropriate duty of excise payable when calculated by including freight in the assessable value, since sales were made on FOR basis.

(ii) Copy of declaration made by following customers of the appellant stating that the relevant contracts for the period FY 2005-06 and 2006-07 were on FOR basis, no separate charges were charged by the appellant towards transportation cost and transit insurance for the journey of goods was the responsibility of the appellant.

(a) M/s. The Chemical Center, Udaipur (Declaration dated 20.09.2021)

(b) M/s. General Scientific Company, Jaipur (Declaration dated 16.09.2021),

(c) M/s. Tomar Soientific Corporation, Kota (Declaration dated 15.09.2021)

(d) M/s. Lalit PustakBhandar& General Store, Shriganganagar (Letter dated 20.09.2021)

(iii) Copies of Purchase Orders received from following Customers showing the Contract were on FOR basis.

(a) Purchase Order dated 19.06.2006 of M/s. Kanoria Chemicals & Industries Ltd.

(b) Purchase Order dated 05.04.2006 of M/s. Gujarat Alkalies and Chemicals Ltd.

(c) Purchase Order dated 23.03.2005 of M/s. Instruments &Equipments Company

(d) Purchase Order dated 15.07.2005 of M/s. GSR Products Limited

(e) Purchase Order dated 28.12.2005 of M/s. Shriram Rayons

(f) Purchase Order dated 13.01.2006 of M/s. Paradeep Phosphates Ltd.

(g) Purchase Order dated 02.12.2006 of M/s. Nirma Ltd.

(h) Purchase Order dated 25.01.2007 of M/s. Uvsar India

(i) Purchase Order dated 09.01.2007 of M/s. Krishak Bharati Co. Op. Ltd.

(iv) Copies of Sample Invoices issued by them during the relevant period.

On perusal of these documents, it is observed that the transactions has been on FOR basis.

8. I also find that the Hon'ble High Court of Gujarat in the Appellant's own case, pertaining to the same matter and for the period from January-2007 to December-2007 dismissed the tax appeal filed by the department vide Order dated 21.04.2011 in Tax Appeal No. 433 of 2010. The adjudicating authority has not discussed any thing about the same while passing the impugned order. It is, therefore, observed that the Hon'ble High Court of Gujarat has allowed the Cenvat to appellant in similar case pertaining to January-2007 to December-2007.

9. The adjudicating authority, while confirming the demand in Para 15 has relied upon the Hon'ble Supreme Court Judgment dated 01.02.2018 in Civil Appeal No. 11261 of 2016. In this regard, I find that after receipt of the above judgment and other judgment i.e. CCE vs M/s Roofit Industries Ltd 2015(319) ELT 221(SC); CCE vs Ispat Industries Ltd 2015(324) ELT670 (SC) &CCE, Mumbai-III vs Emco Ltd 2015(322) ELT 394(SC); the CBIC had issued Circular No.1065/4/2018-CX dated 08.06.2018 giving reference to the said judgement dated 01.02.2018 also and clarified, inter alia, that where the contract for sale is FOR contract and in the case of FOR destination sale, where the ownership, risk in transit, remained with seller till goods are accepted by buyer on delivery and till such time of delivery, seller along remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases. However, I find that the adjudicating authority not considered the said circular, while passing the impugned order. The relevant text of the same is as under:

> "**3. General Principle:** As regards determination of 'place of removal', in general the principle laid by Hon'ble Supreme Court in the case of CCE vs Ispat Industries Ltd 2015(324) ELT670 (SC) may be applied. Apex Court, in this case has upheld the principle laid down in M/s Escorts JCB (Supra) to the extent that 'place of removal' is required to be determined with reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer. The observation of Honb'le Court in para 16 in this regard is significant as reproduced below
>
> > "16. It will thus be seen where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be normal value thereof. Sub-clause (b) (iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is

that each of the premises is referable only the manufacturer and not to the buyer of excisable goods. The depot or the premises of the consignment agent of the manufacturer are obviously places which are referable to the manufacturer. Even the expression "any other place of premises" refers only to a manufacturer's place or premises because such place or premises is to be stated to be where excisable goods "are to be sold". These are key words of the sub-section. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. If we were to accept contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to buyer's premises."

*4. **Exceptions:** (i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III vs Emco Ltd 2015(322) ELT 394(SC) and CCE vs M/s Roofit Industries Ltd 2015(319) ELT 221(SC). To summarise, in the case of FOR destination sale such as M/s Emco Ltd and M/s Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases."*

10. In view of the above discussion and on verification of the documents submitted by the appellant, CA certificate dated 06.09.2022 mentioned para supra certifying that during the relevant period all the transactions of the appellant, freight was included in price of goods and formed integral part of assessable value; various Purchase Orders submitted by the appellant and various Declaration of the Customers of the appellant, I find that in the present case the contracts for sale is FOR contracts and the ownership, risk in transit, remained with the appellant till goods reached the destination of the Customers. Therefore, the appellant is eligible for Cenvat in the case as clarified in Para 4 of the CBIC Circular No.1065/4/2018-CX dated 08.06.2018 mentioned supra.

11. In view of the above discussion, I set aside the impugned order and allow the appeal filed by the appellant.

12. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है|

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

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date : 31.10.2022

By RPAD / SPEED POST

To,

M/s. Ambalal Sarabhai Enterprise Ltd., Appellant

89-92, Naroda Industrial Estate,

Naroda, Ahmedabad – 382330

The Assistant Commissioner, Respondent

Central GST & Central Excise,

Division I, Ahmedabad North

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Assistant Commissioner, CGST, Division I, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North (for uploading the OIA)
5) Guard File
6) PA file