



<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद - उत्तर, कस्टम हाउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. V.84/15-123/OA/2015

आदेश की तारीख/Date of Order: - 29.03.2019

जारी करने की तारीख/Date of Issue :- 31.03.2019

द्वारा पारित/Passed by:-

ए.एस. चौहान / *M.S. Chauhan*

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 12-13/ADC/2019/MS

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए.-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

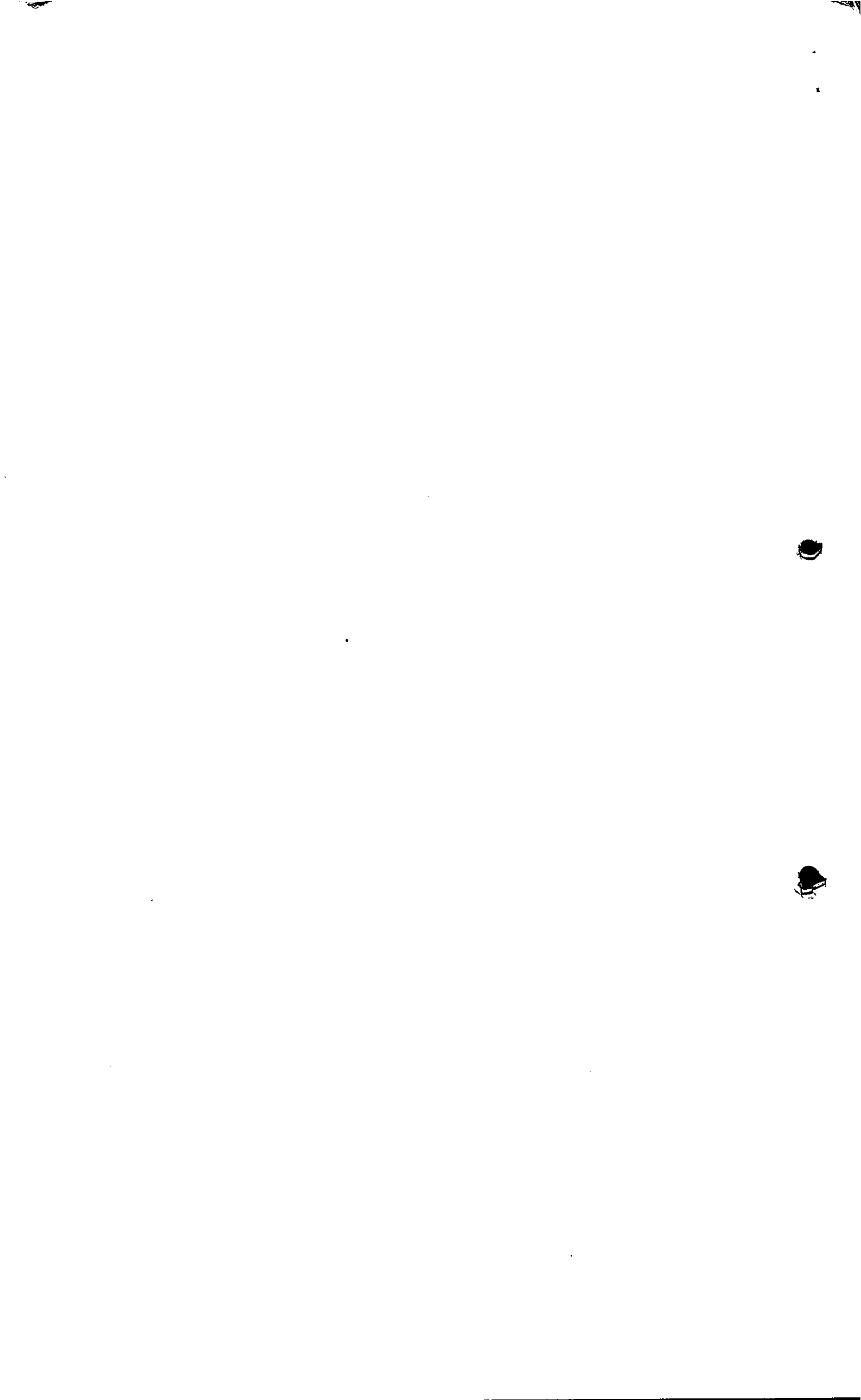
(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय:- Denovo proceedings of कारण बताओ सूचना/Show Cause Notice F.No. V.84/15-123/OA/2015 dated 15.01.2016 & V.84/15-74/OA/2016 dated 02.08.2016 issued to M/s Ingersoll Rand (India) Ltd, Plot No. 21-30, GIDC, Naroda, Ahmedabad-382330.



Brief facts of the case:

M/s Ingersoll Rand (India) Ltd, situated at Plot No. 21-30, GIDC, Naroda, Ahmedabad-382 330 (hereinafter referred to as the "the noticee" for the sake of brevity) is a manufacturer of excisable goods viz. Air Compressors, Air Motors, Spares for Air Compressors, Bus Air Conditioning Systems and parts thereof falling under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985. The noticee is holding Central Excise Registration No. AAACI3099QXM003 and is a multi-national company functioning in India and its parent company is M/s Ingersoll Rand Company, U.S.A.

2. During the course of Audit, it was observed that the noticee is in a buyers' market in India and relies on a network of 40 Distributors [also called Channel Partners], for carrying on their business. Each of these Distributors have entered into separate agreements with the noticee whereby they are required to identify the customers in their assigned territory and provide necessary support to convert the latent demand in the market for Compressors to a Purchase Order for "Ingersoll Brand Products". The distributors of the noticee provide repair, maintenance and sales support services in the market. It was observed that the noticee has wrongly availed CENVAT credit on certain tax invoices relating to the services of Courier Agency. Further, inputs service credit taken on Maintenance and Repair Service and Business Auxiliary Service pertain to sales support services provided by the Distributors of the noticee at the customer's end. None of these services appeared to be input service for the noticee in terms of the definition given in Rule 2(l) of the Cenvat Credit Rules, 2004 [hereinafter referred to as the said Credit Rules].

2.1 Audit officers had also observed that input service credit taken on certain invoices pertaining to service like Business Auxiliary Services, Commission, Maintenance and Repair Service, Canteen, Construction, Courier, Membership Fee, Rent-a-cab, Travel, GTA etc. do not appear to be eligible to be termed as input services and they had wrongly availed CENVAT Credit on the above services and that the revenue implication of the above alleged lapse on part of the noticee was raised in Revenue Para No. 6 of FAR No. 32/2012-13 dated 17.07.2012 issued by the Assistant Commissioner (Audit), Ahmedabad-II.

2.2. In view of the above, it appeared that the noticee had taken and availed CENVAT credit on invoices issued in respect of different services mentioned above knowing the fact that such input services cannot be termed as services directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal. Even in majority of cases, they were well aware of the fact that services were provided by their distributors and other parties on behalf of them and they were not raising the bills against service procurers. Even after this situation, they intentionally asked these distributors and service providers to raise bills to their company and availed CENVAT Credit with intent to avail undue benefit of CENVAT Credit with intention to evade the payment of Central Excise Duty.

2.3 They submitted that the investigation culminated into issuance of the Show Cause Notice listed in Table 1 below, alleging that CENVAT credit of input services availed by them was in contravention of the provisions contained in Cenvat Credit Rules 2004 as the impugned services were not covered within the definition of input services as defined under Rule 2(l) of Cenvat Credit

Rules, 2004 as the same were neither used in or in relation to manufacturing of final products nor for clearance of the final products up to the place of removal.

TABLE 1

S. No.	SCN No. & Date	Duty Demand	Period
1.	F.No.V.84/15-105/OA/2012 dated 30.01.2013	Rs. 2,25,70,040/-	January 2008 to September 2012
2.	F.No.V.84/15-86/OA/2013 dated 08.01.2013	Rs. 27,00,267/-	October 2012 to March 2013
3.	F.No.V.85/15-72/OA/2014 dated 13.08.2014	Rs. 8,75,024/-	November 2013 to March 2014
4.	F.No.V.84/15-37/OA/2015 dated 07.08.2015	Rs. 1,00,63,648/-	April 2014 to December 2014

The above 4 SCNs at Table-1 were adjudicated by the Ld. Commissioner vide Order-in-Original No. AHM-EXCUS-002-COMMR-08 to 10/2015-16 dated 25.01.2016 confirming the proposals made in the show cause notices.

2.4 Since the noticee continued to follow the same practice of wrong availment and utilization of Cenvat credit on ineligible input services, viz. Maintenance and Repair Service, Courier Service and Business Auxiliary Service during January-2015 to June-2015 & July 2015 to March 2016, show cause notices listed in Table 2 below were issued to the noticee.

TABLE 2

S. No.	SCN No. & Date	Duty Demanded	Details of services of which credit was availed	Period
1.	F.No.V.84/15-123/OA/2015 dated 15.01.2016	Rs. 30,42,820/-	Business Auxiliary Service (Rs.6,18,925/-) Courier Agency (Rs.86,352/-) Maintenance & Repair (Rs.23,37,543/-)	January 2015 to June 2015
2.	F.No.V.84/15-74/OA/2016 dated 02.08.2016	Rs.1,34,79,904/-	Business Auxiliary Service (Rs.6,73,418/-) Courier Agency (Rs.1,38,443/-) Maintenance & Repair (Rs.1,26,68,043/-)	July 2015 to March 2016

Personal hearing in case of the above said two SCNs at Table-2 was held on 07/11/2016 and the same were adjudicated vide OIO No. 28-29/JC/2016/GCJ dated 25.11.2016 wherein the adjudicating authority confirmed the proposals made in the show cause notices.

2.5 Being aggrieved by the aforesaid OIO dated 25.11.2016, the assessee filed an appeal before the Commissioner (A) who vide OIA No.AHM-EXCUS-002-APP-115-17-18 dated 25.09.2017 has passed following decisions-

- (i) The matter for determining the admissibility of CENVAT Credit on BAS to remanded back to the original to determine the issue after according the appellant fair chance to produce the evidences regarding its claim. (Para 6 of OIA)

- (ii) In regard to Courier Service and Maintenance & Repair services the impugned order has been set aside. (Para 7 & 8 of OIA)

3. In view of above Order-in-Appeal passed by the Ld. Commissioner (A), I take up the matter afresh for adjudication regarding admissibility of CENVAT Credit on Business Auxiliary Service (BAS).

Written Submission and Personal Hearing:-

4. Personal Hearing in the matter held on 19.02.2019. The representative of the noticee, Ms. Madhu Jain, Advocate, appeared before me and re-iterated the defence submission made at the time of reply to these SCNs. She has relied upon the case of M/s Essar Steels India Ltd. and requested to allow the Cenvat Credit on Business Auxiliary Service. She also sought 10 days time for filing of additional submission along with documentary evidence. Further vide letter receipt dated 04.03.2019 the noticee submitted their defence submission as under:-

1. They have entered into a Distributor agreement with the sendee providers namely, Standard Engineering Company, Skyline Distributors etc.
2. The scope of work covered under the scope of agreement is to develop the market for and to sell the products within the territory and give satisfactory services to the users thereof. Also to establish and maintain adequate service capabilities for servicing and installing the products and performing warranty obligation for the products.
3. The distributor raises invoice upon them towards advertisement expenses incurred on certain portal for marketing of finished products, Sales Commission refers to the work done on customer's place on behalf of them, Chargeback of expenses arc of employees who have provided services to foreign entity, if any.
4. They have further submitted that under the category of Business Auxiliary Services, they have availed the Input Service Tax Credit on the services received for the purpose of manufacturing activity. The major portion of services given by distributors has been classified as Business Auxiliary Services; that apart from that, services for indirect support taken for production are also received and this has been categorized on the basis of service tax invoice and services mentioned by the service provider for which it is registered with Service Tax Department.
5. In the case of *Essar Steel India Ltd. v. CCE* reported at 2016 (42) S.T.R. 869 (Tri. - Ahmd.), the Hon'ble Tribunal held as under-

'20. But, the Hon'ble Gujarat High Court in the case of *Cadila Healthcare Ltd.* (supra) was unable to concur with the contrary view taken by the Hon'ble Punjab & Harvana High Court in the case of *Commissioner of /excise, Ludhiana v. Ambika Overseas* (supra). The Hon'ble Gujarat High Court held that this issue is concerned, the question is answered in favour of the Revenue and against the assessee. In this background, legislature explained the meaning of the sales promotion by inserting Explanation in Rule 2(1) of Rules, 2004 and declared that sales promotion includes services by way of sale of dutiable goods on commission basis. In other way, Explanation to Rule 2(1) of Rules says in clear terms that there is no bar

on availment of the Cenvat credit on sales promotion service by way of sale of dutiable goods on commission basis. Further, by inserting the Explanation in the Rule 2(1), it has confirmed the Board Circular and resolved the different views of the High Courts. Taking into circumstances under which the Explanation was inserted in Rule 2(1) of Rules. 2004 and consequence of the Explanation to extend the benefit to the assessee as per Board Circular, we hold that the Explanation inserted in Rule 2(1) of Rules. 2004 by Notification No. 2/2016-CX (N.T.) (supra) should be declaratory in nature and effective retrospectively.'

Emphasis supplied

6. In the case of **CCE v. Cadila Healthcare Ltd.** reported at 2013 (30) S.T.R. 3 (Guj.), the Hon'ble High Court of Gujarat held as under:-

'viii) From the definition of sales promotion, it is apparent that in case of sales promotion a large population of consumers is targeted. Such activities relate to promotion of sales in general to the consumers at large and are more in the nature of the activities referred to in the preceding paragraph. Commission agent has been defined under the explanation to business auxiliary service and insofar as the same is relevant for the present purpose means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration. Thus, the commission agent merely acts as an agent of the principal for sale of goods and such sales are directly made by the commission agent to the consumer. In the present case, it is the case of the assessee that service tax had been paid on commission paid to the commission agent for sale of final product. However, there is nothing to indicate that such commission agents were actually involved in any sales promotion activities as envisaged under the said expression. The term input service as defined in the rules means any service used by a provider of taxable service for providing an output service or 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 various activities of the description provided therein including advertisement or sales promotion'

7. In the case of **Carrier Airconditioning & Refrigeration Ltd v. CCE** reported at 2016 (41) S.T.R. 1004 (Tri. - Del.), the Hon'ble Tribunal held as under

'9. As regards the Cenvat credit demand of Rs. 3,34,60,922/- this demand is in respect of the service tax paid by the commission agents on the service of procuring sales orders provided by them to the appellants. The Department's contention is that the Commission Agent service received by the appellant for procuring sales orders is not covered by the "input service". We are of the view that this service is nothing but sales promotion service which is specifically mentioned in the definition of "input service". This issue has been discussed at length by the Hon'ble Punjab & Haryana High Court in its judgment in the case of *Ambika Overseas* (supra) and by the Tribunal in the case of *Birla Corporation* (supra), wherein it has been held that this service is covered by the definition "input service" and would be eligible for Cenvat credit. In view of this, the Cenvat credit demand of Rs. 3,34,60,922/- is also not sustainable.'

8. In the facts of present case, the Distributor is engaged to carry out sale of finished goods along with ancillary services required for which charges charged by the service provider is categorized under business auxiliary service on which credit is availed by them.

9. The services are very much in relation to manufacturing activity of the finished goods. As clearly laid down by the Hon'ble High Court of Gujarat, sales promotion is in relation to manufacture of finished goods. Even in the facts of present case, the service provider has provided sales promotion service and service ancillary to sales promotion service.

10. They have also relied upon the decision held by various courts and Tribunals in following cases-

- CCE, Salem vs. ITC Ltd. 201 1 (268) E.L.T. 80 (Tri. - Chennai)
- Vishal Natural Food Products vs. CC, Bangalore 2011 (260) E.L.T. 360 (Tri Bang.)
- Sanghi Industries Ltd. vs. CCE, Rajkot 2009 (234) E.L.T. 367 (Tri. - Ahmd.)

11. On the above grounds the assessee has requested to drop the both SCNs and allow the Cenvat credit availed on the Business Auxiliary Service.

5. In regard to Business Auxiliary Service, the noticee vide their written submission dated 26.10.2016 submitted as under:-

Business Auxiliary Services:

1. They have submitted that under the category of Business Auxiliary Services, the they have availed the Input Service Tax Credit on the services received for the purpose of manufacturing activity; the major portion of services given by distributors has been classified as Business Auxiliary Services; that apart from that, services for indirect support taken for production are also received and this has been categorized on the basis of service tax invoice and services mentioned by the service provider for which it is registered with Service Tax Department.

2. That it has been held by the various courts and Tribunals that the credit on Business Auxiliary Services is available. They placed reliance on the following case laws:

- CCE, Salem vs. ITC Ltd. 2011 (268) E.L.T. 89 (Tri. - Chennai)
- Vishal Natural Food Products vs. CC, Bangalore 2011 (266) E.L.T. 369 (Tri. - Bang.)
- Sanghi Industries Ltd. vs. CCE, Rajkot 2009 (234) E.L.T. 367 (Tri. - Ahmd.)

3. That they availed Cenvat credit on the input services of Sales Promotion Services for marketing the product of the Company; the department has denied the Cenvat credit on this services stating that the services are not related to the manufacturing activity of the company.

4. That however the Department has issued Circular No. 943/4/2011-CX dated 29.04.2011 clarifying that the input service credit on the business Auxiliary services available. Relevant para of the Circular is extracted here under:

5.	Is the credit of Business Auxiliary Service (BAS) on account of sales commission now disallowed after the deletion of expression "activities related to business"?	The definition of input services allows all credit on services used for clearance of final products upto the place of removal. Moreover activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale. Reading the provisions harmoniously it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis.
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5. That further in case of **Ambica Forging 2010(259)ELT 593 (Tri-Del)** it has been held that Business promotion activity if adds to revenue earning by manufacture and sale of incremental quantity, activity may have nexus to such sales - Service tax paid on such service may be attributable to input Service tax; relevant Para of the Judgment is extracted as under:

"In common business or commercial parlance business promotion adds to earning of Revenue for a seller or a manufacturer. Whether addition to revenue earning by a manufacturer is made by manufacture of extra quantity goods has earned excise duty is also relevant. If business promotion activity adds to Revenue by manufacture and sale of incremental quantity, the business promotion activity may have nexus to such sales. Accordingly, service tax paid on such service may be attributable to input service tax. Claim of Cenvat credit is made to avoid cascading effect under Rule 2 (1)(ii) of the Cenvat Credit Rules, 2004."

6. The noticee vide their letter dated 16.05.2018 had submitted the sample copies of invoices for Business Auxiliary Services against which they have availed CENVAT Credit covering period from January 2015 to March 2016.

Discussion and Findings:-

7. I have carefully gone through the contents of the Show Cause Notices, defence submission made by the noticee vide their letter dated 26.10.2016, submission made during personal hearing on 19.02.2019 and additional submission made by the noticee vide letter dated 04.03.2019.

8. In the instant cases, I find that the then adjudicating authority vide Order-in-Original No. 28-29/JC/2016/GCJ dated 25.11.2016 confirmed the proposals of demand made under SCNs bearing No. F. No. V.84/15-123/OA/2015 dated 15.01.2016 and F. No. V.84/15-74/OA/2016 dated 02.08.2016. Further, being aggrieved with the above detailed Order-In-Original dated 25.11.2016, the noticee preferred appeal before the Ld. Commissioner (A). The Ld. Commissioner (A) vide their Order-in-Appeal No. AHM-EXCUSE-002-APP-115-17-18 dated 25.09.2017 set aside the impugned Order-In-Original in regard to services other than Business Auxiliary Services. In regard to Business Auxiliary Service, the Ld. Commissioner (A) remanded matter back to the original adjudicating authority to determine the issue after according the appellant fair chance to produce the evidences regarding the claim.

9. Therefore, in the present matter I have to decide the issue pertains to CENVAT Credit taken on input service of Business Auxiliary Service.

10. Firstly, the definition of Input service is reproduced below:-

"input service" means any service, -

- (i) used by a provider of taxable service for providing an output service, or*
- (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,*

and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes-

11. I find that it has been alleged in the SCN that on observation of the physical description of invoices in respect of Business Auxiliary Services, it was noticed that the Business Auxiliary Services was included modification of piping work, printing job, designing of environment, health & safety posters, clearing and binning of material, labour work for painting packages, O&M work at Tata Motor Ltd., electrification Bills for package works etc, and such activities nowhere suggests that the services procured by the noticee falls under the definition of "Input Services" as given in Rule 2(l) of the CENVAT Credit Rules, 2004. It has also been alleged that these invoices do not exhibit the exact nature of services. I also find that a statement of Shri Sachin Kumar, Finance Controller and authorized signatory of the noticee was recorded on 23.10.2012 while issuing the Show Cause Notice No. V.84/15-105/OA/2012 dated 30.01.2013. During the statement, Shri Sachin Kumar stated regarding Business Auxiliary Services that they have paid the amount to distributors for support extended by them in getting the orders and services rendered by them during warranty period, where sales invoice have raised by their company directly in the name of end customer and not under obligation to provide these services; that these machines are invoiced by them and the distributors act on their behalf. Shri Sachin Kumar had also stated that they are not charging anything from their end customs as long as it is under obligatory period and if services are rendered beyond this period they charge from customers.

11.1 I find that the noticee had contested that scope of work covered under the scope of agreement is to develop the market for and to sell the products within the territory and give satisfactory services to the users thereof. Also to establish and maintain adequate service capabilities for servicing and installing the products and performing warranty obligation for the products. They have also contested that the distributor raises invoice upon the noticee towards advertisement expense incurred on certain portal for marketing of finished products, sales commission refers to the work done on customer's place on behalf of noticee, chargeback of expenses are of employees who have provided services to foreign entity, if any.

11.2 I have gone through the sample invoices submitted by the noticee vide their letter dated 16.05.2018 and find that the invoices issued by M/s MGM Industrial solutions, shows the category of ' Description of Goods', as " Service Charges (Category- Business Auxiliary Service)"; invoice raised by M/s Collabera shows the category of Description of goods as "Consultant Name, service period, worked days, Bill rate"; invoice raised by M/s Skyline Distributors shows the category of Description of Goods mentioned as " Commission, sales Commission" .

On observation of the invoices submitted by the noticee I find that in the most of the cases there are ambiguity to find for which services the invoices were issued shows that noticee has taken CENVAT Credit carelessly without understanding the fact of functional utility of services that cannot be treated as in or in relation of the manufacture or clearance of the goods upto the place of removal. It has also been observed that some of the service provider has provided service for commission/sales commission and such services have been claimed by the noticee as Sales promotion. However, such services do not cover under Sales promotion it covers under Commission agent service. Therefore, applying the ratio of judgment in the case of *Cadila Healthcare Limited (supra)*, the Hon'ble High Court has held that CENVAT Credit would not be admissible in respect of the commission paid to agent.

11.3 In the instant case, the noticee has relied on the judgments in the case of *Essar Steel India Ltd. vs. CCE reported in [2016 (335)ELT 660 (Tri-Ahmd.)]*; in the case of *CCE vs Cadila Healthcare Ltd. reported at [2013 (30) S.T.R. 3 (Guj)]* and in the case of *Carrier Airconditioning & Refrigeration Ltd. vs CCE reported at [2016 (41) S.T.R. 1004 (Tri-Del)]*. I have gone through the citation of the Hon'ble Court and Hon'ble Tribunal and find that in these cases it has only been elaborated regarding sales promotion. However, in the present case it is not only the matter of sales promotion. During the audit conducted by the Central Excise Officers they have noticed that the noticee has taken CENVAT credit on the invoices issued for the services such as modification of piping work, printing job, designing of environment, health & safety posters, clearing and binning of material, labour work for painting packages, O&M work at Tata Motor Ltd., electrification Bills

for package works etc, do not cover under sales promotion. Therefore, rely on judgments detailed/submitted by the noticee is not similarly placed in the instant case.

11.4 With regards to credit of service tax on commission, Shri Sachin Kumar, Finance Controller and authorized signatory of the noticee had stated in his statement dated 24.12.2012 that commission was paid to the distributors. The noticee has nowhere claimed that the commission was paid for sales promotion. Therefore, the impugned CENVAT Credit is not admissible as held in the order of the Hon'ble High Court of Gujarat in the case of *Commissioner of Central Excise vs. Cadila Healthcare Ltd. reported in [2013 (30) S.T.R. 3 (Guj)]*. Further, the Hon'ble High Court of Gujarat in the case of *Astik Dyestuff Pvt. Ltd. vs Commissioner of Central Excise & Customs reported at [2014 (34) STR 814 (Guj)]* has held that ruling of the jurisdictional High Court is binding on the department rather than the circular issued by CBEC. The relevant extracts are reproduced below. To quote:-

“ 4. Heard Shri S. Suriyanarayan, learned advocate for the appellant. At the outset, it is required to be noted that issue involved in the present appeal i.e. whether the appellant would be entitled to Cenvat credit on Sales Commission services obtained by them is now not res *integra* in view of the decision of this Court in the case of *Cadila Healthcare Limited (Supra)*. At this stage, it is required to be noted that while passing the OIO the department relied upon and followed the decisions of the jurisdictional High Court in the case of *Cadila Health Care Limited (Supra)*. The appellant has heavily relied upon the C.B.E.&C circular dated 29.04.2011 and according to the appellant, as per the C.B.E.&C circular dated 29.04.2011; the appellant shall be entitled to cenvat credit on Sales Commission services obtained by them. As contended/submitted on behalf of the appellant, C.B.E.&C. Circular dated 29.04.2011 is binding to the department and therefore, while passing OIO the adjudicating authority ought not have taken a contrary view/decision then the C.B.E.&C circular. On interpretation of the relevant provision of law in the case of *Cadila Healthcare Limited (Supra)* jurisdictional High Court has held that on sales commission services obtained by them, Cenvat credit is not admissible. It appears that while issuing the circular dated 29.04.2011, C.B.E. & C has not considered the decision of this Court in the case of *Cadila Healthcare Limited (Supra)*. In any case, the decision of the jurisdictional High Court is binding to the department rather than the circular issued by the C.B.E. & C. If there is any conflict between the jurisdictional High Court and the C.B.E. & C. circular, the decision of the jurisdictional High Court is binding to the department rather than C.B.E & C circular. Under the circumstances, the contention on behalf of the appellant that the department has erred in taking contrary decision then the C.B.E. & C circular, cannot be accepted. As such the adjudicating authority rightly relied upon and followed the binding decision of this court in the case of *Cadila Helathcare Limited (supra)*.

5. Now, so far as request made by Shri Suriyanarayan, learned advocate for the appellant that in view of the contrary decision of the Punjab and Harayana High Court in the case of *Ambika Overseas (supra)* matter may be referred to the Larger Bench as there would be discrimination amongst the similar unit is concerned, the said cannot be accepted. At the outset, it is required to be noted that decision of the jurisdictional High Court- this court in the case of *Cadila Health care Limited (supra)* is challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court is seized with the matter. It is reported that judgment and order passed by this Court in the case of *Cadila Health Care Limited (supra)* has not been stayed. The decision of the jurisdictional High Court is binding to the department rather than decision of the other High Court. When there are two contrary decisions, one of the jurisdictional High Court and another of the other High Court, then the decisions of the jurisdictional High Court is binding to the department and not the decision of another High Court. Under the circumstances, while passing OIO and while passing the impugned judgment and order, the learned CESTAT has rightly relied

upon the binding decisions of the jurisdictional High Court in the case of *Cadila Healthcare Limited (supra)*."

12. In the case of *Royal Hatcheries (P) Ltd. vs State of A.P. 1994 Supp(1) SCC429*, the Hon'ble Supreme Court held that the words such as indicate that what are mentioned thereafter are only illustrative and not exhaustive. Thus, the activities that follow the words such as are illustrative of the activities relating to business which are included in the definition of input service and are not exhaustive. Therefore, activities relating to business could also be other than the activities mentioned in the sub-rule. However, that does not mean that every activity related to the business of the assessee would fall within the inclusive part of the definition. For an activity related to the business, it has to be an activity which is analogous to the activities mentioned after the words such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security. Thus, what is required to be examined is as to whether the service rendered by the distributors of the noticee can be said to be an activity which is analogous to any of the said activities. I find that none of the illustrative activities viz. accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security similar to the services rendered by the distributor of the noticee nor are the same in any manner related to such services. Consequently, the activities for which the noticee claimed as input service in the category of Business Auxiliary Service do not qualify as Input Service in terms of Rule 2(1) of the CENVAT Credit Rules, 2004. The Hon'ble High Court of Gujarat in the case of *Commissioner of Central Excise vs. Cadila Healthcare Ltd. reported in [2013 (30) S.T.R. 3 (Guj)]* has held that CENVAT Credit would not be admissible in respect of commission paid to agent.

12.1. In view of above discussion and applying the ratio of judgment held by the Apex Court in the case of *Royal Hatcheries (P) Ltd. vs State of A.P. 1994 Supp(1) SCC429*, and judgment held by the Hon'ble High Court of Gujarat in the case of *Commissioner of Central Excise vs. Cadila Healthcare Ltd. reported in [2013 (30) S.T.R. 3 (Guj)]* and judgment held by the Hon'ble High Court of Gujarat in the case of *Astik Dyestuff Pvt. Ltd. vs Commissioner of Central Excise & Customs reported at [2014 (34) STR 814 (Guj)]*, I find that CENVAT Credit taken by the noticee on the name of Business Auxiliary Service is not legally correct and sustainable.

13. As regards the proposal to impose penalty on the noticee under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of CEA, 1944, the noticee has clearly contravened the provisions of Rule 3(1) of CCR, 2004 inasmuch as they have availed CENVAT Credit of Service Tax on the impugned service. They have also contravened the provisions of Rule 9(6) of CCR, 2004 by clearly failing to honor the burden cast upon them to ensure that the CENVAT Credit availed and utilized by them was actually admissible. Therefore, I uphold the proposal in the present SCN and find that the noticee is liable to penalty under Rule 15 of CCR, 2004 read with Section 11AC of CEA, 1944. I rely on decision of Hon'ble Supreme Court in India in the case of *Union of India vs Rajasthan Spinning & Weaving Mills reported in 2009 (238) E.L.T. 3(SC)*, where the ratio given by the Hon'ble Apex Court in the case of *Union of India vs. Dharmendra Textile Processors-2008 (231) E.L.T. (S.C.)* has been affirmed. As per ratio of these decisions, once Section 11AC is applicable in a case, the concerned authority would have no discretion in quantifying the amount and penalty must be equal to the duty determined.

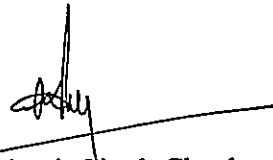
14. In view of above discussion, I pass the following order

Order

- i. I confirm the demand for recovery of CENVAT Credit amounting to Rs. 6,18,925/- (Rs. Six Lacs Eighteen Thousands Nine Hundred and Twenty Five Only) wrongly taken as input service in the category of Business Auxiliary Service, in terms of Section 11A(10) of Central Excise Act, 1944, as demanded in SCN F. No. V.84/15-123/OA/2015 dated 15.01.2016 under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944.

- ii. I confirm the demand for recovery of CENVAT Credit amounting to Rs. 6,73,418/- (Rs. Six Lacs Seventy Three Thousands Four Hundred and Eighteen Only) wrongly taken as input service in the category of Business Auxiliary Service in terms of Section 11A(10) of Central Excise Act, 1944, as demanded in SCN F. No. V.84/15-74/OA/2016 dated 02.08.2016 under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944.
- iii. I confirm the recovery of interest on the amount of demand confirmed at Sr. (i) & (ii) above to be paid at appropriate rates under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944.
- iv. I impose penalty of Rs. 61,893/- (Rs. Sixty One Thousands Eight Hundred and Ninety Three only) in the matter SCN F. No. V.84/15-123/OA/2015 dated 15.01.2016 under Rule 15(1) of the CENVAT Credit Rules, 2004 read with Section 11(AC) (1)(a) of Central Excise Act, 1944.
- v. I impose penalty of Rs. 67,342/- (Rs. Sixty Seven Thousands Three Hundred and Forty Two only) in the matter SCN F. No. V.84/15-74/OA/2016 dated 02.08.2016 dated 15.01.2016 under Rule 15(1) of the CENVAT Credit Rules, 2004 read with Section 11(AC)(1)(a) of Central Excise Act, 1944.
- vi. In terms of Section 11AC(1)(b), the penalty imposed herein shall be reduced to 25% of penalty, if duty, interest and penalty is paid within 30 days from the date of communication of this order.

15. Denovo proceedings in reference to Order-in-Appeal No. AHM-EXCUS-002-APP-115-17-18 dated 25.09.2017 are disposed of in the above terms.


(Mahavir Singh Chauhan)
Additional Commissioner
CGST, Ahmedabad North

F. No. V.84/15-123/OA/2015

Date- 29.03.2019

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(4) Guard File.