केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय कर भवन, 7th Floor, GST Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
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7578 to 7582

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)47&48/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-093&094-2018-19**
दिनाँक Date : **31-10-2018** जारी करने की तारीख Date of Issue _____ 7/12/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **STC/66&67/DC/Div-III/09-10** दिनाँक: **19.01.2010** issued by Deputy Commissioner, Div-III, Central Tax, Ahmedabad-South

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

Air Control & Chemical Engineering Ltd.
Ahmedabad

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 a 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 पूर्वोक्त 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–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 ओ–20, न्यू मैन्टल हारिपटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

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

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) इस 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 (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 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

Two appeals have been filed by M/s. Air Control & Chemical Engineering Company Limited, Nandej, Barejadi, Dist. Ahmedabad [*for short- 'appellant'*] the details of which are as follows:

Sr. No.	Impugned OIO No. and date against which appeal is filed	OIO passed by	Appeal No.
1	STC/66/DC/Div III/09-10 dated 19.1.2010	Dy. Commissioner, Division III, Service Tax Commissionerate, Ahmedabad	V2(ST)47/Ahd-South/2018-19
2	STC/67/DC/Div III/09-10 dated 19.1.2010	Dy. Commissioner, Division III, Service Tax Commissionerate, Ahmedabad	V2(ST)48/Ahd-South/2018-19

These appeals were placed in call book as a departmental appeal was pending in the Hon'ble Supreme Court. Since the said departmental appeal has been decided by the Apex Court in the case of Vasavadatta Cements Limited [2018(11)GSTL 3(SC)], the appeals have been retrieved and are being decided by this common order.

2. Briefly, the facts are that two show cause notices both dated 31.7.2008 were issued to the appellant *inter alia* alleging that the appellant had wrongly paid the service tax on outward freight from the CENVAT credit when the service tax should have been paid in cash. The show cause notice therefore, proposed demand of the service tax wrongly paid through CENVAT along with interest; proposed penalty on the appellant; proposed that the service tax credit wrongly taken by the appellant to be disallowed.

3. These notices were adjudicated vide the aforementioned impugned OIOs, wherein he confirmed the service tax demand along with interest, imposed penalty on the appellant and further ordered that the CENVAT credit utilized wrongly stands disallowed and ordered its recovery alongwith interest under Rule 14 of the CENVAT Credit Rules, 2004.

4. Aggrieved, the appellant has filed the appeal on the grounds that:

- the impugned orders have been passed without appreciating the facts and merits of the case;
- that they can avail CENVAT credit on outward freight and can utilize the credit availed for payment of service tax on GTA service as they are deemed output service provider in respect of GTA services;
- that the payment of service tax is legally correct in terms of Rule 2(r), 2(p), 3 of the CENVAT Credit Rules, 2004; that on a combined reading it is apparent that if a person is liable for payment of service tax although he may not be providing output service it shall be deemed that the service for which he is paying tax is his output service;
- that the output service is deemed to be provided by them in respect of goods transport agency and the service tax can be paid from CENVAT credit account as per the rule 3(4)(e) of CENVAT Credit Rules, 2004;
- that in the CENVAT credit Rules, there is no one to one correlation of input to output services and therefore there is no bar on payment of service tax from CENVAT account;
- that they would like to rely on the case of Bharat Litho Co [2004(172) ELT 327], EMCO Elecon India Ltd [2008(208) ELT 379], Johnson and Johnson Ltd [2002(149) ELT 1340], Bhushan Power & Steel Ltd [2008(10) STR 18], Flowserve Microfinish Pumps P Ltd [2008(9) STR 278], Nahar Industrial Enterprises Ltd [2007(7) STR 26], India Cements Ltd [2007(7) STR 569], Nahar Exports Ltd [2008(9) STR 252], Prakash Industries ltd [2008(11) STR 248];
- the then Commissioner(A) vide his OIA No. 308/2009 dated 19.8.2009, had held that prior to 1.3.2008 GTA service was also considered to be an output service;
- that the whole exercise is revenue neutral as whatever amount is being paid by the appellant is accrued back to them as CENVAT credit;
- that no penalty is imposable.

- that such services of transportation are input services for the appellant and therefore they are entitled for the availment of the CENVAT credit of the same;
- that they are eligible for CENVAT credit in terms of Rule 3(1)(ix) of the CENVAT Credit Rules, 2004;
- that in terms of circular dated 23.8.2007, the sale of delivery of any goods will be construed to have been completed at a place where transfer of property in goods take place;
- that the appellant is eligible for CENVAT credit of service tax paid on outward freight.

5. Consequent to the appeals being retrieved from call book, personal hearing in the matter was granted on 23.10.2018 wherein Shri P.G.Mehta, Advocate appeared on behalf of the appellant and reiterated the grounds of appeal. He also submitted copies of judgment in the case of Panchmahal Steel[2015(37)STR 965] and Oudh Sugar [2017(52) STR 353] to substantiate their argument.

6. I will deal with both the impugned OIOs separately. Taking up **OIO no. STC/66/DC/Div III/09-10 dated 19.1.2010** [sr. no. 1 of the table supra], I have gone through the show cause notice dated 31.7.2008, covering the period from April 2005 to July 2007 and it is observed that the notice starts by alleging that the appellant paid service tax under GTA service on outward freight and thereafter wrongly availed the CENVAT credit of the said service tax paid. The notice also gives the month wise figures of the service tax paid and the CENVAT credit availed during the period under dispute. The notice thereafter in page 3 states that ...."*Therefore the CENVAT credit is not admissible to the said assessee which availed incorrect by them and hence the assessee was liable to pay service tax of Rs. 3,39,333/- on outward freight.*" In the next para the notice states that " *Whereas all these acts of contravention on the part of the said assessee appears to have been committed by way of suppression of the facts by not discharging the correct service tax as they paid service tax on the outward freight and* ***availed incorrect CENVAT credit*** *of the same which is against the law as outward freight is in the nature of output service and tax paid on same cannot be utilised for payment of duty again [in the form of cenvat credit] against taxable service to the department with the intent to evade payment of service tax and therefore the service tax which is not paid was required to be demanded/recovered from them under the provision of Section 73(1) of the Finance Act, 1994 by invoking extended period of 5 years.* "

6.1 In the impugned OIO dated 31.7.2008[sr. no. 1 of the table supra], the adjudicating authority frames the dispute to be decided as *"I find that the case of the department is that the said firm had* **wrongly utilized the credit of Rs. 3,39,333 for payment of service tax** *payable on GTA services received by them during the April 2005 to July 2007 as the said credit could have been utilized for payment of service tax payable on their output service only and GTA services received by them were not their output service but they were required to pay service tax on those service on account of the provisions contained in Rule 2(d)(v) of the CENVAT Credit Rules, 2004. [*para 10 of the OIO*]"* Consequently, the adjudicating authority in his order has [a] confirmed the demand of service tax amounting to Rs. 3,39,333/- u/s 73(1) along with interest, imposed penalty under sections 76, 78, of the Finance Act, 1994 & 15(3) of the CENVAT Credit Rules, 2004. The adjudicating authority has further held that CENVAT credit of Rs. 3,39,333/- utilized wrongly by the said assessee is disallowed and is required to be recovered with interest under Rule 14 of the CENVAT Credit Rules, 2004.

6.2 I am constrained to state that the impugned OIO has been passed in a casual way. The above reading clearly demonstrates that there is a variance as far as facts are concerned. Infact the entire facts are not clearly forthcoming. While the show cause notice states that the appellant after paying the service tax on GTA of Rs. 3,39,333/-, wrongly availed the CENVAT credit of the same, the adjudicating authority has held that the dispute basically is that the appellant wrongly utilized the CENVAT credit of Rs. 3,39,333/- for payment of service tax on GTA. While in the notice the period of wrong availment of CENVAT Credit of Rs. 3,39,333/- is April 2005 to July 2007, the impugned OIO states that the service tax of Rs. 3,39,333/- was wrongly paid from CENVAT credit during the period from April 2005 to July 2007.

6.3 The apt way of dealing with such a situation would have been to remand back the matter to the original adjudicating authority. However, it has been eight years since the impugned OIO was passed and I find that since most of the things [as far as the disputes are concerned regarding eligibility of CENVAT credit for payment of service tax on GTA and availment of CENVAT credit in respect of service tax paid on GTA], has attained finality, no purpose would be served by remanding back the matter. Therefore, as far as the aforementioned appeal is concerned, two issues need to be examined viz.

[a] whether the appellant is eligible to utilize CENVAT credit for payment of service tax on GTA; and

[b] whether the appellant is eligible to avail of CENVAT credit in respect of service tax paid on GTA.

6.4. Going to the first issue as to whether the appellant is eligible to utilize CENVAT credit for payment of service tax on GTA, I find that the issue is no longer *res integra*. The issue was first decided by the larger bench of the Hon'ble CESTAT in the case of Panchmahal Steel Limited [2014(34) STR 351], the head notes of which are as follows:

> *Cenvat credit - Utilization of - Service Tax liability for Goods Transport Agency (GTA) service - Discharge by manufacturer of excisable goods as deemed service provider without providing actual service - HELD : Credit availed for manufacturing activities could be used for payment of Service Tax on GTA service, even if inputs/input services/capital goods were not utilized for providing taxable services - There was no bar/restriction for such utilization of Cenvat Account - Rule 3(4)(e) of Cenvat Credit Rules, 2004. [paras 3, 4, 5]*

Department feeling aggrieved, filed an appeal against the aforementioned order before the Hon'ble High Court, which in its order reported at [2015(37) STR 965], held as follows:

> *8 Rule 3 of the Cenvat Credit Rules, 2004 pertains to Cenvat credit. Sub-rule (1) thereof allows the manufacturer or purchaser of final products or provider of output service to take credit of Cenvat of various duties specified therein. Sub-rule (4) of Rule 3 of the said Rules provides that the Cenvat credit may be utilized for payment of various duties specified in clauses (a) to (e) thereof; clause (e) pertains to "Service Tax on any output service". A combined reading of these statutory provisions would, therefore, establish that though the assessee was liable to pay Service Tax on G.T.A. Service, it could have utilized Cenvat credit for the purpose of paying such duty. In view of the decisions of Punjab and Haryana High Court and Delhi High Court noted above, we do not find any error in the view of the Tribunal. Tax Appeal is, therefore, dismissed.*

Therefore, since it has been held by the Hon'ble High Court of Gujarat, that there is no restriction in so far as the utilization of CENVAT credit towards payment of service tax on

outward transportation [i.e. GTA] is concerned, the findings of the adjudicating authority, holding otherwise, is set aside and the appeal of the appellant it allowed in this respect.

6.5 Now moving on to the second aspect, whether the appellant is eligible to avail of CENVAT credit in respect of service tax paid on outward transportation [GTA], again the matter is no longer res integra. The Hon'ble Supreme Court of India in the case of Vasavadatta Cements Limited [2018(11)GSTL 3(SC)], held as follows :

> *1. These appeals are preferred by the Central Excise Department against the judgment and order passed by the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT") whereby the CESTAT has allowed to the respondents (hereinafter referred to as "assessees") CENVAT credit on goods transport agency service availed for transport of goods from the place of removal to depots or the buyers premises. The lead judgment was given by the CESTAT in the case of Commissioner of Central Excise & S.T Unit Bangalore v. M/s. ABB Limited. The aforesaid judgment dated 18-5-2009 [2009 (15) S.T.R. 23 (Tri.-LB)] has been upheld by the Karnataka High Court vide judgment dated 23-3-2011 [2011 (23) S.T.R. 97 (Kar.)]. This judgment has been followed in all other cases*
>
> *7. As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.*

Since the Hon'ble Supreme Court of India has held that CENVAT credit in respect of service tax paid on outward transportation can be availed, the finding of the adjudicating authority holding otherwise, is set aside.

6.6 Hence, in view of the foregoing, the impugned OIO no. STC/66/DC/Div III/09-10 dated 19.1.2010[sr. no. 1 of the table supra],, is set aside.

7. I will now take up **OIO no. STC/67/DC/Div III/09-10 dated 19.1.2010** [sr. no. 2 of the table above]. The show cause notice dated 31.7.2008 against which this impugned OIO is passed, alleges that the appellant paid service tax of Rs. 2,52,426/- by debiting CENVAT account instead of paying the duty through PLA. The period involved is from August 2007 to March 2008. The adjudicating authority in his impugned OIO has confirmed the demand of service tax of Rs. 2,52,426/- along with interst, imposed penalty under sections 76 of the Finance Act, 1994 and under Rule 14 of the CENVAT Credit Rules, 2004 and further held that the CENVAT credit of Rs. 2,52,426/- utilized wrongly by the said appellant is disallowed and is required to be recovered with interest under Rule 14 of the CENVAT Credit Rules, 2004.

7.1 As far as the utilization of CENVAT credit for payment of service tax on outward transportation [GTA] is concerned, I have already recorded my findings in para 6.4 supra. It would however, hold for the period from August 2007 to February 2008. As far as the period of March 2008 is concerned, I would like to reproduce paras 10 to 12 [relevant] from the judgement in the case of Oudh Sugar Mills Limited [2017(52) STR 353], viz.

> *10. Central Government enacted Cenvat Credit Rules, 2004 (hereinafter referred to as "Rules 2004") vide Notification dated 10-9-2004. Assessee is availing credit of Central Excise paid on 'Inputs' and 'Capital Goods' and service tax paid on Input Services under Rules, 2004 for further payment of duty. Assessee was availing services of GTA and paying service tax on the same as*

recipient of the said service. Assessee thus, paid Services Tax by availing Cenvat credit of duty paid on 'Inputs', 'Capital Goods' and 'Service Tax on Input Services'. The term 'output service' 'person liable for paying service tax' and 'provider of taxable service' are defined in Rule 2(p)(q) and (r) of Rules, 2004 and read as under :-

2. Definitions - In these rules, unless the context otherwise requires,

"2(p) "output service" means any taxable service provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly.
Explanation. - For the removal of doubts it is hereby clarified that if a person liable for paying service tax does not provide any taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the 'output service'.
2(q) "person liable for paying service tax" has the meaning as assigned to it in clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994.
2(r) "provider of taxable service" include a person liable for paying service tax."

11. Explanation provided under Rule 2(p) of Rules, 2004 was omitted vide notification dated 19-4-2006. Definition of "Output Services" under Rule 2(p) was amended by notification dated 1-3-2008 and amended definition reads as under :-

"Rule 2(p) - "Output Service" means any taxable services excluding the taxable services referred to in sub-clause (zzp) of clause (105) of Section 65 of the Finance Act, provided by the provider of taxable services to a customer, client, subscriber, policy holder or any other person, as the case may be and the expression "provider" and "provided" shall be construed accordingly."
(emphasis added)

12. Therefore, after 1-3-2008, Assessee is not allowed to utilize Cenvat credit for the purpose of payment of 'Service Tax' towards GTA and it is now required to pay Service Tax towards GTA by cash deposit

Thus the finding of the adjudicating authority for the period from August 2007 to February 2008, disallowing utilization of CENVAT credit for payment of service tax on outward transportation (GTA), is set aside. As far as the finding of the adjudicating authority for March 2008 is concerned holding that the appellant was liable to pay service tax in respect of outward transportation [GTA] through PLA in cash, the same is upheld, in terms of the judgment *supra*.

7.2 Now, as far as the confirmation of recovery of CENVAT credit of Rs. 2,52,426/- is concerned for wrongly utilizing the CENVAT credit, I find that the CENVAT credit upto February 2008 was correctly utilized and therefore the question of recovering the CENVAT credit along with interest is not tenable. As far as the availment of CENVAT credit for March 2008 is concerned, I find that the appellant has wrongly utilized CENVAT credit of Rs. 49551/- towards payment of service tax on outward transportation [GTA] and since I have upheld the confirmation of the demand of service tax of Rs. 49551/- pertaining to March 2008, the question of demanding CENVAT credit again under Rule 14 would amount to double taxation/double jeopardy for the appellant since neither in the notice nor in the impugned OIO has it been alleged that the credit was wrongly availed. For the wrong utilization in respect of the credit which was correctly availed, the question of demanding CENVAT credit does not arise more so since the demand of service tax of Rs. 49,551/- has already been confirmed against the appellant.

7.3 In view of the foregoing, OIO No. STC/67/DC/Div III/09-10 dated 19.1.2010 [sr. no. 2 of the table supra], is modified as follows : the confirmation of service tax of Rs. 49551/- [pertaining to March 2008] is upheld along with interest. The penalty imposed under section 76

of the Finance Act, 1994 is set aside because, as is evident the utilization of CENVAT credit for payment of service tax on outward transportation was litigated and settled by the ruling of various High Courts. The question of penalty under Rule 15(3) does not arise since I have already set aside the recovery of CENVAT credit wrongly utilized for reasons mentioned supra.

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

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

(उमा शंकर)
आयुक्त (अपील्स)

Date :31.10.2018

Attested

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

By RPAD.

To,
M/s. Air Control & Chemical Engineering Company Limited,
Nandej,
Barejadi,
Dist. Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Assistant Commissioner, Central Tax Division-III(Vatwa II), Ahmedabad South Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.