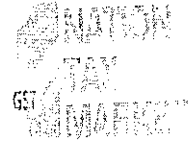


आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211264SW0000555C43

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1378/2021 & GAPPL/COM/STD/02/2021 & -Appeal-O/o Commr-CGST-Appl-Ahmedabad /5163 To 5167

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-43 & 44/2021-22**
दिनाँक Date : **30.11.2021** जारी करने की तारीख Date of Issue : **16.12.2021**

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

ग Arising out of Order-in-Original Nos. **CGST/A'bad-North/Div-VII/ST/03/2020-21** dated **16.09.2020**, passed by the Assistant Commissioner, CGST, Div-VII, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Adani Gas Ltd., 8th Floor, Heritage building, Ashram Road, Usmanpura, Ahmedabad.

Respondent-The Assistant Commissioner, Central GST & Central Excise, Div-VII, Ahmedabad-North.

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 :

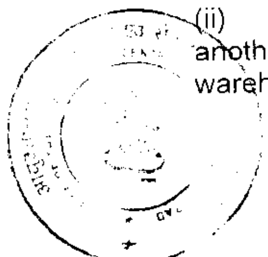
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत 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) 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.



(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 रेबेट 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.

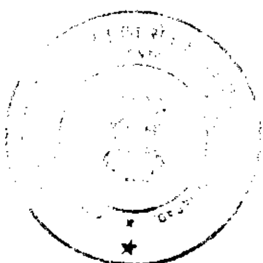
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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 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.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण <u>(सिस्टेट)</u>, 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:

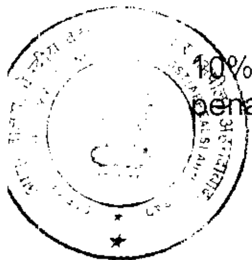
(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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

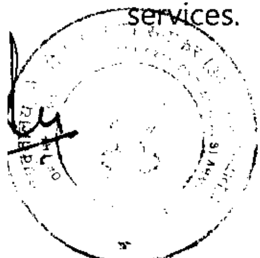
Following appeals have been filed against the OIO No CGST/A'bad-North/Div-VII/ST/03/2020-21 dated 16.09.2020 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-VII, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

Sr.No.	Appeal No.	Appellants
01	GAPPL/COM/STP/1378/2020	M/s. Adani Gas Ltd., 8th Floor, Heritage Building, Ashram Road, Usmanpura, Ahmedabad-380014 (hereinafter referred as '**AGL**')
02	GAPPL/COM/STD/02/2021	Deputy Commissioner, Central GST, Division-VII, Ahmedabad North (hereinafter referred as '**Department**')

2. The facts of the case, in brief, are that M/s. Adani Energy Ltd (AEL) had filed an application before Hon'ble High Court of Gujarat for de-merger of its City Gas Distribution business from M/s. Adani Energy Ltd, into a separate company namely M/s. Adani Energy (U.P.) Ltd. The Hon'ble High Court vide Order dated 09.12.2009, approved the de-merger. Later, M/s. Adani Energy (U.P.) Ltd changed its name to M/s. Adani Gas P. Ltd, this name was further changed to M/s. Adani Gas Ltd. Thereafter, on 16.3.2010, M/s. Adani Gas Ltd. obtained registration as Input Service Distributor (ISD).

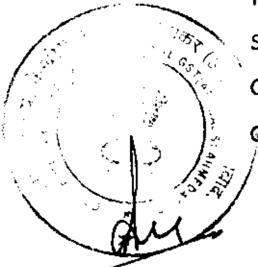
2.2 M/s. Adani Gas Ltd ('M/s. AGL' in short) after completing the above formalities decided to avail Cenvat credit of Rs.6,86,88,707/- in respect of City Gas Distribution business of M/s. Adani Energy Ltd under Input Service Distributor to distribute the credit lying unutilized in the account of M/s. Adani Energy Ltd. They, therefore, on 18.02.2011, made a request to the jurisdictional Assistant Commissioner, erstwhile Service Tax Division-II, Ahmedabad, to allow them to avail Cenvat Credit transferred from erstwhile M/s. Adani Energy Ltd ('AEL' for brevity) after de-merger.

2.3 On receipt of the above request, the jurisdictional Range Superintendent, vide his letter dated 10.3.2011, sought clarifications from M/s. AGL on **(i)** whether M/s. Adani Energy Ltd was engaged in providing both taxable and non-taxable services since Cenvat credit is permissible only to the extent of taxable output service. Year-wise details of the value of both taxable and non-taxable services and the proportionate bifurcation of the Cenvat credit involved was sought; **(ii)** As per Rule 4(1) of Cenvat Credit Rule (CCR), 2004, the Cenvat credit is to be taken immediately, since Cenvat credit balance was not reflected in the ST-3 returns of erstwhile M/s. Adani Energy Ltd, why such a request was made; **(iii)** why was this request made when there is no provision in the CCR, 2004, for transfer of credit for de-merger; **(iv)** what is the status of their Central Excise unit in Ahmedabad after the Order of Hon'ble High Court; whether separate application has been filed claiming service tax credit; and **(v)** whether the Cenvat credit of Rs.40,45782/- reflected in the ST-3 returns of M/. AGL for the period April-Sept, 2010, taken and distributed is for both taxable and exempted services.



2.4 In response, M/s. Adani Gas Ltd vide their letter dated 28.4.2011, clarified that the Cenvat credit pertains to services received at various CNG stations of erstwhile AEL; that M/s.AEL had applied for centralized registration in respect of all its CNG stations in October,2005 which was granted on 24.04.2009. This credit has been recorded in the books of accounts of M/s. AEL as "Cenvat Credit receivable" and included Cenvat credit in respect of inputs, capital goods and input services. A note was put up in the "Notes to Accounts" of Annual Reports of M/s. AEL for the F.Y. 2007-2008, F.Y. 2008-09 & F.Y. 2009-2010. They informed that the credit shall be availed only after the approval from the Department therefore, the same was not availed earlier. The credit to be availed mainly includes the services (listed therein), availed at various CNG stations. As regards the transportation of goods through pipeline, they stated that they purchased natural gas from Gujarat State Petroleum Corporation, Hazira (GSPC). This natural gas is transported from Hazira to M/s. AGL's City Gas Station (CGS), Ahmedabad through pipeline of Gujarat State Petronet Ltd (GSPL). The GSPL charged transportation charges including service tax to M/s. AGL and the same were accounted under the head "Transportation of Goods through Pipeline" in their books of accounts. The natural gas purchased/transported is used in manufacturing of Compressed Natural Gas (CNG) & Piped Natural Gas (PNG). CNG is chargeable to Central Excise duty whereas PNG is chargeable to 'NIL' rate of duty and credit is admissible on service tax paid towards transportation of goods with reference to CNG through pipeline only. The usage of natural gas into CNG/PNG is arrived based on the billing at the end of the month. After computing the total quantity of CNG & PNG sold, Cenvat credit of service tax paid in respect of only CNG is availed. It was also clarified that both M/s. AGL and M/s. Arvind Mills Ltd. purchased natural gas from GSPC. The GSPC transported natural gas from Haz ra to M/s. AGL's City Gas Station through their pipeline and on receipt of the same, M/s. AGL further transported portion of said natural gas to the premises of M/s. Arvind Mills Ltd, through their pipeline. The GSPC raised common bills for transportation of natural gas from Hazira to City Gas Station, in the name of M/s. AGL. Simultaneously, M/s. AGL raised separate bills to M/s. Arvind Mills Ltd and charged the service tax on the said amount. M/s. AGL availed Cenvat credit of service tax paid for the transportation of natural gas through GSPL, however, from December, 2008 they stopped availing such credit.

2.5 On analyzing the above clarification, the then A.C. of erstwhile Service Tax, Division-II vide his letter dated 20.05.2011, informed M/s. AGL that their request to allow them to avail the Cenvat Credit lying in balance of the Cenvat credit account of M/s. Adani Energy Ltd at the time of de-merger, is not considered. The request was rejected on the grounds that for the F.Y. 2007-08, F.Y. 2008-09 and F.Y. 2009-10, M/s. Adani Energy (U.P.) Ltd. & M/s. AGL have not declared the Cenvat Credit taken and utilized in their ST-3 returns and no declaration was made by the assessee regarding the credit taken/accumulated/availed on inputs, capital goods or input services. Further, in terms of Rule 4(1) of the CCR, 2004, the Cenvat credit in respect of inputs may be taken immediately on receipt of inputs in the factory or premises of the output service provider. However, neither M/s. Adani Energy Ltd nor M/s. AGL made declaration about any such accumulation of Cenvat credit nor the same was consumed/availed immediately.



3. Being aggrieved, M/s. AGL filed an appeal before the Commissioner (Appeal), Ahmedabad, who vide OIA No. 283/2011(STC)/K.ANPAZHAKAN/Commr.(A)/Ahd dated 09.11.2011, set-aside the letter dated 20.05.2011 of A.C., Div-II and remanded the matter to the authority with following directions;

- The appellant have not declared any details regarding Cenvat credit taken and utilized in their ST-3 returns during the disputed period, which is a major condition laid down under Cenvat Credit Rules (CCR), 2004, hence the Cenvat credit was rightly denied.

- The details of the service tax credit shown in the work sheets and its eligibility, should have been discussed with respect to the earlier registration dated 04.05.2007 (to examine credit admissibility at the material time i.e. prior to centralized registration).

- Searches were conducted by Central Excise officers at the appellant's registered and unregistered premises covering period upto 2007, for wrong availment of service tax credit also. Since the worksheet also includes the period of search i.e. before 2007, it needs to be examined how the said amount of service tax credit was incorporated in the worksheet.

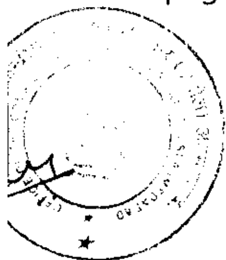
- Centralized registration was given on 24.04.2009, it needs to be verified how these services were categorized as 'input service' and have been utilized for providing the output services or used in manufacture of CNG.

- The worksheets are incomplete as some serial numbers are missing and in some cases invoice numbers and dates have not been mentioned.

- The appellant have obtained centralized registration for ISD only on 16.3.2010, hence details of service tax credit shown in the work sheet which is for the prior period also, needs to be verified.

- Principles of natural justice to be followed and a speaking order should be passed.

4. Being aggrieved by the aforesaid O-I-A, M/s. AGL filed an appeal before the Hon'be CESTAT, Ahmedabad on the contention that the Commissioner (A) has erred in holding that the Cenvat credit was rightly denied as details of Cenvat credit taken and utilized was not declared in their ST-3 returns during the disputed period, which is a major condition laid down under Cenvat Credit Rules (CCR), 2004. Hon'ble Tribunal vide Order No./10309/2015 dated 08.04.2015, remanded the matter directing the adjudicating authority to also consider the submissions of the appellant regarding the Cenvat Credit taken and utilized in their ST-3 returns as mentioned in Para-6 of the impugned O-I-A.



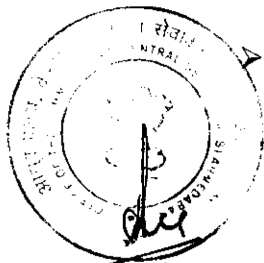
5. On the directions of the above remand order, the adjudicating authority decided admissibility of **(a)** accumulated Cenvat credit lying in balance and its utilization thereof when the same was not declared to the department and **(b)** the Cenvat credit in respect of inputs received in the factory not availed immediately as per proviso to Rule 4(1) of the CCR, 2004. He, vide the impugned order, held that non-declaration of Cenvat credit in the statutory records has not led to any contravention on the part of the assessee, when erstwhile M/s. Adani Energy Ltd vide their correspondences dated 27.02.2007, 07.07.2007 had submitted the list of inputs to the department, on which Cenvat credit remains to be availed until decision on Centralized Registration and jurisdiction of CNG station is being finalized; though the assessee had not declared the Cenvat credit in their ST-3 returns, but reflected it in all their correspondences made with the department since year 2005 and was also reflected as receivables in the Notes to Books of Accounts for the F.Y. 2007-08, 2008-09 and 2009-10. He held there was no contravention of Rule 4(1) of the CCR, 2004, as the assessee vide letter dated 18.4.2011 informed that they reflected the data of Cenvat credit taken on inputs in the ST-3 returns of their transferor units, prior to de-merger order and availed the same within the stipulated time.

5.1 Regarding, the inclusion of Cenvat credit covering the period upto 2007, he finds that the same has been intimated to the department since 2005 and is lying unutilized as per asseesse's records also that the data and copies of invoices submitted by the assessee to the jurisdictional Range Superintendent vide their letters dated 27.02.2007, 07.06.2007, 25.07.2007 etc which were never questioned or demand raised.

5.2 He allowed the Cenvat Credit of **Rs.5,86,96,096/-** on the grounds that such credit shown as 'Receivable' have been validated by the Chartered Accountant; that in terms of para 3.8 of the merger order passed by Hon'ble High Court of Gujarat, the assessee is eligible for said unutilized Cenvat credit lying in the balance in the account of M/s. Adani Energy (U.P.) P Ltd. The credit is also eligible to the assessee in terms of ISD Registration obtained on 16.3.2010 which entitle them to legally distribute the unutilized Cenvat credit involved in the list and in terms of declaration dated 10.9.2020 declaring that they neither availed the Cenvat credit of Rs.6,86,88,807/- upto 30.06.2017 nor declared it and for which no ITC under Transitional Credit under CGST Act, 2017 was availed.

5.3 The adjudicating authority, however, also observed that from the list of Cenvat credit of Rs.6,86,88,807/-, certain credit of tax paid under Commercial & Industrial Construction Services, Maintenance & Repair Services, BAS (Commission on Sales of CNG) was inadmissible and therefore dis-allowed the Cenvat credit amount of **Rs.99,92,711/-** [*Rs.3258793/ under Civil Work and Rs.6733971/- under Commission on CNG sales*].

6. This impugned O-I-O dated 16.09.2020, has been challenged both by the department as well as by M/s. AGL. The department is in appeal on the grounds that;



- The adjudicating authority allowed the Cenvat credit merely by relying on the intimations made by M/s. AGL to the department and failed to verify the fact

whether the books of accounts has been intimated by the assessee to the department under Rule 5 of Service Tax Rules (STR), 1994.

- His reliance on the case of M/s. Samruddhi Cement Ltd [2014(314) ELT 826] has been mis-placed as there the ground of appeal was that Rule 10(1) does not provide for transfer of Cenvat credit on demerger. Whereas, in the present case, rejection ground was not de-merger.

- Order is not a speaking order as reliance on declaration in notes to account is without any legal backing and no findings has been given on Rule 10(1), 10(2) & 10(3) of CCR, 2004.

- there is inconsistency in the O-I-O as at para-12 of O-I-O he mentions that data in respect of Cenvat credit of inputs have been mentioned in their ST-3 returns of their transferred units prior to de-merger, whereas para 6 of the O-I-A states that details of Cenvat credit taken and utilized in their ST-3 returns during the disputed period were not declared.

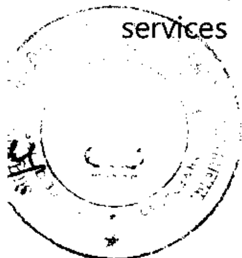
- While quantifying the admissible Cenvat credit, he failed to follow the clarification issued by CBIC at para 6 & 7 of Circular No.943/04/2011-CX dated 29.04.2011 on Cenvat Credit Rules, 2004 and trading of goods, and also the clarification issued vide Circular No.178/4/2014-ST dated 11.07.2014.

- Whether 'input service' have been utilized for providing the output services or used in manufacture of final products was not examined.

- The adjudicating authority observed that the assessee had submitted data and copies of invoices to the jurisdictional Range Superintendent vide their letters dated 27.02.2007, 07.06.2007, 25.07.2007 etc and they also submitted compliance to queries regarding Cenvat credit for which no demand was raised, but he failed to appreciate the fact that demand is raised when Cenvat Credit is taken and reflected in statutory returns, when this act was not done, question of demand does not arise.

- He erred in not giving personal hearing to the assessee and rejected the claim of Cenvat credit of Rs.99,92,711/- without issuing a show cause notice.

7. M/s. AGL is in appeal only against the rejection of Cenvat credit amount of Rs.67,33,971/- relating to commission on CNG sales and have not disputed the credit rejected to the tune of Rs.32,58,739/- under Commercial & Industrial Construction services, Maintenance Repair services etc. They contended that the adjudicating authority failed to appreciate that the credit claimed was in respect of charges paid for distribution of CNG, without which manufacturing and distribution of CNG would not have been possible; since excise duty has been paid on the value of the excisable goods i.e. on the sale price, which includes the cost of alleged input services, credit of such input services cannot be denied; that no findings were given as to why said services are not covered under the definition of input service while deciding the



inadmissibility of credit and lastly provisions and lastly procedures laid down in Section 142 of the CGST Act, 2017, not followed.

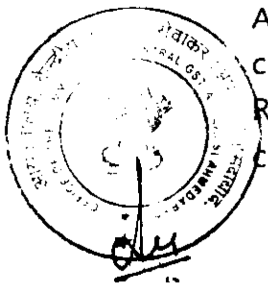
8. Personal hearing in both the appeals was held on 27.10.2021 through virtual mode. Shri Rahul Patel, Chartered Accountant, appeared on behalf of M/s. AGL. He reiterated the submissions made in their appeal memorandum as well as in the cross-objection filed against the department's appeal. He also submitted a written submission during hearing containing their submissions and the documents in support of their contentions raised in their appeal as well as in the cross-objection filed. He further submitted that he would make further written submissions in the matter however the same were not submitted.

9. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made by M/s. AGL in their appeal memorandum as well as in the cross objection filed against the department's appeal, submissions made by department in their appeal memorandum, submissions made by Shri Rahul Patel at the time of personal hearing and evidences available on records. The issue to be decided under the present appeal is whether the Cenvat credit amount of Rs.6,86,88,707/- lying unutilized in the account of M/s. Adani Energy Ltd, recorded in their books of accounts as "Cenvat Credit receivable" but not declared to the department in their ST-3 returns, is admissible to M/s. AGL, after the de-merger?

10. The adjudicating authority vide the impugned order allowed the Cenvat credit amounting to Rs.5,86,96,096/- as admissible and rejected the Cenvat credit amounting to Rs.99,92,711/- as inadmissible. The department is in appeal against the order allowing Cenvat credit whereas M/s. AGL is in appeal only against the rejection of Cenvat credit amount of Rs.67,33,971/-, held inadmissible under Business Auxiliary Service. M/s. AGL is therefore not disputing the disallowed service tax credit amount of Rs.32,58,740/- under Construction services.

11. The find that the Commissioner (A) vide Order dated 11.11.2011, remanded the matter to the adjudicating authority on specific directions. This order was further modified by the Hon'ble CESTAT, Ahmedabad vide Order dated 08.04.2015, to the extent that the adjudicating authority should also consider the submissions of M/s. AGL regarding the Cenvat credit taken and utilized in their ST-3 returns. The adjudicating authority, therefore, while deciding the request of M/s. AGL was also required to consider whether the Cenvat credit taken and utilized was reflected in the ST-3 returns.

12. It is observed from the case records that the City Gas Distribution business de-merger from M/s. Adani Energy Ltd. into a separate company named M/s. Adani Energy (U.P.) Pvt. Ltd) (hereinafter referred as 'AEUPL' in brief) vide Hon'ble High Court's Order dated 09.12.2009. The name of the M/s. AEUPL was changed to M/s. Adani Gas Pvt Ltd, which was subsequently changed to M/s. Adani Gas Ltd. After the change of name to M/s Adani Gas Ltd (M/s. AGL), they applied for Centralized Registration & ISD Registration under the name of M/s. AGL on 15.01.2010. The Centralized registration was granted on 16.03.2010, thereafter, M/s. AGL decided to



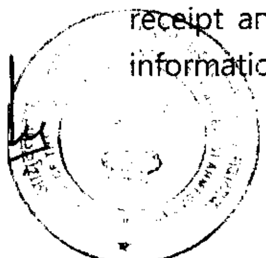
avail the Cenvat Credit amount of Rs.6,86,88,707/- lying unutilized in the account of M/s. Adani Energy Ltd, which was earlier not taken by them as the process of granting centralized registration took substantial time. Until this time, M/s. AEL had recorded their rights to receive the Cenvat credit on input, capital goods and input services, in their books of accounts, by putting up in the notes to accounts of Annual report of the Company for the year 2007-08, 2008-09, 2009-10, reflecting the same as '*Cenvat credit receivable*'. Subsequent to the de-merger, M/s. AGL vide letter dated 18.02.2011, made a request to jurisdictional D.C. that in terms of Rule 10(2) of the CCR, 2004, they may be allowed to transfer and avail the unutilized Cenvat credit, lying in the accounts of M/s. AEL. In terms of Hon'ble High Court's Order dated 09.12.2009, whatever credit was lying in the registers of or in the account of M/s. AEL shall be transferred to M/s. AEUPL. However, considering the change of name from M/s. AEUPL to M/s. AGL in 08.01.2010, request for such transfer was made by M/s. AGL.

13. To examine the issue in proper perspective, the relevant Rule 10 is reproduced below;

> ***RULE 10. Transfer of CENVAT credit.*** *— (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.*
>
> *(2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.*
>
> *(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise.*

The plain reading of the legal provisions make it abundantly clear that in terms of Rule 10(2), the provider of output service is allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business. It is M/s. AGL's claim that the unutilized Cenvat credit lying in the accounts of M/s. Adani Energy Ltd should be allowed to them subsequent to the de-merger.

13.1 The documents on the basis of which Cenvat credit can be taken is prescribed in Rule 9 of the CCR, 2004 and in terms of Rule 9(6) of the CCR, 2004, the manufacturer of final products or the provider of output service should maintain proper records for receipt and consumption of the input services. The records should contain relevant information regarding – (a) Value of service (b) Tax paid (c) Cenvat Credit taken and

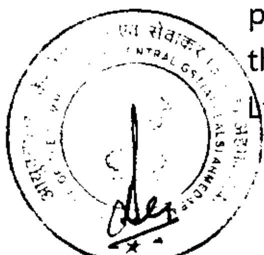


utilised (d) Person from whom input service has been procured and the burden of proof regarding the admissibility of Cenvat credit shall lie upon the person taking such credit. However, it is observed that M/s. AGL though submitted the list of input service received, but no evidence with regard to maintenance of proper records for the receipt and consumption of such services to discharge the burden of proof regarding admissibility of Cenvat credit as required under Rule 9(6) of Cenvat Credit Rules, 2004, was provided by them either before the adjudicating authority or before me.

13.2 The word 'taken' has not been defined anywhere under the provisions of Central Excise and Service Tax provisions. However, Rule 14 of the CCR,2004 which deals with the recovery of Cenvat credit wrongly taken, it can be inferred that 'taken' means claiming the same in respective periodical Excise or Service Tax Returns. So if erstwhile M/s. Adani Energy Ltd has accounted for the Cenvat credit in their books of accounts, but has not availed it in the respective Service tax returns, then the question of recovery of said wrongly taken credit in their books of accounts under Section 73 of the Finance Act, 1994 does not arise. The law requires that M/s. Adani Energy Ltd should claim the Cenvat credit in its periodical returns within the period of limitation. In terms of Rule 9(9) of CCR, 2004, erstwhile M/s. Adani Energy Ltd was required to file a half yearly return in the form of ST-3 as prescribed in Rule 7 of the Service Tax Rules, 1994, giving details of Cenvat credit taken on inputs, capital goods, input services & Cenvat credit received from ISD, to the jurisdictional Superintendent, but they failed to reflect such details of unutilized Cenvat credit of input services in their statutory returns. Therefore, the contention of M/s. AGL that they may be allowed to take the credit is legally untenable. The Service Tax Returns provide self-assessment and declaration of Cenvat credit in various columns, in which the assessee is required to independently declare the cenvat credit 'availed' and Cenvat credit 'utilized'. M/s. Adani Energy Ltd had the option of availing the Cenvat credit in tune with the ledgers maintained by them without actually utilizing them in such returns, Therefore, it is clear that the books of accounts maintained by erstwhile M/s. Adani Energy Ltd do not correspond with the Service tax Returns, which clearly demonstrate the fault on the part of M/s. Adani Energy Ltd making M/s. AGL ineligible for the Cenvat credit in terms of the statutory provisions.

13.3 Similarly, in terms of Rule 9(10) of CCR, 2004, the Input Service Distributor (ISD) has to furnish a half yearly return in the form of ST-3 returns, giving details of opening balance of Cenvat credit, credit received on input service and distributed during the half year, to the jurisdictional Superintendent. It is observed that though M/s. AGL obtained the ISD registration on 16.03.2010, but even after a lapse of almost one year they did not file any return giving details of credit received and distributed during the half year to the jurisdictional Superintendent. This clearly establishes that both M/s. AGL and M/s. Adani Energy Ltd, failed to follow the procedures laid down under Rule 9(9) & Rule 9(10) of the CCR, 2004, which prescribes the conditions for taking the Cenvat credit.

13.4 The above request was examined by the adjudicating authority in the denovo proceedings, who justified the admissibility of Cenvat credit on the sole argument, that though the Cenvat credit was not declared in the ST-3 returns of M/s. Adani Energy Ltd., but they vide their letters dated 27.02.2007, 11.05.2005, 10.07.2006 and



05.02.2007 declared the department that, the Cenvat credit remains to be claimed until Centralized Registration decision and jurisdiction of CNG station is being finalized. Such declaration he claims establishes that there was no contravention of Rule 4(1) of the CCR, 2004, on the part of M/s. AEL. He also placed reliance on the decision passed by Hon'ble CESTAT in the case of M/s. Samruddhi Cements [2014(314) ELT 826] and the judgment of Hon'ble High Court of Andhra Pradesh passed in the Tax Appeal No: 101/2012 filed in case of M/s Nagarjuna Agrichem Ltd, for allowing the credit.

13.5 The adjudicating authority at para 11.1 & 11.2 stated that M/s. AEL vide their letter dated 07.07.2007 made reference of their earlier communications dated 11.10.2005. 10.07.2006 & 05.02.2007, regarding their request for centralized registration and that they are submitting list of inputs, on which they have availed cenvat credit and also submitted list of Cenvat credit which remains to be availed on receipt of centralized registration. He, at para-12, also further recorded that M/s. AGL vide their letter dated 18.4.2011, have mentioned, that the data of Cenvat credit on inputs have been reflected in the ST-3 returns of their transferor units prior to de-merger order and have availed the same within the stipulated time. I find that such conclusions made by adjudicating authority, is without any basis as he failed to examine the facts correctly. When M/s. AEL could avail the Cenvat credit of inputs and reflected the same in their ST-3 returns, then what stopped them from availing the Cenvat credit of input services and reflecting the Cenvat credit details of input services in their relevant ST-3 returns, is not forthcoming from the findings. The entire dispute of allowing the Cenvat credit is based on the argument that the disputed Cenvat credit was not taken by erstwhile M/s. AEL, instead was reflected by them as receivables in the Notes to Books of accounts for the F.Y. 2007-08, 2008-09, 2009-10. In terms of provisions of Rule 10(2) of the CCR, 2004, only such CENVAT credit which is lying unutilized in the books of accounts, is allowed to be transferred and not the credit, which was not taken in the books of accounts. Mere reflecting the Cenvat credit as 'Cenvat credit receivables' cannot be construed as Cenvat credit taken and this fact was totally ignored by the adjudicating authority.

13.6 Further, at para-6 of the OIA, Commissioner (A) observed that the appellant has not declared any details regarding Cenvat credit taken and utilized in their ST-3 returns during the period in dispute and which is a major condition laid down under CCR, 2004. The fact that the unutilized Cenvat credit details of input services were not mentioned in the statutory returns of erstwhile M/s. Adani Energy Ltd, is also evident from the content of the letter dated 10.3.2011 issued by the Range Superintendent, who examined the ST-3 returns of the relevant period. In terms of Rule 9(9) of CCR, 2004, erstwhile M/s. Adani Energy Ltd was required to file a half yearly return in the form of ST-3 as prescribed in Rule 7 of the Service Tax Rules, 1994, giving details of Cenvat credit taken on inputs, capital goods, input services & Cenvat credit received from ISD, to the jurisdictional Superintendent, but they failed to reflect such details of unutilized Cenvat credit of input services in their statutory returns.

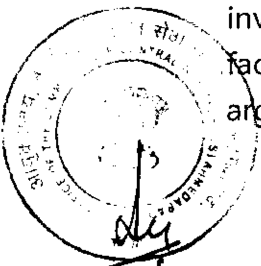
13.7 Similarly, Rule 5 of the Service Tax Rules, 1994, also prescribed that every assessee shall furnish to the Superintendent of Central Excise at the time of filing of return for the first time a list in duplicate of (i) all the records prepared or maintained by the assessee for accounting of transactions in regard to, (a) providing of any service;

(b)receipt or procurement of input services and payment for such input services; (c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods; (d) other activities, such as manufacture and sale of goods, if any and also (ii) all other financial records maintained in the normal course of business. The rule also provides that all such records shall be preserved at least for a period of five years immediately after the financial year to which such records pertain. I find that the adjudicating authority in the instant case while allowing the Cenvat credit merely relied on the intimations made by M/s. AGL to the department without examining the fact whether the books of accounts have been intimated to the department under Rule 5 of Service Tax Rules (STR), 1994 and whether such credit has been taken in the books of accounts.

13.8 As no documentary evidence was produced by M/s. AGL with regard to proper records maintained by them for the receipt and consumption of services and given the fact that they did not show the credit taken particulars in the ST-3 Returns filed during the F.Y. 2007-08 to F.Y. 2009-2010, as required under Rule 9(6) and 9(9) of the CCR 2004, I find the claim of M/s. AGL with regard to availment of Cenvat credit of Rs.6,86,88,707/- is not tenable, in view of the provisions of Rule 9(6), Rule 9(9) & Rule 9(10) of the CCR, 2004.

14. Further, Commissioner (A) also directed the adjudicating authority to verify whether the 'input services' have been utilized in relation to manufacturing CNG or for providing the output services and also to examine the admissibility of Cenvat credit at the material time i.e. prior to centralized registration as the work-sheet also includes the period of search conducted upto 2007. I, find that the earlier Service Tax Registration No.AABCG5533EST001 dated 04.06.2007 was cancelled subsequent to issuance of ISD registration on 16.03.2010, it was therefore crucial to examine whether the input services received prior to ISD registration were actually used by the existing unit i.e. M/s. AEL, for providing the output services or for manufacturing CNG.

15. Further, Commissioner (A) at para-7 of the OIA, also observed that wrong availment of service tax credit was noticed during searches conducted by the Central Excise officers on the appellant's registered and un-registered premises, covering period prior to 2007. As this period is found overlapping with the period covered in the work-sheet, it needs to be examined how the said amount of service tax credit has again been incorporated in the worksheet. The adjudicating authority though recorded that M/s. AGL have produced relevant documents before him, he however failed to give any findings on the outcome of verification of such documents. He held the Cenvat credit prior to year 2007, as admissible, merely on the argument that it has been intimated to the department since 2005 and was lying unutilized as per asseesse's records, for which no demand has been raised. I find such argument unsustainable, for the reasons that the adjudicating authority was duty bound to examine the admissibility of the service tax credit claimed for the period prior to 2007, especially when such disputed credit pertains to the period which has already been investigated by central excise officers, at the relevant time and also considering the fact that M/s. AEL was granted Service Tax registration on 04.08.2007. Further, the argument for allowing the credit, as no demand has been raised, also seems to be



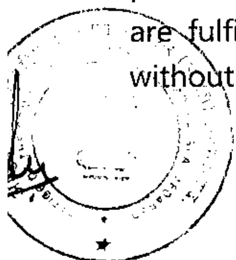
illogical and untenable for the reasons that unless the credit is availed/taken by M/s. AEL in the statutory returns, question of issuing notice by the department does not arise. Department at this juncture cannot allow the Cenvat credit without examining the admissibility of such credit hence such findings by the adjudicating authority is flawed and legally not sustainable.

16. Further, on the incomplete entries as pointed out by the then Commissioner (A), where some serial numbers are missing and in some cases invoice numbers and dates have not been mentioned, I find that some of the invoices pertaining to Commission on Sale of CNG and Repair & Maintenance service, listed in the impugned order, were issued subsequent to the period in dispute (i.e. in the year 2011 to 2017). Considering that M/s. AGL's request for Cenvat credit in this case was dated 18.02.2011, the documents of the subsequent period apparently cannot be a part of such claim. It is not clear as to under what circumstances and why the same were considered by the adjudicating authority while deciding the credit under dispute. Therefore, it is obvious that no proper verification concerning the genuineness of the credit claimed was done by the adjudicating authority before allowing such credit.

17. Similarly, at para 8 of the OIA, the Commissioner(A), directed to verify the details of service tax credit shown in the worksheet which is for the period prior to the ISD registration obtained by M/s. AGL on 16.03.2010. I find that such verification is crucial especially because, M/s. AGL has made a request vide letter dated 18.2.2011, to allow them to avail the disputed credit under ISD and to distribute this credit. The ISD can distribute the credit pertaining to input services only to eligible manufacturer or output service provider. Since M/s AGL was not in existence as ISD before 16.3.2010, the input services received by erstwhile M/s AEL, cannot be allowed for distribution.

18. The adjudicating authority further allowed the credit of Rs.5,86,96,096/- merely by relying on the Chartered Accountants certificate, ISD Registration certificate and declaration made by M/s. AGL on 10.9.2020. However, he failed to examine, whether the 'input services' for which the claim is made were actually utilized in manufacturing CNG or for providing output services. The name of services which he found to be admissible as input service in terms of Rule 2(l) of the CCR, 2004, was not recorded by him. Similarly, at para-15, he made a passing remark that Cenvat credit of Rs.99,92,711/- was inadmissible, being the credit of service tax paid on 'Commercial & Industrial Construction' Services, Maintenance & Repair Services and Commission on Sales of CNG, without giving any justification on why these services were inadmissible. The adjudicating authority also failed to examine the provisions of Rule 2(l) of the CCR, 2004 vis-à-vis the period of dispute involved. The definition of 'input service' excluded construction services vide Notification No. 03/2011-C.E.(N.T) dated 01.03.2011, with effect from 01.04.2011. Thus, the adjudicating authority while deciding the admissibility of Cenvat credit has not considered the provisions of CCR, 2004, prevalent during the period in dispute.

19. I find that the entire issue of allowing Cenvat credit depends on the precondition that the provisions of Rule 9(6), Rule 9(9) and Rule 9(10) of the CCR, 2004 are fulfilled. The adjudicating authority decided the admissibility of Cenvat credit, without examining these provisions. As M/s. AEL or M/s. AGL has not produced any



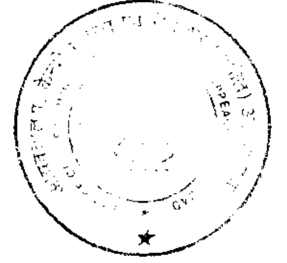
documentary evidence supporting the fulfillment of these pre-conditions, I find that the Cenvat credit of Rs.6,86,88,707/- is not admissible to them. Thus, in view of the above discussions and findings, I find that the impugned O-I-O is not sustainable and is therefore set-aside.

20. In view of the above discussions and findings, the appeal filed by the department is allowed and the appeal filed by M/s. AGL is rejected.

21. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals stand disposed off in above terms.

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 11.2021



Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST. Ahmedabad

By RPAD/SPEED POST

To,
M/s. Adani Gas Ltd., - **Appellant**
8th Floor, Heritage Building,
Ashram Raod, Usmanpura, Ahmedabad

The Deputy Commissioner - **Appellant**
CGST, Division-VII
Ahmedabad North
Ahmedabad

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.