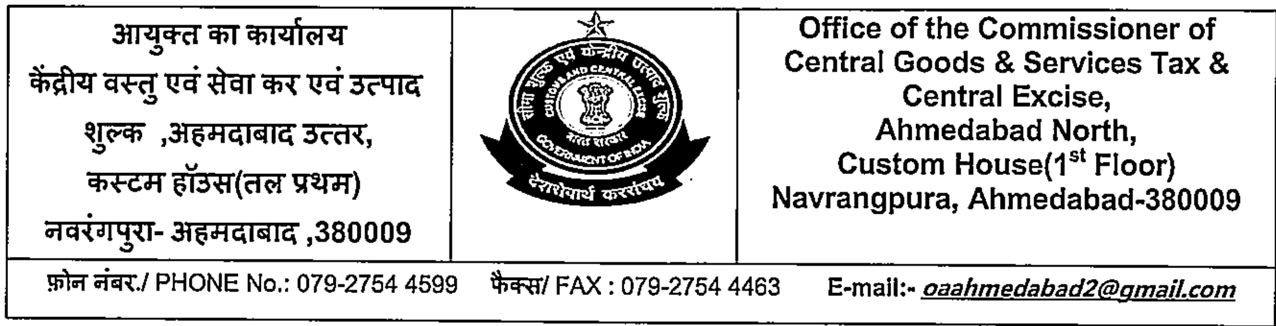



<u>निबन्धित पावती डाक द्वारा / By REGISTERED POST AD</u>

**फा .सं/. V.30/15-51/OA/2016**

आदेश की तारीख / Date of Order : 17.02.2020

जारी करने की तारीख / Date of Issue : 17.02.2020

द्वारा पारित/Passed by -

**डॉ. बलबीर सिंह / Dr. BALBIR SINGH**

**आयुक्त / COMMISSIONER**

<u>मूल आदेश संख्या /</u>

**<u>ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–24/2019-20</u>**

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

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

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 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 Tribunal 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)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के

विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ )उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो, उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show-Cause-Notice F.No. V.30/15-51/OA/2016 dated **22.04.2016.** 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., Plot No 21-30, GIDC, Naroda, Ahmedabad-382330 (hereinafter referred to as "M/s. IRIL" or the "said assessee") is engaged in the manufacture of excisable goods viz. Air Compressors, Air Motors, Spares for Air Compressors etc. falling under Chapter 84 of the first schedule to Central Excise Tariff Act, 1985 and were holding Central Excise Registration No. AAACI3099QXM003. The said assessee were availing Cenvat credit of Central Excise Duty paid on inputs and capital goods and Service Tax paid on input services, as provided under Cenvat Credit Rules, 2004..

2. Audit of Central Excise records maintained by the said assessee was carried out by the officers of Indian Audit & Accounts Department wherein it was observed that the said assessee manufactures air compressors and also doing trading activities of the products such as lubricant oil, grease, coolants, spare parts etc.; that all the parts required to manufacture Air Compressors were imported as well as purchased locally by them, who avails CENVAT credit of all the items purchased by them. It was further observed that the said assessee initially takes credit of all the goods procured and later, as per requirement, the materials were issued to production and for trading and other business activities; that materials were removed for Free of Charge supply (FOC), removed as such, transferred for assessee's authorized service centers. It was observed that the assessee does trading activities of the products such as lubricant oil, grease, coolants, spare parts etc. It was also observed that the assessee had availed CENVAT credit of input services, which were used to execute every kind of business operations of the assessee; that the input services were in the nature of Custom House Agent, Goods Transport Agency, Renting, Consultancy, Business Auxiliary Service, Networking, Communication, Manpower Recruitment etc. It was further observed that the process of 'Trading' is not chargeable to Central Excise duty/Service Tax, and the assessee was required to pay amount under Rule 6 of CCR, 2004 in respect of trading sales.

3.1.1 The relevant portion of Rule 6 of CCR, 2004 reads as follows :-

*"**RULE 6. Obligation of a manufacturer or producer of final products and a provider of output service.** — (1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2) :*

> ***Provided** that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*
>
> ***Explanation 1.** - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.*
>
> ***Explanation 2.** - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.*
>
> *(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for -*
>
> *(a) the receipt, consumption and inventory of inputs used –*
>
> *(i) in or in relation to the manufacture of exempted goods;*
>
> *(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;*
>
> *(iii)for the provision of exempted services;*
>
> *(iv)for the provision of output services excluding exempted services; and*

*(b) the receipt and use of input services —*

*(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;*

*(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;*

*(iii)for the provision of exempted services; and*

*(iv) for the provision of output services excluding exempted services,*

*and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).*

*(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely :-*

*(i) pay an amount equal to six per cent. of value of the exempted goods and seven per cent. of value of the exempted services; or*

*(ii) pay an amount as determined under sub-rule (3A); or*

*(iii)maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment :*

***Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :*

***Provided** further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be seven per cent. of the value so exempted :*

***Provided** also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent. of value of the exempted services.*

.....

*(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-*

*(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-*

*(i) name, address and registration No. of the manufacturer of goods or provider of output service;*

*(ii) date from which the option under this clause is exercised or proposed to be exercised;*

*(iii)description of dutiable goods or [output] services;*

*(iv) description of exempted goods or exempted services;*

*(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;*

*(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -*

*(i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;*

*(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)= (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods*

*manufactured and removed plus the total value of [output] services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;*

*(iii)the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of [output] and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;*

*(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-*

*(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;*

*(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of [output] services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;*

*(iii)the amount attributable to input services used in or in relation to manufacture of exempted goods [and their clearance upto the place of removal] or provision of exempted services = (M/N) multiplied by P, where [M] denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, [1][N] denotes total value of [output] and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and [1][P] denotes total CENVAT credit taken on input services during the financial year;*

*(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;*

*(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;*

*(f) where the amount determined as per condition (c) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;*

*(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely :-*

*(i) details of CENVAT credit attributable to exempted goods and exempted services, month wise, for the whole financial year, determined provisionally as per condition (b),*

*(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),*

*(iii)amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,*

*(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and*

*(v) credit taken on account of excess payment, if any, determined as per condition (f);*

*(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons*

*that no dutiable goods were manufactured and no [output] service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.*

(i) *Where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent per annum from the due date till the date of payment.*

*(3B)* ………

*(3C)* ………

*(3D)* ………

***Explanation I.*** *- "Value" for the purpose of sub-rules (3) and (3A), —*

(a) ………;

(b) ………;

(c) *in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten per cent. of the cost of goods sold, whichever is more;*

(d) ………;

(e) ………

***Explanation II.*** *- The amount mentioned in sub-rules (3), (3A) and (3B), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.*

***Explanation III.*** *- If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (3), (3A) [and (3B)], it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.*

***Explanation IV.*** *- In case of a manufacturer who avails the exemption under a notification based on the value of clearances in a financial year and a service provider who is an individual or proprietary firm or partnership firm, the expressions, "following month" and "month of March" occurring in sub-rules (3) and (3A) shall be read respectively as "following quarter" and "quarter ending with the month of March".*

*(4)* ………

……………"

3.1.2 The amount required to be paid under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004 was five per cent of value of exempted service till 31.03.2012, six per cent of value of exempted service from 01.04.2012 to 31.05.2015 and has been seven per cent of value of exempted service from 01.06.2015.

3.2.1 Rule 2(e) of CCR, 2004 defined the term "exempted service", w.e.f. 01.04.2011, as follows :

*"(e) 'exempted services' means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.*

*Explanation.- For the removal of doubts, it is hereby clarified that "exempted services" includes trading";*

3.2.2 The aforesaid clause (e) of Rule 2 of CCR, 2004 was substituted w.e.f. 01.07.2012 as follows :

*"(e) "exempted service" means a-*

*(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*

*(2) service, on which no service tax is leviable under section 66B of the Finance Act; or*

*(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;*

*but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994."*

3.3 Section 66B of the Finance Act, 1994 provides for levy of Service Tax at the prescribed rate on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another.

3.4 Section 66D of the Finance Act, 1944 provides the negative list of services and clause (e) thereof prescribes "trading of goods".

4. A statement dated 23.03.2016 of Shri Yatish Brijmohan Bansal, Senior Manager (Finance) of the said assessee was recorded under Section 14 of the Central Excise Act, 1944, wherein he *inter-alia* deposed as follows :-

*Que. 1 : What is the business of M/s. Ingersoll Rand (India) Ltd.? Please explain.*
*Ans. 1 : M/s. Ingersoll Rand (India) Ltd. is engaged in manufacture of different sizes of Air Compressors and its spare parts.*

*Que. 2 : What are the inputs required to manufacture Air Compressors and its spare parts ?*
*Ans. 2 : Major inputs required to manufacture Air Compressors and its spare parts are Electrical Motors, Connecting Rods, Fly Wheel, Inter-Cooler, After-Cooler, Cylinder, Air Receiver, Bearings, Coolant etc.*

*Que. 3 : Do you avail Cenvat Credit of Central Excise Duty paid on aforesaid inputs?*
*Ans. 3 : Yes, M/s. Ingersoll Rand (India) Ltd. avail Cenvat credit of Central Excise duty paid on aforesaid inputs.*

*Que. 4 : Which are the input services being used by M/s. Ingersoll Rand (India) Ltd.? Whether Cenvat credit of Service Tax paid on such services is availed by M/s. Ingersoll Rand (India) Ltd.?*
*Ans. 4 : M/s. Ingersoll Rand (India) Ltd. avails various input services such as Manpower Supply Service, Courier Service, Business Auxiliary Service, Consultancy Service, Security Service, Legal Service, Goods Transport Agency Service and Clearing and Forwarding Service in respect of import of inputs etc.*

*Que. 5 : Whether M/s. Ingersoll Rand (India) Ltd. clears 'input as such'?*
*Ans. 5 : In case of rejection of inputs, we return / clear the same as 'input as such'. We also clear the inputs to our Service Centre, outside factory premises, where our earlier sold Compressors are received for repairing. In case of supply of inputs 'Free of Charge' for repairing of earlier sold Compressors within Warrantee period, we clear the 'inputs as such'.*

*Que. 6 : What are the documents prepared for clearance of 'input as such'?*
*Ans. 6 : While clearing the rejected inputs or inputs cleared to Service Centre or inputs cleared 'Free of Charge' as 'input as such', we prepare Central Excise Invoice and pay amount of equal to Cenvat credit availed on such inputs, as required under Rule 3(5) of Cenvat Credit Rules.*

*Que. 7 : Whether M/s. Ingersoll Rand (India) Ltd. has ever been engaged in trading activity ?*
*Ans. 7 : Lubricant Items such as Grease and Oil, Coolant etc. are inputs required in or in relation to manufacture of Air Compressors. M/s. Ingersoll Rand (India) Ltd. also separately sells these Lubricant items such as Grease and Oil, Coolant etc. We commonly purchase Lubricant Items such as Grease and Oil, Coolant etc. from domestic market as well as from international market and avail Cenvat credit of Central Excise Duty paid on domestically purchased inputs and CVD and SAD (Countervailing Duty and Special Additional Duty) paid on imported inputs.*

*Que. 8 : What are the documents prepared for separately selling Lubricant items and what is the procedure followed to reverse the Cenvat Credit availed on such Lubricant items, which are separately sold?*

*Ans. 8 : In respect of sale of Lubricant items, we clear the same under Commercial Invoice against Purchase Order of the buyer by paying applicable VAT / CST. We do not show amount of Cenvat credit required to be paid on sale of such Lubricant items in the Commercial Invoice.*

*Based on the Purchase Orders of the buyer, the quantity of Lubricant Items are transferred in our Software from one storage location (which may be termed as storage for 'inputs used for manufacture') to another storage location (which may be termed as storage for 'trading sale') as and when required. When the Lubricant Items are sold under Commercial Invoice as detailed above, the quantity of such Lubricant Items are reduced from such another storage location in our Software. On the basis of quantity of Lubricant Items thus sold under Commercial Invoice, we reverse on monthly basis, the amount equal to the Cenvat credit availed on such quantity of Lubricant Items transferred in our Software from one storage location (which may be termed as storage for 'inputs used for manufacture') to another storage location (which may be termed as storage for 'trading sale').*

*Que. 9 : Since how long M/s. Ingersoll Rand (India) Ltd. is following the aforesaid practice of taking Cenvat credit on total quantity of Lubricant Items and subsequently reversing the amount equal to Cenvat credit availed on Lubricant Items separately sold to buyers.*

*Ans. 9 : We are following the aforesaid practice of taking Cenvat credit on total quantity of Lubricant Items and subsequently reversing the amount equal to Cenvat credit availed on Lubricant Items separately sold to buyers since 1st April, 2013 as after implementation of new ERP system, our company was not able to differentiate these items at the time of receiving and therefore, we are taking input credit on total quantity and later on reverse the input credit on trading quantity.*

*Que. 10 : What procedure was being followed by M/s. Ingersoll Rand (India) Ltd. prior to April, 2013 in respect of Lubricant Items etc. being separately sold to buyers ?*

*Ans. 10 : Prior to April, 2013, our company had identification available for trading items which were being separately sold to buyers and therefore our company was not availing Cenvat credit on that quantity of Lubricant Items which were subsequently being sold to buyers.*

*Que. 11 : What were the documents prepared for separately selling Lubricant items and what was the procedure followed to reverse the Cenvat Credit availed on such Lubricant items, which are separately sold prior to April 2013?*

*Ans. 11 : Prior to April, 2013, our company used to sale Lubricant items etc. under Commercial Invoice against Purchase Order of the buyer by paying applicable VAT / CST. As I have already clarified that M/s. Ingersoll Rand (India) Ltd. was not availing Cenvat credit on that quantity of Lubricant Items which were subsequently being sold to buyers, our company was not required to reverse the Cenvat Credit availed on such Lubricant items, which are separately sold, hence our company did not reverse any Cenvat credit amount on sale of such Lubricant Items.*

*Que. 12 : Whether Lubricant Items etc., which are separately sold, have been purchased, received and sold from Naroda unit of M/s. Ingersoll Rand (india) Ltd. during the period prior to April, 2013 and after April, 2013?*

*Ans. 12 : The activities of purchase, receipt, storage and sale of Lubricant Items, which are separately sold under Commercial Invoice, have always taken place, prior to April, 2013 and after April, 2013, at our Naroda unit situated at Plot No. 21-30, GIDC, Naroda, Ahmedabad.*

*Que. 13 : Is there any common input service used in or in relation to manufacturing activity and trading activity of M/s. Ingersoll Rand (India) Ltd.? Please elaborate.*

*Ans. 13 : Yes, the services of Custom House Agent service, Goods Transport Agency Service, Clearing and Forwarding Service in respect of imported inputs, Consultancy Service, Courier Service and all the services received at our Bangalore Head Office from where Input Service Distributor Invoices are issued, are common input services used in or in relation to manufacturing activity and trading activity of M/s. Ingersoll Rand (India) Ltd.*

*Que. 14 : Whether M/s. Ingersoll Rand (India) Ltd. maintain separate record for input services utilized in manufacture of dutiable final products and exempted final goods and trading activity, which is an exempted service, and avail Cenvat credit only on the input services utilized in manufacture of dutiable final products ?*

*Ans. 14 : No, M/s. Ingersoll Rand (India) Ltd. has not maintained*

*Que. 15 :Has M/s. Ingersoll Rand (India) Ltd. ever given intimation to the Central Excise department for availing option of proportionate reversal of Cenvat credit on the basis of turnover of dutiable final products and exempted final goods and exempted services ?*

*Ans. 15 : No, M/s. Ingersoll Rand (India) Ltd. has never given intimation to the Central Excise Department for availing option under sub-rule (3A) of Rule 6 of Cenvat Credit Rules, 2004 for proportionate reversal of Cenvat credit on the basis of turnover of dutiable final products, exempted final products and exempted service.*

*Que. 16 :Whether M/s. Ingersoll Rand (India) Ltd. has paid an amount equal to 5% / 6% of the value of exempted goods and exempted service i.e. trading activity ?*

*Ans. 16 : M/s. Ingersoll Rand (India) Ltd. has paid amount equal to 5% / 6% of the value of exempted goods, (not covered under sub-rule (6) of Rule 6 of Cenvat Credit Rules) as required under Rule 6(3) of Cenvat Credit Rules, 2004.*

*M/s. Ingersoll Rand (India) Ltd. has not paid an amount equal to 5% / 6% of the value of exempted service i.e. trading activity.*

*However, M/s. Ingersoll Rand (India) Ltd. has paid some amount from time to time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. I will submit details for common services reversal for trading sales, for the period from April-2011 to till date.*

*Que. 17 :What was the system followed by M/s. Ingersoll Rand (India) Ltd. for payment of amount from time to time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. Have you ever informed the department about the system followed by M/s. Ingersoll Rand (India) Ltd. for payment of amount from time to time?*

*Ans. 17 : M/s. Ingersoll Rand (India) Ltd. has not informed the system followed for payment of amount from time to time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. Different systems were followed for payment of amount from time to time, but now we have calculated the proportionate amount required to be paid in respect of common input services used for exempted service i.e. trading activity. I will submit the details of the same within a week time.*

5.1 It appeared that M/s. IRIL had been engaged in the 'trading' activity. They had been trading Lubricant Items such as Grease, Oil and Coolant etc. In respect of such trading items which were being separately sold to buyers, M/s. IRIL had identification available prior to April, 2013 and therefore M/s. IRIL was not availing Cenvat Credit on that quantity of Lubricant Items, which were subsequently being sold to buyers. However, it appeared that after implementation of new ERP system since 1st April, 2013, M/s. IRIL has been taking Cenvat credit in respect of entire quantity of Lubricant Items received in their factory as there was no differentiation at the stage of receipt of Lubricant Items how much quantity would be used in or in relation to manufacture of finished goods and how much quantity would be separately sold to buyers as trading activity. But even after April, 2013, M/s. IRIL has been transferring the quantity of Lubricant Items in their ERP software from one storage location (which may be termed as storage for 'inputs used for manufacture') to another storage location (which may be termed as storage for 'trading sale') as and when required, on the basis of purchase orders of the buyers. Thus, even after April, 2013, the transactions involving sale of Lubricant Items have been in the nature of trading activity and not in the nature of removal of 'input as such'. The fact that M/s. IRIL had been trading Lubricant Items such as Grease, Oil and Coolant etc. has not been disputed by M/s. IRIL.

5.2 M/s. IRIL had been selling such trading items (Lubricant Items) under Commercial Invoices by paying applicable VAT / CST. For such sale of trading items, M/s. IRIL had not been preparing Central Excise Invoices. As prior to April, 2013, M/s. IRIL was not availing Cenvat credit on the quantity of trading items, the question of reversing the amount of Cenvat credit or showing in the Commercial Invoices the amount equal to Cenvat credit availed on the

quantity of trading items sold, did not arise. However, even after April, 2013, M/s. IRIL was not showing in the Commercial Invoices amount equal to Cenvat credit availed on the quantity of trading items sold. The amount equal to Cenvat credit availed on Lubricant Items had been reversed by M/s. IRIL on monthly basis on such quantity of Lubricant Items, which was transferred in their ERP Software from one storage location (which may be termed as storage for 'inputs used for manufacture') to another storage location (which may be termed as storage for 'trading sale') during the month, and not on the basis of actual quantity of Lubricant Items sold during the month.

5.3 M/s. IRIL has been engaged in 'trading of goods' viz. Lubricant Items. As 'trading of goods' is included in negative list as per clause (e) of Section 66D of Finance Act, 1944 and hence no Service Tax is leviable on the service of 'trading of goods' under Section 66B of the Finance Act, 1944, the same falls within the definition of 'exempted service' as defined under clause (e) of Rule 2 of CCR, 2004.

6.1 M/s. IRIL had been availing Cenvat credit of Service Tax paid on various input services. Many of such input services are common services, used in or in relation to manufacturing activity and trading activity. Such common services include Custom House Agent Service, Goods Transport Agency Service, Clearing and Forwarding Service in respect of imported inputs; Consultancy Service; Courier Service; all the services received at their Bangalore Head Office from where Input Service Distributor Invoices are issued; etc.

6.2 Sub-rule (1) of Rule 6 of CCR, 2004 provides that the CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provisions of exempted services, except in the circumstances mentioned in sub-rule (2). It appeared that M/s. IRIL has neither maintained separate accounts, as provided under sub-rule (2) of Rule 6 of CCR, 2004, nor exercised the option to pay an amount as determined under sub-rule (3A) of Rule 6 of CCR, 2004 provided under clause (ii) of sub-rule (3) of Rule 6 of CCR, 2004, nor followed the procedure prescribed vide clause (iii) of sub-rule (3) of Rule 6 of CCR, 2004 in respect of 'trading of goods'. Therefore, it appeared that M/s. IRIL would be liable to pay an amount equal to five / six / seven per cent of value of the exempted service as provided under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004.

6.3 M/s. IRIL submitted the details of purchase and sales for trading goods during the period April-2011 to March-2016 and also submitted details of amount paid under Rule 6(3A) and Rule 6(3)(i) of CCR, 2004 for the period from April-2011 to March-2016 vide their letter dated 07.04.2016.

6.4 On the basis of details of Sales Value and Purchase Value (Cost of Goods Sold) of Trading of goods for the period April-2011 to March-2016 submitted by M/s. IRIL, the value of Trading Service has been worked out which is the difference between Sales Price and Cost of Goods Sold or ten per cent of the cost of goods sold, whichever is more. M/s. IRIL appeared to be liable to pay an amount equal to five / six / seven per cent of value of such trading service, which is an exempted service.

7.1 It was submitted by Shri Yatish Bansal, Senior Manager (Finance) of M/s. IRIL that they had not paid an amount equal to 5% / 6% of the value of exempted service i.e. trading activity, however, M/s. IRIL had paid some amount from time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. It was also been submitted that different systems were followed for payment of amount from time to time, but now they had calculated the proportionate amount required to be paid in respect of common input services used for exempted service i.e. trading activity.

7.2 M/s. IRIL has paid amount equal to 5% / 6% of the value of exempted goods as required under Rule 6(3) of CCR, 2004, which fact has been confirmed by Shri Yatish Bansal, Senior Manager (Finance) of M/s. IRIL in his statement. As per Explanation I below sub-rule (3) of

Rule 6 of CCR, 2004, if the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year. It, therefore appeared that since M/s. IRIL has opted to pay amount equal to 5% / 6% of the value of exempted goods as provided under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004, they are required to follow the same option in respect of exempted service i.e. trading activity and are liable to pay the amount of 5% / 6% / 7% of the value of said exempted service. In view of Explanation I below sub-rule (3) of Rule 6 of CCR, 2004, M/s. IRIL cannot withdraw the said option in respect of exempted service i.e. trading activity.

7.3 Though it has been submitted by M/s. IRIL that 'different systems were followed for payment of amount from time to time, but now they had calculated the proportionate amount required to be paid in respect of common input services used for exempted service i.e. trading activity', it appeared that M/s. IRIL had not followed any of the procedure and conditions prescribed under various clauses of sub-rule 3A of Rule 6 of CCR, 2004. As per clause (a), the manufacturer or the provider of output service, while exercising this option, shall intimate in writing to the Superintendent of Central Excise giving the prescribed particulars. However, no such written intimation to the Superintendent of Central Excise has been given by M/s. IRIL. Further, as per clause (b), the manufacturer of goods or the provider of output service shall provisionally determine and pay the amount as calculated in the prescribed manner for every month, but M/s. IRIL had not determined and paid the amount as calculated in the prescribed manner for every month. Instead, M/s. IRIL has paid some amount, on several occasions, without following any particular system for payment of such amount. As M/s. IRIL has not provisionally determined and paid the amount every month, the question of finally determining the amount of Cenvat credit attributable to exempted goods and exempted services for the whole financial year, as provided under clause (c), does not arise. For the same reason, conditions of payment of amount equal to difference between amount provisionally determined and paid and amount finally determined, along with interest, as provided under clause (d) and (e) or taking the credit of excess amount paid as provided under clause (f) etc. have not been fulfilled by M/s. IRIL. As M/s. IRIL not followed any of the procedure and conditions prescribed under various clauses of sub-rule 3A of Rule 6 of CCR, 2004, options provided at clause (ii) or clause (iii) of Rule 3 of CCR, 2004 applicable to M/s. IRIL.

7.4 M/s. IRIL had paid / reversed some amount in respect of Common Services utilized for manufacturing of goods and trading activity during the period from April – 2011 to March – 2016. M/s. IRIL, vide letter dated 07.04.2016 explained the manner of calculation of those amount paid / reversed by them, as follows:-

*(i) April-2011 to March-2013 :*

*Debited Rs. 1,86,375/- on 31.03.2013 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from April-2011 to March-2013.*

*Debited Rs. 16,30,724/- on 31.12.2013 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from April-2011 to March-2013.*

*Subsequently, they calculated the amount required to be reversed under Rule 6(3)(i) of CCR, 2004 @ 5% on Sales Value of Trading Sales for the period April-2011 to March-2012 and @ 6% on Sales Value of Trading Sales for the period April-2012 to March-2013. The amount thus required to be reversed was worked out at Rs. 2,07,12,547/- (Rs. 84,19,729/- @ 5% on 16,83,94,581/- + Rs. 1,22,92,818/- @ 6% on 20,48,80,301/-) out of which Duty already paid on Trading Sale of Goods (equal to Cenvat Credit taken) was Rs. 1,57,54,510/-. Thus, an amount of Rs. 59,58,037/- was required to be paid, out of which they already debited Rs. 16,30,724/- on 31.12.2013 as stated above, hence the remaining amount of Rs. 33,27,313/- was paid on 27.08.2014.*

*(ii) April-2013 to March-2015*

*Debited Rs. 2,92,066/- on 31.12.2013 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from April-2013 to March-2015.*

*Debited Rs. 3,31,107/- on 11.01.2016 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from April-2013 to March-2015.*

*Subsequently, calculated the amount required to be reversed under Rule 6(3)(i) of CCR, 2004 @ 6% on Sales Value of Trading Sales for the period April-2013 to March-2015. The amount thus required to be reversed was worked out at Rs. 3,39,02,234/- out of which Duty already paid on Trading Sale of Goods (equal to Cenvat Credit taken) was Rs. 3,22,73,589/-. Thus, an amount of Rs. 16,28,645/- was required to be paid, out of which already debited Rs. 2,92,066/- on 31.12.2013 as stated above, hence the remaining amount of Rs. 13,36,579/- was paid on 29.10.2015.*

*(iii) April-2015 to March-2016*

*Debited Rs. 3,47,707/- on 31.10.2015 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from April-2015 to August-2015.*

*Debited Rs. 4,42,168/- on 11.01.2016 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period September-2015.*

*Debited Rs. 7,09,233/- on 13.01.2016 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from October-2015 to January-2016.*

*They provisionally debited Rs. 7,68,075/- on 31.03.2016 under Rule 6(3A) of CCR, 2004 in respect of Common Services utilized in manufacturing of goods and trading activity for the period from January-2016 to March-2016 in the ratio of trading sales to manufacturing sales.*

7.5 It appeared from the aforesaid details submitted by M/s. IRIL that they opted to pay the amount equal to five / six per cent of exempted service i.e. trading activity as required under Rule 6(3)(i) of CCR, 2004 for the period April-2011 to March-2013 as well as for the period from April-2013 to March-2015, though they had not paid the correct amount under Rule 6(3)(i) of CCR, 2004 in as much as they calculated the amount equal to five / six per cent of sales value of trading goods from which the amount of Central Excise Duty / Cenvat credit involved on those goods was reduced.

7.6 It also appeared that in respect of amount of Rs. 1,86,375/- paid on 31.03.2013 and Rs. 16,30,724 paid on 31.12.2013 for the period April-2011 to March-2013 and amount of Rs. 2,92,066/- paid on 31.12.2013 and Rs. 3,31,107/- paid on 11.01.2016 for the period April-2013 to March-2015 by M/s. IRIL purported to be under Rule 6(3A) of CCR, 2004, they had not followed any procedure as required under sub-rule (3A) of Rule 6 of CCR, 2004, as discussed above. Similarly, M/s. IRIL has not followed any procedure as required under sub-rule (3A) of Rule 6 of CCR, 2004 in respect of the amounts of Rs. 3,47,707/- paid on 31.10.2015, Rs. 4,42,168/- paid on 11.01.2016, Rs. 7,09,233/- paid on 13.01.2016 and Rs. 7,68,075/- paid on 31.03.2016 for the period April-2015 to March-2016.

8.1 It, therefore appeared that M/s. IRIL was required to pay an amount equal to five / six / seven per cent of value of exempted services i.e. trading activity, as required under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004, which they have failed to pay. Therefore, in terms of Explanation – III below sub-rule 3A of Rule 6 of CCR, 2004, the said amount of Rs. **4,41,54,693/-**, is required to be recovered from M/s. IRIL under Rule 14 of CCR, 2004 read with Section 11A of the CEA, 1944 and the amount of Rs. 93,71,347/- already paid by them from time to time under Rule 6 of CCR, 2004, is required to be appropriated against the aforesaid demand.

8.2 It also appeared that the whole system of collection of indirect taxes now is based on the trust placed on the assessee. The assessee has to do the self-assessment and various aspects related to Cenvat credit, such as, whether a particular item / service is input / input service or not,

whether credit is admissible or not, same can be used or not, whether the document on the basis of which Cenvat credit has been availed is prescribed one or not, whether proper procedure in respect of dutiable and exempted goods and taxable and exempted services has been followed or not, are part of assessment process. The department cannot, nor are they expected to, find out on their own in all cases what each assessee is doing and whether discharging the correct duty liability and availing correct admissible Cenvat credit. Even the audit of records of assessee by Central Excise officers is carried out on test check basis and 100% verification / scrutiny of documents is not carried out. However, it appeared that the said assessee has neither maintained separate accounts, as provided under sub-rule (2) of Rule 6 of CCR, 2004, nor exercised the option to pay an amount as determined under sub-rule (3A) of Rule 6 of CCR, 2004 provided under clause (ii) of sub-rule (3) of Rule 6 of CCR, 2004, nor followed the procedure prescribed vide clause (iii) of sub-rule (3) of Rule 6 of CCR, 2004 in respect of 'trading of goods'. Though the said assessee was well aware that they were engaged in trading activity, were availing cenvat credit of common input services and hence were required to follow the procedure prescribed under Rule 6 of CCR, 2004, they paid some amount on several occasions in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity, but they never followed any procedure prescribed under either sub-rule (2), or sub-rule (3) or sub-rule (3A) of Rule 6 of CCR, 2004 and never followed any particular system for payment of amount from time to time, as admitted by their Senior Manager Finance. Further, M/s. IRIL has never informed to the department about the system followed by them for payment of amount from time to time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. Therefore, it appeared that M/s. IRIL had contravened the provisions of Rule 6 of CCR, 2004 with intent to avail inadmissible Cenvat credit and thereby evade payment of Central Excise duty in cash and had suppressed the facts from the department in as much as the fact that M/s. IRIL was engaged in trading activity, the value of such exempted service i.e. trading activity, the amount required to be paid under Rule 6 of CCR, 2004 in respect of such exempted service etc. were known to M/s. IRIL which it has never informed to the department and therefore, extended period of five years as provided under sub-section (4) of Section 11A of CEA, 1944, instead of normal period of one year, for demand and recovery of the said amount appears applicable in the present case.

9. M/s. IRIL appeared to have taken and utilized Cenvat credit wrongly, as discussed herein above, they appear to be liable to pay interest under Section 11AA of CEA, 1944 read with Rule 14 of CCR, 2004 and the amount of interest of Rs. 23,25,069/- already paid by them from time to time, required to be appropriated against the aforesaid demand of interest.

10. It also appeared that aforesaid acts of omission and commission on the part of M/s. IRIL attract penalty in terms of Rule 15(2) of CCR, 2004 read with clause (c) of sub-section (1) of Section 11AC of CEA, 1944 in as much as they appeared to have contravened the provisions of Rule 6 of CCR, 2004 with intent to avail inadmissible Cenvat credit and thereby evade payment of Central Excise duty and have also suppressed the facts from the department and the amount of penalty of Rs. 25,57,806/- paid by them from time to time, is required to be appropriated against the penalty so imposed.

11. Therefore, M/s Ingersoll Rand (India) Ltd., Plot No 21-30, GIDC, Naroda, Ahmedabad 382 330 were called upon to Show Cause to the Commissioner of Central Excise, Ahmedabad-II vide SCN No.V.30/15-51/OA/2016 dated 22.04.2016 as to why:-

(i) the amount of Rs. 4,41,54,693/- (Rs. Four Crore Forty One Lakh Fifty Four Thousand Six Hundred Ninety Three only) required to be paid under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004, should not be demanded and recovered from them under sub-section (4) / (5) of Section 11A of Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004.

(ii) the amount of Rs. 93,71,347/- (Rs. Ninety Three Lakh Seventy One Thousand Three Hundred Forty Seven Only) already paid by them from time to time under

Rule 6 of CCR, 2004, should not be appropriated and adjusted against the aforesaid demand mentioned at (i) above.

(iii) interest under Section 11AA of the Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004 should not be charged and recovered from them on the amount mentioned at (i) above.

(iv) amount of interest of Rs. 23,25,069/- (Rs. Twenty Three Lakh Twenty Five Thousand Sixty Nine Only) already paid by them should not be appropriated against the aforesaid demand of interest mentioned at (iii) above.

(v) Penalty under Section 11AC(1)(c) of Central Excise Act, 1944, read with Rule 15(2) of the Cenvat Credit Rules, 2004 should not be imposed upon them.

(vi) the amount of penalty of Rs. 25,57,806/- (Rs. Twenty Five Lakh Fifty Seven Thousand Eight Hundred Six Only) paid by them should not be appropriated and adjusted against the penalty proposed to be imposed upon them at (v) above.

## 12. DEFENCE REPLY:

The said assessee vide their letter dated 22.04.2016 has filed the written submission to the SCN wherein they interalia submitted that :-

"By the aforesaid Show Cause notice dated 22.04.2016), *M/s* Ingersoll Rand (India) Ltd. has been called upon to show cause as to why:

a) An amount ofRs.4,41,54,693/- alleged to be payable under clause (i) of Rule 6(3) of the Cenvat Credit Rules, 2004 should not be recovered from the noticees under sub-section (4)/(5) of Section 11 A(1) of the Central Excise Act, 1944 read with Rule 14 of the Cenvat Credit Rules, 2004;

b) An amount of Rs.93,71,347/- already paid should not be appropriated and adjusted against the aforesaid demand mentioned at (a) above;

c) Interest under Section 1 lAA of the Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004 should not be charged and recovered from the noticees;

d) Amount of interest of Rs 14,62,536/-(Rs. 23,25,069/- wrongly mentioned in the show Cause notice ) paid by noticees should not be appropriated against the aforesaid demand of interest mentioned at (c) above,

e) Penalty should not be imposed under Section 11AC(l)(c) of Central Excise Act, 1994 read with Rule 15(2) of Cenvat Credit Rules, 2004;

f) the amount of penalty of Rs. 13,47,160/- (Rs.25,27,806/- wrongly mentioned in the show cause notice) paid by them should not be appropriated and adjusted against the penalty proposed upon noticees at (e) above.

2. The Noticees are *inter alia* engaged in manufacture of air compressors, Air motors and parts thereof falling under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985. The Noticees are registered with the central excise department holding Central Excise Registration No. AACI3099QXM003.

3.1 The noticees avail cenvat credit in respect of inputs, capital goods and input services used in or in relation to the manufacture of final products. Cenvat credit so availed is utilized for payment of duty on final products cleared from the factory. Illustrative copies of ER-I returns is enclosed and marked as **Annexure-I.**

3.2 The major inputs required for manufacture of air compressors and its spare parts are electrical motors, connecting rods, fly wheel, inter-cooler, after-cooler, cylinder, air receiver, bearings etc. In case the aforesaid inputs are rejected, the noticees clear the same 'free of charge' as 'input as such' or as 'stock transfer' to their service centre situated outside the factory premises.

**Inputs traded - Lubricant items**

3.3 Lubricant items such as grease and oil, coolant etc. are inputs required for manufacture of air compressors. These lubricants are imported as well as procured from domestic market. Cenvat credit of the same is availed on duty paid on domestic goods and CVD and SAD on imported goods. Illustrative copies of invoice issued upon the noticees is enclosed and marked as **Annexure-2.**

3.4 Noticees sell the purchased lubricant items separately under commercial invoice against the purchase order of the buyer by discharging applicable VAT/CST. Illustrative copies of invoices is enclosed and marked as **Annexure-3.**

**3.5** The activity of trading of inputs, i.e., lubricant items fall under the scope of exempted service under sub-clause (2) of Rule 2(e) of the Finance Act, 1994. The total value of inputs sold and cleared by the noticees during the financial year 2011-12 to 2015-16, i.e., exempted services is mentioned herein below:-

| Period | Value of inputs (lubricant items) cleared for trading purpose<br>+<br>value of deemed sale (Rs.) |
|---|---|
| 2011-12 | 16,83,94,581 |
| 2012-13 | 20,56,55,301 |
| 2013-14 | 23,14,09,407 |
| 2014-15 | 24,57,91,043 |
| 2015-16 | 29,67,65,284 |
| Total | **114,80,15,616** |

**Common Input Services distributed by Head Office holding ISD Registration**

4.1 The Noticees require various services in relation to manufacture of the final product and trading activity in the course of business. The value of these services is included in the assessable value of the final product and excise duty is paid thereon.

4.2 The head office of the noticees (herein after referred to as 'Head Office') is situated at Bangalore and is registered with the service tax department as an "Input Service Distributor" (hereinafter referred to as "ISD") in terms of Rule 2(m) of the Cenvat Credit Rules, 2004 read with Notification No.27/2004ST dated 10.9.2004. The ISD raises ISD invoices on the noticees for distribution of credit of service tax paid on various input services. Illustrative copies of invoices/challans issued by the head office over the noticees is enclosed and marked as **Annexure-4.**

4.3 The noticees have availed various common input services in relation to manufacturing activity and trading activity such as manpower supply service, courier service, business auxiliary service, consultancy service, security service, legal service, goods transport agency service, clearing and forwarding services etc. All the services were received by their Bangalore Head Office from where input service credit was distributed to the noticees unit.

4.4 The noticees have taken cenvat credit of service tax paid on various input services used in relation to manufacture of finished goods on the strength of the invoices raised by the ISD as well as invoices raised on plant for the financial year 2011-12 to 2015-16. The details of common input service availed during the period 2011-12 to 2015-16 is as follows:

| Financial Year | Common input service credit availed by the noticees (Rs.) |
|---|---|
| 2011-12 | 46,64,83 1/ |
| 2012-13 | 5,23,02,501 |
| 2013-14 | 3 ,46,45,919 |
| 2014-15 | 9,25,67,862 |
| 2015-16 | 5,65,77,361 |
| **Total** | **24,07 ,58,4 7 4** |

4.5 The noticees reversed the ratio of common input service utilized for exempted service, i.e., trading of items in terms of Rule 6(3A) of the Cenvat Credit Rules, 2004. The table showing year wise reversal detail of amount of credit reversed by the noticees during the period financial year 2011-12 to 2015-16 is as under:

| Period | Cenvat Credit availed on common services under **Rule 6(3A)** | Cenvat credit reversal entry no. | Cenvat credit reversal date |
|---|---|---|---|
| April 2011- March 2013 | 16,30,724 | 608,620 to 631 | 31.12.2013 |
| | 1,86,375 | 42525 | 31.03.2013 |
| April 2013- March 2015 | 2,92,066 | 609 to 618 | 31.12.2013 |
| | 3,31,107 | 1898 | 11.01.2016 |
| April 2015- March 2016 | 3,47,707 | 1416 | 31.10.2015 |
| | 4,42,168 | 1899 | 11.01.2015 |
| | 7,09,233 | 1904 | 13.01.2016 |
| | 7,68,075 | 2769 | 31.03.2016 |
| **Total** | **47,07,455** | | |

## Audit

5. Audit report no. 100/2014-15 dated 22.09.2014

5.1 Audit was carried out by revenue officers at the premises of the noticees on 08.04.2014, 12.04.2014, 29.07,2014 & 13.08.2014 for the period November 2011 to October 2013.

5.2 An Audit report no. 100/2014-15 dated 22.09.2014 was issued upon the noticees, wherein revenue

vide para 2 observed that there is non-reversal of 6%/5% of cenvat credit on exempted service even when taken the credit of" service tax" on commonly used services in the manufacturing and trading activity. Copy of the Audit report no. 100/2014-15 dated 22.09.2014 is enclosed and marked as **Annexure-5.**

5.3 On being pointed out, the noticees reversed the cenvat credit amounting to Rs.33,27,313/- vide RG23Apt.II E No. 49 dated 27.08.2014 as per Rule 6(3)(i) of the Cenvat Credit rules, 2004. The detail work out for reversal of credit of Rs.33,27,313/- is enclosed and marked as **Annexure-6.**

6. **CERA audit report no. 308/15-16 dated 20.01.2016**

6.1 CERA Audit was carried at the premises of the noticees for the period 2010-11 to 2014-15 by the department on 16.11 to 31.12.2015.

6.2 It was observed by the department in the Report no.308/15-16 dated 20.1.2016 that as the noticees have not maintain separate record as per rule 6, they were required to pay amount equal to pay amount under rule 6 in respect of trading sales. The total credit to be reversed for the period 2012-2013 and 2013-2014 is:

| | | |
|---|---|---|
| A | Total sales value of the goods traded | 470532118 |
| B | Total purchase value of the goods traded | 188409705 |
| | Difference A-B | 282122413 |
| C | 10% of purchase goods | 1884097 |
| | **Value of exempted services, i.e, trading amount** | **282122413** |
| | **Payable under rule 6 (@6% whichever is higher)** | **16927345** |

Copy of the audit report no. 308/15-16 dated 20.01.2016 is enclosed and marked as **Annexure-7.**

7. **Audit report dated 02.03.2016**

7.1 Simultaneously, audit was carried out at the premises of the noticees on 2/21.09.2015,

16/29.10.2015 and 01.01.2016 by the department for the period November 2013 to June 2015. Final report no. 779/2015-16 dated 2.3.2016 was issued upon the noticees wherein it was observed that in the CERA audit report dated 02.12.2015, the noticees were asked to reverse amount of Rs.1,69,27,345/-, however, noticees had not agreed for payment of the differential duty ofRs.1,48,17,491/-. Direction was given to the department to issue a show cause notice when CERA objection has been raised against the noticees in view of notice's circular. Copy of the audit report dated 02.03.2016 is enclosed and marked as **Annexure-8.**

**Correspondence with the Department**

8.1 Noticees vide letter dated 12.01.2015 submitted to the Superintendent of central excise, Ahmedabad revised worksheet of calculation of interest and penalty wrt para 1 & 2 of Audit report no. 100/2014-15. Copy of the letter dated 12.01.2015 is enclosed and marked as **Annexure-9.**

8.2 Noticees vide letter dated 30.11.2015 and 23.12.2015 provided details against para no. I and para 5 taken in the EA-2000 audit. It is stated that notices would like to avail option to reverse the proportionate cenvat credit taken on common service as per rule 6(3A) of the cenvat credit rules. 2004. Copy of the letter dated 30.11.2015 and 23.12.2015 is enclosed and marked as **Annexure-10** and **Annexure-11** respectively.

8.3 Noticees vide letter dated 23.12.2015 gave its submission with respect to CERA audit observation to the Superintendent of central excise, Ahmedabad. With respect to quantification on nonpayment of duty under rule 6(3)(i) calculated by the department equal to Rs.1,69,27,345/- is not correct as they have sold some lubricants as such and the input cenvat credit is reversed by the noticees on regular basis. Copy of the letter dated 23.12.2015 is enclosed and marked as **Annexure-12.**

8.4 Noticees vide letter dated 02.04.2016 submitted the details of cenvat credit reversal for common services for the year 2015-16 amounting to Rs.22,67,183/- to the Superintendent of Central Excise, Ahmedabad. Also, noticees vide another letter dated 02.04.016 submitted the statement of sales and purchase figure of trading of lubricant items and cenvat credit reversal for the period 2015-16 under Rule 6 of the Cenvat Credit Rules, 2004. Copy of the letter dated 02.04.2016 and 02.04.2016 is enclosed and marked as **Annexure-13A** and **Annexure-13B** respectively.

8.5 Noticees vide letter dated 07.04.2016 submitted details of purchase and sales figure for trading of goods and duty payment for common services for the period April 2011 to March 2016. Copy of the letter dated 07.4.2016 is enclosed and marked as **Annexure-14.**

8.6 Further, noticees vide letter 07.04.2016 **(Annexure-15)** provided details and manner of calculation adopted for reversal of cenvat credit on common input services for the period April 2011 to March 2016. In the letter it is in detail submitted that for year 2011-12 to 2015-16, noticees have adopted both method of reversal, i.e., under Rule 6(3)(i) and rule 6(3A) of the cenvat credit rules, 2004. The details of same are provided herein below in tabular form:-

| | **Cenvat credit on common input service reversed suo moto under Rule 6(3A)** | | **Cenvat credit on common input service reversed on direction of department during audit under Rule 6(3A)i** | | | | |
|---|---|---|---|---|---|---|---|
| Period | Cenvat credit availed on common services under Rule 6(3A) | Cenvat credit reversal date | Cenvat credit availed on common services under Rule | Cenvat credit reversal date | Total debit under Rule 6 of CCR, 2004 | Interest paid (Rs) | Penalty (Rs) |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| April 2011-March 2013 | 1630724 | 31.12.13 | 3327313 | 27.08.14 | 4958037 | 1024266 | 1146673 |
| | 186375 | 31.03.13 | | | 186375 | 0 | 0 |
| April 2013-March 2015 | 292066 | 31.12.13 | 1336579 | 29.10.15 | 1628645 | 438270 | 200487 |
| | 331107 | 11.01.16 | | | 331107 | | |
| April 2015-March 2016 | 347707 | 31.10.15 | | | 347707 | | |
| | 442168 | 11.01.16 | | | 442168 | | |
| | 709233 | 13.01.16 | | | 709233 | | |
| | 768075 | 31.3.16 | | | 768075 | | |
| **Total** | **4707455** | | **4663892** | | **9371347** | **1462536** | **1347160** |

8.7 A statement of Shri Yatish Brijmohan Bansal, Senior Manager Finance was recorded on 23.03.2016 by the revenue officers.

9. The noticees have reversed the complete amount of common input service credit, i.e., Rs.93,71,347/- as per calculation prescribed under Rule 6(3A) of the Cenvat Credit Rules, 2004 for the period 2011-12 to 2015-16. The table showing the calculation of the year-wise reversal in terms of Rule 6(3A) of the Cenvat Credit Rules, 2004 is shown at para C.8 below.

10. However, a show cause notice was issued upon noticees by the Commissioner of Central Excise Ahmedabad-11 on the basis of observation made in Audit Report dated 02.3.2016 (already enclosed and Annexure 9 hereto) issued by the Assistant Commissioner (Audit-II), Central Excise, Ahmedabad-11. **Issuance of show cause notice dated 22.04.2016**

11.1 The present show cause notice dated 22.04.2016 is issued upon the Noticees for recovery of Rs.4,41,54,693/- which is payable under Rule 6(3)(i) of the Cenvat Credit Rules, 2004 and recovery to be made under Section 11A(4)/(5) proviso to Section 1 lA(l) of the Central Excise Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004. Show cause notice also propose to levy interest under Section 11.AA of the Central Excise Act, 1944 and impose penalty under Section 1 lAC(l)(c) of Central Excise Act read with Rule 15(2) of Cenvat Credit Rules, 2004.

11.2 The show cause notice also alleges that the amount of Rs.93,71,347/- already paid by the noticees along with interest ofRs.14,62,536/- and penalty ofRs.13,47,160/- should not be appropriated against the demand raised in the present show cause notice.

**Case of the Department**

11.3 It is the case of the Department in the present show cause notice issued by Commissioner of Central Excise, Ahmedabad that the noticees have neither maintained separate accounts, as provided under sub-rule (2) of rule 6 of cenvat credit rules, 2004, nor exercised the option to pay an amount as determined under sub-rule (3A) of rule 6 of Cenvat credit rules, 2004 provided under clause (ii) of sub-rule (3) of rule 6 of CCR, 2004, nor followed the procedure prescribed vide clause (iii) of sub-rule (3) of Rule 6 of Cenvat credit rules, 2004 in respect of 'trading of goods'. Therefore, noticees are liable to pay an amount equal to five/six percent of value of the exempted service as provided under clause (i) of sub-rule (3) of rule 6 of CCR, 2004.

11.4 It is also the case of the department in the show cause notice that the noticees have opted to pay amount equal to 5%6% of the value of exempted goods as provided under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004 and have also opted to pay under Rule 6(3A) of cenvat credit rules, 2004, they are required to follow the same option in respect of exempted service i.e., trading activity and are liable to pay the amount of 5%/6%17% of the value of said exempted service. In view of Explanation I below sub-rule 3 of rule 6 of Cenvat credit rules, 2004, noticees cannot withdraw the said option in respect of exempted service, i.e, trading activity. However, noticees have paid some amount on several occasions, without following any particular system for payment of such amount. Explanation I provides that if the manufacturer of goods or the provider of output service, avails any of the option under the sub-rule, he shall exercise such

option for all exempted goods manufactured by him or, as the case may be and such option shall not be withdrawn during the remaining part of the financial year.

11.5 Further, it is the case in the show cause notice that the noticees have not followed any procedure as required under sub-rule (3A) of rule 6 for the reversal made by the noticees for the period April 2011 March 2013 and April 2013-March 2015.

11.6 According to the show cause notice this is a fit case to invoke extended period of limitation as the Noticees have not disclosed the material facts to department at any manner that they were using input service for trading of goods. Noticees have deliberately suppressed the material facts from the department with an intention to evade payment of amount under Rule 6(3) of Cenvat Credit Rules, 2004.

12. The Noticees submit that the proceedings initiated in the present show cause notice are liable to be dropped on the basis of following submissions which are without prejudice to each other.

## SUBMISSIONS

A. At the outset the Noticees submit that the present proceedings initiated in the Show Cause Notice are bad on facts as well as in law and therefore on this ground itself the present Show Cause Notice is liable to be set aside.

Demand of an amount equal to 5% / 6%/7% on the value of trading service is incorrect.

B.1 The department in the show cause notice proposes to demand reversal of cenvat credit availed on common input services during the period F.Y. 2011 - 2012 to F.Y. 2015-2016 by invoking Rule 6(3)(i) of Cenvat Credit Rules, 2004. The show cause notice alleges that the noticees cannot reversal proportionate cenvat credit availed on common input services under Rule 6(3)(iii) of Cenvat Credit Rules, 2004.

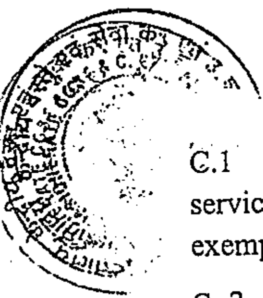
B.2 The noticees submit that Rule 6 of the Cenvat Credit Rules, 2004 provide three options for reversal of cenvat credit taken on input service used for exempted goods and exempted services. When the law has provided option to the assessee to reverse the proportionate credit under any of the option which is beneficial to them, then in such a case, the department cannot compel the noticees to choose any particular option for reversal.

B.3 The noticees submit that they have opted Rule 6(3)(iii) read with Rule 6(3 A) of Cenvat Credit Rules, 2004 for reversal of cenvat credit on common input services used for exempted goods and exempted services. The option availed by the noticees is as per law. Therefore, the department cannot compel the noticees to reverse the disputed cenvat credit under Rule 6(3)(i) of Cenvat Credit Rules, 2004.

B.4 Further, the demand of reversal proposed in the show cause notice under Rule 6(3)(i) of Cenvat Credit Rules, 2004 is very disproportionate to the cenvat credit on common input service availed by the noticees. The intention of the legislature behind Rule 6 is that the assessee should not get credit for those input and input services which have been used in the manufacture of those goods or services on which no duty / tax is liable to be discharged. Therefore, if the department proposes to recover the amount of cenvat credit which was not availed / over and above the credit availed by the noticees then it will cause legal wrong to the noticees. Hence, the show cause notice invoking Rule 6(3)(i) in the present case is perverse.

B.5 In view of the above, the show cause notice is incorrect and is liable to be dropped.

**Rule 6(3) provides three options for the manufacturer of dutiable goods and provider of exempted services to avail credit of common input services which are used in providing exempted services and manufacture of dutiable goods. The noticees have correctly availed the option provided under Rule 6(3)(iii) of the Cenvat Credit Rules, 2004 and correctly reversed the Cenvat credit on common input services quantified on pro rata basis as per Rule 6(3A). Therefore, demand proposed under Rule 6(3)(i) is not sustainable.**



C.1 In the instant case, the noticees are not maintaining the separate accounts for input services used for manufacture of dutiable final products, exempted final products as well as exempted service.

C. 2 Rule 6(3) of the Cenvat Credit Rules, 2004 gives three options to the person who is not maintaining a separate account. Rule 6(3) of the Cenvat Credit Rules, 2004 reads as under:

> "Rule 6(3) - Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow **any one** of the following options, as applicable to him, namely :-
>
> (i) pay an amount equal to six per cent of value of the exempted goods and seven percent of value of the exempted services; or
>
> (ii) pay an amount as determined under sub-rule (3 A); or
>
> (iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3 A) shall not apply for such payment."

C.3 Rule 6(3)(i) of the Cenvat Credit Rules gives an option to pay an amount equal to 5% /6% / 7% on the value of exempted goods and services.

C.4 Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, gives an option to proportionately reverse the credit availed on inputs and input services used for manufacture of exempted goods in terms of the formulae provided under Rule 6 (3A).

C.5 The third option provided under Rule 6(3)(iii) is to maintain separate accounts for the receipt, consumption and inventory of inputs as provided under Rule 6(2) and opt to pay the amount determined under Rule 6(3 A) in respect of the input services. The third option is introduced w.e.f. 1.4.2011. This option allows the manufacturer or service provider to follow Rule 6(2) in respect of inputs and Rule 6(3)(ii) read with Rule 6(3A) in respect of the common input services.

C.6 The noticees submits that they have received certain services such as goods transport agency service, courier service, security services, manpower services, business support service housekeeping service, etc. which are used in the manufacture of dutiable final product as well as for trading activity. The said services qualify as input services in terms of Rule 2(1) of the Cenvat Credit Rules, 2004 is undisputed. Thus the noticees has correctly availed Cenvat credit of service tax paid on such input services.

C.7 However, since the aforesaid input services were used both for manufacture as well as trading, the noticees were liable to reverse the Cenvat credit on input services attributable to trading activity being exempted services.

C.8 Accordingly, the noticees calculated the reversal amount on their own for the period F.Y. 20112012 to F.Y. 2015-2016 in terms of Rule 6(3 A) by applying the following formula:

| Credit attributable to common input services used for exempted goods & exempted services (i.e., trading activity) | = | A<br>B | X | Cenvat credit of service tax taken in respect of common input services |
|---|---|---|---|---|

A = Total value of exempted goods manufactured and exempted services (includes trading) provided.

B = Total Turnover [i.e., Value of dutiable goods + exempted goods + taxable services provided + exempted services (includes trading)]

* For the purpose of above formula:

- Value of Goods means = Section 4 Value
- Value of Service means = Gross amount charged

- Value of Trading means = [Sale price - Cost of Goods Sold] or [10% of Cost of Goods Sold], Whichever is higher.

C.8 In the present case, the details relevant for determining reversal amount in terms of Rule 6(3 A) of Cenvat Credit Rules, 2004 is given in the table hereunder:

Amount (in "Rs.")

| F.Y. | Value of Traded goods (i.e., Exempted Service) | Value of Deemed sale (Rental Income) | Value of Total Turnover as per "B" required in formula | Value of Common Input Services | Value of deemed sale & Traded goods as per "A" required in formula | Reversal required as per Rule 6(3A) formula |
|---|---|---|---|---|---|---|
| | [11 | [2] | [3] | [4] | m = n+2i | [6]=[5*4/3] |
| 2011-12 | 16,83,94,581 | | 5,99,71,00,000 | 46,64,831 | 16,83,94,581 | 1,30,985 |
| 2012-13 | 20,48,80,301 | 7,75,000 | 5,99,84,00,000 | 5,23,02,501 | 20,56,55,301 | 17,93,193 |
| 2013-14 | 22,80,46,074 | 33,63,333 | 5,53,32,00,000 | 3,46,45,919 | 23,14,09,407 | 14,48,961 |
| 2014-15 | 24,12,86,043 | 33,05,000 | 6,02,45,00,000 | 9,25,67,862 | 24,57,91,043 | 37,76,637 |
| 2015-16 | 28,40,47,666 | 1,27,17,61 | 5,51,21,16,081 | 5,65,77,361 | 29,67,65,284 | 30,46,053 |
| **Total** | **1,12,66,54,665** | **2,01,60,951** | **2906,53,16,081** | **24,07,58,474** | **114,80,15,616** | **1,01,95,829** |

C.9 The total amount required to reversed by the noticees under Rule 6(3 A) of Cenvat Credit Rules, 2004 for the period 2011-12 to 2015-16 comes to Rs. 1,01,95,829/- as seen from the above table. However, the noticees have already paid amount of Rs.93,71,347/- before issuance of show cause notice along with interest of Rs. 14,62,536/-. However, as reflected in column 6 of the table, the service tax payable is Rs. 1,01,95,829/-,whereas, Noticees have reversed Rs.93,71,347/-. The differential amount which comes to [Rs.1,01,95,829 - 93,71,347 =] Rs.8,24,482 vide cenvat part <u>II</u> entry no 1694 dated 19/10/2016. along with interest of Rs.37610/- is paid by the Noticees on 20.10.2016 vide PLA Entry No. 3453 dated 20.10.2016 for the period from 01.07.16 to 20.10.16 @ 15%. Copy of the challan no. 10309 dated 18.10.16 forrs.70,000/- is enclosed and marked as **Annexure-16.** The worksheets showing details of aforesaid calculations and application of formula prescribed under Rule 6(3A) are collectively enclosed as **Annexure-17.**

C.10 The noticees submit that the aforesaid calculation for reversal of cenvat credit is done per the formula prescribed under Rule 6(3 A) of Cenvat Credit Rules, 2004. This fact is not under dispute. Further, the Revenue in the show cause notice admitted the fact that the calculations made by the noticees for reversal of amount is as per Rule 6(3)(ii) read with Rule 6(3A) of Cenvat Credit Rules, 2004.

C.11 Therefore, as per Rule 6(3A), the noticees are required to reverse Rs. 1,01,95829/- availed on common input services during the period in dispute. However, the noticees have reversed cenvat credit totaling to Rs.93,71,347/- prior to issuance of show cause notice. Hence, the noticees have reversed cenvat credit of Rs. 8,24,482/- in short, as compare to the reversal required under Rule 6(3 A) of Cenvat Credit Rules, 2004.

C.12 Thus, the noticees have correctly reversed the cenvat credit on common input services attributable to exempted services (i.e., trading activity). Hence, the Revenue in the show cause notice proposing to recover / demand cenvat credit at the rate of 5% / 6%/7% of the value of traded goods/ exempted goods is not sustainable in law. Thus, the show cause notice is liable to be dropped.

**<u>Without prejudice, the noticees have suo-moto exercised the option under Rule 6(3A) for reversal of credit for each financial year, whereas, for the same financial year option under Rule 6(3)(i) was opted on direction of department during the course of audit</u>**

D.1 The noticees have reversed the credit of Rs. 93,71,347 along with interest and penalty of Rs. 14,62,536/- and Rs. 13,47,160/- respectively in compliance of formula mentioned under Rule 6(3 A) of the Cenvat Credit Rules, 2004. However, the partial amount out of Rs.93,71,347/- was reversed by the noticees under Rule 6(3)(i) on direction of department during the course of audit for the period November 2011 to October 2013 following which the Audit report no. 100/2014-15 dated 22.09.2014(Annexure-6) was issued upon the noticees.

D.2 Similarly, the same pattern was followed by the noticees in compliance of CERA audit report for the period 2010-11 to 2014-15 for which Report no.308/15-16 dated 20.1.2016 (Annexure-8) was issued upon the noticees. At the cost of repetition, the table is produced herein below to show the date- wise reversal made by the noticees under Rule 6(3A) and Rule 6(3)(i) for the period F.Y. 2011-12 to 2015-16:-

| | **Cenvat credit on common input service reversed suo moto under Rule 6(3A)** | | **Cenvat credit on common input service reversed on direction of department during audit under Rule 6(3A)i** | | | | |
|---|---|---|---|---|---|---|---|
| Period | Cenvat credit availed on common services under Rule 6(3A) | Cenvat credit reversal date | Cenvat credit availed on common services under Rule 6(3A)i | Cenvat credit reversal date | Total debit under Rule 6 of CCR, 2004 | Interest paid (Rs) | Penalty (Rs) |
| April 2011-March 2013 | 1630724 | 31.12.13 | 3327313 | 27.08.14 | 4958037 | 1024266 | 1146673 |
| | 186375 | 31.03.13 | | | 186375 | 0 | 0 |
| April 2013-March 2015 | 292066 | 31.12.13 | 1336579 | 29.10.15 | 1628645 | 438270 | 200487 |
| | 331107 | 11.01.16 | | | 331107 | | |
| April 2015-March 2016 | 347707 | 31.10.15 | | | 347707 | | |
| | 442168 | 11.01.16 | | | 442168 | | |
| | 709233 | 13.01.16 | | | 709233 | | |
| | 768075 | 31.3.16 | | | 768075 | | |
| **Total** | **4707455** | | **4663892** | | **9371347** | **1462536** | **1347160** |

D.3 Rule 6(3) of the Cenvat Credit Rules, 2004 is extracted herein below:-

"Rule 6 (3) - Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow <u>any one</u> of the following options, as applicable to him, namely :-

(i) pay an amount equal to six per cent of value of the exempted goods and seven percent of value of the exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses

(ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3 A) shall not apply for such payment."

**<u>Provided</u>** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :

**Provided** further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be seven per cent, of the value so exempted :

**Provided** also that in case of transportation of goods or passengers by rail, the amount required to be paid under clause (i) shall be an amount equal to two per cent, of value of the exempted services.

*Explanation 1.* - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be. all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

*Explanation 2.* - No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

*Explanation 3.* - For the purposes of this sub-rule and sub-rule (3 A),-

(a) "non-exempted goods removed" means the final products excluding exempted goods manufactured and cleared upto the place of removal;

(b) "exempted goods removed" means the exempted goods manufactured and cleared upto the place of removal;

(c) "non-exempted services" means the output services excluding exempted services"

D.4 It is the case of the Department in the show cause notice that the noticees have opted to pay amount equal to 5%6% of the value of exempted goods as provided under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004 and have also opted to pay under Rule 6(3 A) of cenvat credit rules, 2004, they are required to follow the same option in respect of exempted service i.e., trading activity and are liable to pay the amount of 5%/6%/7% of the value of said exempted service. In view of Explanation I below sub-rule 3 of rule 6 of Cenvat credit rules, 2004, noticees cannot withdraw the said option in respect of exempted service, i.e, trading activity. The noticees submit that the said allegation levelled against the noticees is baseless and devoid of legal merits.

D.5 Explanation 1 clearly provides that if the manufacturer avails any of the option under this sub rule of Rule 6, he shall exercise such option for all exempted goods manufactured by him or all exempted services provided by him, such option shall not be withdrawn during the remaining part of the financial year. The noticees submit that the above drawn table and evidence place on record is crystal clear to show that for each financial year, the first method opted by the noticees for reversal of common input service credit is under Rule 6(3 A) and not Rule 6(3)(i). Meaning thereby, the same method should have been practiced by the noticees throughout the same financial year. However, department during the course of audit sought reversal of credit on remaining balance amount under Rule 6(3)(i) and not under Rule 6(3A) which was complied by the noticees. For the financial year 2015-16, noticees have reversed credit only under Rule 6(3A) and not under Rule 6(3)(i) of the Cenvat Credit Rules, 2004.

D.6 It is submitted that once the option under Rule 6(3A) was opted by the noticees, the same could not have been asked to withdraw by the department and ask for the reversal to be made under Rule 6(3) (i) of the Cenvat Credit Rules, 2004.

D.7 Even otherwise, if law provides two options to the assesse to exercise for payment of tax, the assessee has a right to choose on option which cast a less burden upon the assessee.

D.8 On this ground alone, show cause notice deserves to be dropped.

**Even Revenue has accepted the reversal of common input service credit under Rule 6(3A) for the earlier period, i.e., March 09 to Feb 11 under which Noticees have paid for reversal of common service proportionately with trading ratio @ 2.25%. Revenue cannot approbate and reprobate in the same issue. The revenue cannot take diametrically opposite stands in the same issue.**

D.9 The noticees submit that the provisions of the Cenvat Rules, Central Excise Act, 1944, the Finance Act, 1994, the Notifications issued under the relevant statues and the business practice of the noticees has substantially remained similar over the periods in dispute.

D. 10 An audit was carried out at the premises of the noticees for the period March 2009 to February 2011, wherein, audit para 2 was raised for wrong availment of service tax credit on trading of goods. On pointing out the objection during audit, the noticees reversed proportionate service credit calculating trading ratio @ 2.25%, meaning thereby, under Rule 6(3A) of the Cenvat Credit Rules, 2004 along with interest. The same is observed in the Audit report no.45/2011-12 dated 26.7.2011 enclosed and marked as **Annexure-18.**

D.11 Similarly, for the period March 2011 to March 2012, audit was undertaken at the premises of the noticees for which Audit report no.32/2012-13 dated 17.07.2012 was issued upon the noticees **(Annexure-19).** Para 3 of the audit had raised the same issue of reversal of cenvat credit to which the noticees made reversal of proportionate credit of Rs. 1,3 8,479.09/- in terms of Rule 6(3 A) of the Cenvat Credit Rules, 2004. The same was intimated to the department vide letter dated 14.08.2012 to the Department answering to all the audit paras raised in the report. Copy of the letter dated 14.08.2012 is enclosed and marked as **Annexure-20.**

D.12 No show cause notice has been issued challenging the amount of reversal of credit made by the noticees for the period March 2009 to February 2011 and March 2011 to March 2012. Thus, it is amply clear that the Department has accepted and affirmed the view that the proportionate reversal of credit under Rule 6(3A) of the Cenvat Credit Rules, 2004 is correct and cannot be disputed at this stage. In spite of the stand taken by the Department before issuance of show cause notice, the department has taken a diametrically opposite position in the impugned show cause notice.

D.13 In the case of **Max India Ltd.** Vs. **Comm. Of C.Ex., Chandigarh** - 2012 (28) **S.T.R.** 248 **(Tri. - Del.),** the Principle Bench of the CESTAT held that the Revenue cannot be allowed to approbate and reprobate on the same issue. In the said case, the department had adopted a diametrically opposite view to the argument adopted in the case of another party. Relevant extract of the judgment is reproduced below:

> *"11. The first argument that classification of service cannot be changed in the hands of the recipient, by itself is good enough to allow this appeal. Further I note that there is no reference in the opening paragraph to the classification as indicated in Column (2) of the Table in the notification. This appears to be a serious lacuna. But such missing words cannot be supplied by anyone interpreting the provisions. Secondly the description in Column (3) of the Table is "Services provided for export of said goods The expression "port services " was known to the persons drafting the notification because such expression is used in taxable entry. That has not been used. So the situation has to judged with reference to the expression actually used. Further the Government has amended by Finance Act, 2010 the definitions in Section 65(105)(zn) to cover any sendee rendered in port area which shows the intention of the Government in this regard. While such amendments may operate only prospectively to cause liabilities to assessees, in the case of a beneficial Notification like 41/2007-S.T. for granting refund of tax incidence on goods exported, the matter needs to be interpreted more liberally.* **I also note that the argument raised by Revenue in para 8 above is diametrically opposite to the argument canvassed by Revenue in the case of Western Agencies Pvt. Ltd referred to supra. Revenue cannot be allowed to approbate and reprobate on the same issue though with reference to different parties.**
>
> *12. Having regard to all the facts and legal position as above I hold that the appellants are eligible for refunds of the impugned credit.*
>
> *13. The appeals are allowed accordingly. "*

...Emphasis Supplied

D.14 The Noticees submit that once the Department has accepted and confirmed the position with respect to proportionate reversal of credit made by the noticees under Rule 6(3

A) of the Cenvat Credit Rules, 2004. Thus the impugned Show cause notice is liable to be dropped on this count alone.

**Without prejudice to the above, the noticees have correctly exercised the option under Rule 6(3A).**

E.1 The noticees submit that the noticees have correctly exercised the option under Rule 6(3 A) for reversing the credit under Rule 6(3)(ii). The relevant portion of the Rule 6(3 A) is reproduced below for ready reference:

> (3 A) For determination and payment of amount payable under clause (ii) of sub-rule
>
> (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely
>
> (a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely
>
> (i) name, address and registration No. of the manufacturer of goods or provider of output service;
>
> (ii) date from which the option under this clause is exercised or proposed to be exercised;
>
> (iii) description of dutiable goods or [output] services;
>
> (iv) description of exempted goods or exempted services;
>
> (v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

E.2 The noticees submit that as per Clause (a) to Sub Rule (3A), the manufacturer or provider of output services who wants to exercise the option available under Sub Rule (3A) shall intimate the same to the Jurisdictional Superintendent. The intimation given to the Jurisdictional Superintendent shall contain the prescribed particulars specified in Clause (a).

E.3 However, the Clause (a) nowhere suggests that the manufacturer or the provider of output service shall exercise such option at the beginning of the Financial Year for which the option is to be exercised. Further, it does not debar a manufacturer or the provider of output service from exercising the option in the middle of the year. In fact, Rule 6(3A)(a)(ii) states that the manufacturer ought to mention "date" from which the option under this clause is exercised or proposed to be exercised". Thus, the rule itself contemplates a situation where the declaration is filed by the manufacturer after they have exercised the option.

E.4 Thus, the allegation in the show cause notice that the noticees have not opted to make payment under Rule 6(3)(ii) is incorrect and is liable to be dropped.

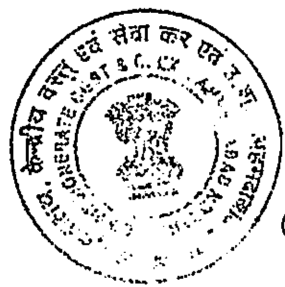
E.5 The noticees submit that, the noticees have correctly exercised the option under Clause (a) of Sub Rule (3A) and also reversed the credit along with interest. Therefore, the show cause notice is incorrect and is liable to be dropped.

**Without prejudice to the above, the conditions and procedures prescribed under Rule 6(3A) is procedural in nature.**

F.1 The noticees submit that, assuming without admitting that contention of the Revenue in the show cause notice is correct and the noticees were required to exercise the option after complying conditions and procedure under Rule 6(3A), even then failure to comply with conditions laid down in Sub Rule (3 A) is procedural in nature. The said procedural lapse cannot take away the substantive right of the noticees to exercise the option available under the Rules.

F.2 Rule 6(3A)(a) provides that the following information has to be intimated in writing to the Superintendent of Central Excise while exercising the option under Section 6(3)(ii):

> (i) name, address and registration No. of the manufacturer of goods or provider of



output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition.

F.3 3 Further, Rule 6(3 A) of the Cenvat Credit Rules, 2004 prescribes the formula for determining the amount of cenvat credit of inputs and input services to be reversed.

F.4 Under the said rule, the reversal of the proportionate credit pertaining to input services is determined on the basis of the turnover.

F.5 Further, Rule 6(3A) of the Cenvat Credit Rules, 2004 prescribes that a manufacturer has to provisionally determine the amount of Cenvat credit to be reversed every month and pay the same to the department. At the end of the financial year, the manufacturer is required to finally determine the amount of Cenvat credit to be reversed and deposit the differential amount along with interest at the rate of 24% p.a.

F.6 On perusal of the aforesaid provision would clearly show that the manufacturer basically has two options namely (a) to maintain separate account of the input and input services received and take credit only on that much quantity of input and input service used in the manufacture of dutiable final product or for providing taxable service OR (b) follow any one of the option provided under Rule 6(3) if separate account as mentioned in (a) above is not maintained.

F.7 In the present case, the noticees are engaged in the manufacture of dutiable goods as well as trading goods. Therefore, the provisions of Rule 6(3) are applicable in the present case.

F.8 In the present case, the noticees have exercised the option under Rule 6(3) (ii) of the Cenvat Credit Rules, 2004. Accordingly, the noticees have paid proportionate Cenvat credit along with interest for the input services used in the trading activity as well as for exempted goods in accordance with Rule 6(3)(ii) of Cenvat Credit Rules, 2004.

F.9 The case of the Revenue is that the noticees have not followed the procedures and conditions prescribed under Rule 6(3)(ii) and hence, Rule 6(3)(i) is applicable in the present case. The noticees submit that the said objection would be incorrect. The Cenvat Credit Rules, 2004 nowhere states that information required under Rule 6(3)(ii) has to be provided before exercising the option and failure to do so will make the manufacturer ineligible to exercise it. In fact, Rule 6(3A)(a)(ii) states that the manufacturer ought to mention "date from which the option under this clause is exercised or proposed to be exercised". Thus, the rule itself contemplates a situation where the declaration is filed by the manufacturer after they have exercised the option. In any case, the information required to be given by a manufacturer in the declaration is only general in nature.

F.10 It can be further noted that the non-filing of declaration is only a procedural lapse.

F.11 The aforesaid submission is supported by the decision of the Hon'ble Tribunal on the identical issue, in the case of **Mercedes Benz India (P) Limited Vs. CCE - 2015-TIOL-1550-CESTAT- MUM.** In this case, the case of the department was that the assessee cannot reverse cenvat credit on common input services under Rule 6(3A) on the ground that the said option is available only when the condition and procedure specified in sub-rule (3A) is complied with. As per the department, the procedure was not followed by the assessee inasmuch as in the beginning of the financial year, have not intimated in writing to the Jurisdictional superintendent regarding the availment of the option provided under clause (ii) of Rule 6(3) and therefore, the assessee is required to reverse cenvat credit in terms of Rule 6(3)(i). In this case, the Hon'ble Tribunal held that non- following the conditions prescribed under Rule 6(3 A) is merely a procedural lapse and therefore, the assessee cannot be made compulsorily to follow Rule 6(3)(ii). The relevant extract of the decision is extracted hereunder:

"5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided:-

(i) Payment of 5% on value of exempted services.

(ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A) (b).

It is observed that the appellant has availed the option provided under sub rule (3) (ii) of Rule 6 and paid an amount as per sub rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14/3/2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit which they have made along with interest is in accordance with Rule 6 (3 A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2012, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input services attributed to the exempted service in terms of Rule 6(3A). In the present case, the appellant has availed Cenvat Credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat Credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3) (ii) and paid an amount as required under sub rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub rule (3) (ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount as required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under Rule (3 A) of Rule 6, therefore to fulfil the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of Sub Rule (3 A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely:

(i) Name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) Date from which the option under this clause is exercised or proposed to be exercised;

(iii) Description of dutiable goods or taxable services;

(iv) Description of exempted goods or exempted services;

(v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition.

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub rule (3 A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been

submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3 A), it stood made.

5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that maybe or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it, is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.

F.12 Similar view is also taken in the case of **Tata Technologies Ltd Vs. CCE - 2016 - TIOL-272- CESTAT-MUM.** In this case, Tata Technologies were asked to pay 8% of the value of exempted services on the ground that they had not maintained separate accounts as required by Rule 6(2) of the Cenvat Credit Rules, 2004. Further, it was also sought to deny them the option of proportionately reversing the cenvat credit under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, on the ground that the option is available only for the period after filing of the declaration as mentioned under Rule 6(3 A) of the Cenvat Credit Rules, 2004. The Hon'ble Tribunal held that condition of filing declaration under Rule 6(3 A) of CCR, 2004 is only directory and not mandatory. Most of the requirements under Rule 6(3A) like, name, address and registration no. of the assessee, description of taxable services and exempted services, CENVAT Credit of inputs and input services lying in balance as on the date of exercising option, are already available in the records of the Revenue. It is also held that due to minor procedural lapses, substantial benefit cannot be denied.

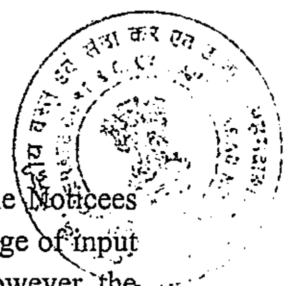
F.13 The noticees submit that the aforesaid decisions are squarely applicable in the facts of the present case. In the present case also, the show cause notice alleges that the noticees have not followed the conditions and procedure while opting under Rule 6(3A). The noticees submit that the procedure as prescribed under the rule is merely procedural. In the present case, the noticees have already paid final amount of Cenvat credit reversible as per the formula prescribed in Rule 6(3)(ii). Therefore, non-following of procedure will not be of any consequence.

F.14 In view of the above, the noticees are eligible to proportionately reverse the credit pertaining to manufacture of exempted goods and exempted service in accordance with the formula prescribed under Rule 6(3 A) of the Cenvat Credit Rules, 2004.

F.15 Therefore, the show cause notice proposing to demand Cenvat credit amount as 5% / 6% / 7%of the value of traded goods is liable to be dropped.

**Reversal of pro-rata credit attributable to inputs services used in the manufacture of exempted goods are sufficient to satisfy the conditions of Rule 6. Reversal of credit on input services used in or in relation to manufacture of exempted goods is in conformity with Rule 6. Ratio of the judgment of Hon'ble Supreme Court in Chandrapur Magnet: Taking credit and reversing it amounts to not taking the credit supports this submission.**

G.1 In the present case, the Noticees have option to reverse the availed credit of service tax paid on the quantity of input services used in or in relation to manufacture of exempted goods even after due date of reversal of credit.



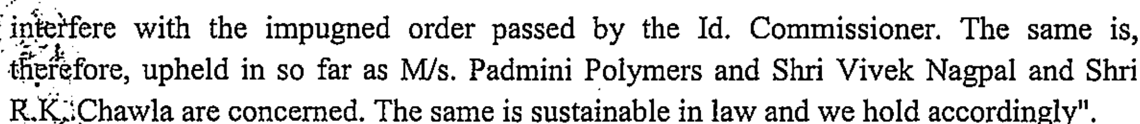
G.2 The Noticees submit that the show cause notice proceed on the basis that the Noticees have not maintained separate maintenance of accounts under Rule 6(2), separate storage of input services for use in the manufacture of dutiable final products, and exempted goods. However, the provisions of Rule 6(2) do not contemplate such a requirement.

G.3 In support of the aforesaid submission, the noticees place reliance on the judgment of the Hon'ble Supreme Court in the case of **CCE Vs. Padmini Polymers - 2003 (151) ELT 358 (SC).** In that case, M/s Padmini Polymers were availing lull exemption in respect of articles of plastics falling under Subheading No. 3923.90 vide Notification No. 4/97 dated 1.4.97. Part of the production of these articles of plastics were also cleared on payment of duty by taking Modvat credit on the inputs used in the manufacture of such goods. The exemption availed for part of the production of article of plastics was sought to be denied by the department on the ground that there was no maintenance of separate inventory and account of modvatable raw material used in the manufacture of exempted goods.

G.4 In other words, the show cause notice issued to Padmini Polymers sought to deny the exemption availed for part of the production on the ground that there was no segregation of inputs, which was used for making containers cleared at nil rate of duty and there was no link established for the inputs in respect of which no credit was taken were really inputs, which were actually used for making the exempted containers. Accordingly, the show cause notice issued to Padmini Polymers proposed to deny the exemption under notification on the ground of non-fulfillment of the condition.

G.5 The Commissioner of Central Excise dropped the proceedings initiated against Padmini Polymers. Against this order of the Commissioner, the department filed appeal to Hon'ble CEGAT. The Hon'ble CEGAT after considering the issue in detail dismissed the department's appeal by observing as under:

> "10. We have heard the rival submissions. We have also perused the evidence on record. We have also perused the law cited and relied upon by both the sides as also the requirement of Notification No. 4/97 and Rules 57C and 57CC. We note that Notification No. 4/97 completely exempts final products classifiable under Chapter Heading 79.23, 39.23 or 39.26 from duty of excise payable thereon subject to the condition that Modvat credit of duty paid on inputs used in the manufacture of such products is not availed. We note that there is no statutory embargo on clearance of part of the final products on payment of duty and part under exemption. We do not find any mistake on the part of the assessee in availing the benefit of Notification No. 4/97 only in respect of clearance of a part of the final product manufactured by them simply because a part of the final product manufactured by the assessee was cleared on payment of duty and the reminder under provision of this notification. We do not see any violation of the conditions of the notification inasmuch as the assessee had not taken Modvat credit on inputs which were used in the manufacture of exempted final product. We note that the Id. Commissioner while deciding the issue of entry of minor raw-materials in Form IV Register, placed reliance on the judgment of this Tribunal in the case of Agarwal Brothers Steel Rolling Mills, reported in 1987 (27) E.L.T. 334 which is correct.
>
> 11. We note thatin the SCN a lot of emphasis has been placed on separate storage of the raw materials used in the manufacture of final exempted product and raw materials used in the final dutiable product. The contention of the respondent herein was that the rules do not contain any such requirement of separate storage, therefore, there was no violation or contravention of any Rule. We find force in the contention of the respondent herein. We have examined the provisions of Rules 57C and 57CC and we do not see any such requirement of separate storage of the two categories of inputs. We note that under Rule 57CC(9) what is required is that separate inventory and accounts of the receipt, use of inputs for the purpose of manufacture of final products cleared under exemption be maintained. We note that the adjudicating authority has examined each aspect legally as well as factually for coming to the conclusion. Therefore, we do not see any reason to



interfere with the impugned order passed by the ld. Commissioner. The same is, therefore, upheld in so far as M/s. Padmini Polymers and Shri Vivek Nagpal and Shri R.K. Chawla are concerned. The same is sustainable in law and we hold accordingly".

G.6 The provisions of Rule 57CC of the erstwhile Central Excise Rules, 1944 are *pari materia* to Rule 6 of Credit Rules. Therefore, the aforesaid decision of the Hon'ble CESTAT on the interpretation of Rule 57CC(9) which is identical to Rule 6(2) is squarely applicable to the present case. In view of the fact that the Noticees have proportionality reversed credit of input services used in or in relation to manufacture of exempted goods, the requirement of Rule 6(2) has been fulfilled. Hence, the show cause notice being incorrect and unsustainable in law to demand 5% under Rule 6(3), therefore, it is liable to be dropped.

G.7 Similarly, reliance is placed on the decision of Hon'ble CESTAT in case of **Mayur Colours Limited Vs. CCE - 2001 (136) ELT 1111 (T).**

G.8 The Noticees submit that the aforesaid submission is also truly supported by the following decisions of the Hon'ble CESTAT wherein it has been held that reversal of credit on inputs used in the manufacture of exempted goods without maintaining a separate account would not attract the provisions of Rule 6 (3)(b) of the Cenvat Credit Rules or Rule 57 CC (1) of the Central Excise Rules, 1944:-

(i) Sirpur Paper Mills Ltd Vs. CCE - 2006 (205) ELT 188

(ii) CCE Vs. Philips India Ltd. - 2006 (200) ELT 106

(iii) SAIL Vs. CCE - 2007 (217) ELT 278

(iv) ETI Technologies Ltd. Vs. CCE - 2007 (212) ELT 371

(v) Bassein Drugs Ltd. Vs. CCE - 2004 (177) ELT 371 (Tri.)

(vi) CCE Vs. Jagan Tubes Ltd. - 2004 (175) ELT 200

(vii) Rochees Watches Ltd. Vs. CC - 2003 (152) ELT 420

(viii) Ballarpur Industries Ltd Vs. CCE - 2006 (201) ELT 146

(ix) Ruchi Soya Industries Ltd Vs. CCE - 2007-TIOL-1096-CESTAT-BANG.

Even in cases where credit was taken on the entire quantity of input and subsequently reversal of credit on *pro rata* quantity was made, Hon'ble CESTAT set aside the demand of the amount under Rule 6(3)(b) of the Cenvat Credit Rules or under the similar provisions of Rule 57CC of the Central Excise Rule. These decisions squarely apply with greater force to the present case.

H.1 In **Chandrapur Magnet Wires Vs. CCE, Nagpur - 1996 (81) ELT 3 (SC) = 1996 (2) SCC 159,** M/s. Chandrapur Magnet was manufacturing enameled winding wire from duty paid copper wire bars. M/s. Chandrapur Magnet manufactured two types of enameled copper wire (winding wire) - those exceeding 6 mm dia and those of less than 6 mm dia.

H.2 Winding wire of copper was dutiable under sl. no. 1 (ii) of Notification No.69/86-CE. Winding wires were also exempt from duty, vide sl. no. l(i) of Notification No.69/86 provided *inter-alia,* if no MOD VAT credit is taken under Rule 57 A or Rule 5 6 A. In other words, this was case where a statutory Notification which granted exemption also stipulated that the exemption was available on fulfilling the condition that credit was not availed on inputs used in manufacture of such exempted final product.

H.3 M/s. Chandrapur Magnet took MODVAT credit on entire quantity of copper wire bar received in the factory. Whenever they cleared enameled winding wire at NIL rate of duty, they reversed the MODVAT credit on the quantity of inputs used in the manufacture of exempted enameled winding wire. The Central Excise department took a view that initial taking of credit was in violation of the condition of the Notification and the subsequent reversal of MODVAT credit cannot amount to fulfillment of the conditions of the aforesaid exemption notification. Therefore, exemption is not available to the said winding wires under SI. No. 1 (i) of the Notification.

H.4 The Hon'ble Supreme Court held that reversing MODVAT credit would be equivalent to M/s. Chandrapur Magnet not availing of MODVAT credit on inputs used in the manufacture of exempted final product. Accordingly, the Hon'ble Supreme Court held that exemption availed by M/s. Chandrapur Magnet was correct in law and that the condition in the Notification was not violated.

H.5 The CBEC applied and followed the above ratio vide Circular No. 232/66/96-CX dated 25.7.1996 - 1996 (15) RLT M159.

H.6 The Noticees submit that the ratio laid down by the Hon'ble Supreme Court in the case of Chandrapur Magnets that subsequent reversal of credit amounts to non-taking of credit. The decision of the Hon'ble Supreme Court in the case of M/s. Chandrapur Magnet Wires Ltd. was subsequently followed by the CESTAT in a number of decisions. These decisions also support the submissions of the noticees. Kindly refer:

(i) Rochees Watches Ltd. Vs. CCE - 2003 (152) ELT 420 (T)

(ii) Hi-Line Pens Pvt. Ltd. Vs. CCE - 2003 (158) ELT 168 (T).

H.7 Therefore, the Noticees submitted that once credit of duty paid on common inputs and inputs services to the extent such inputs and input services are alleged to be used in the manufacture of exempted goods or in rendering exempted services, has been reversed, Rule 6(1) stands complied. The liability to pay 5%/6%/7% of the value of tarded goods in terms of Rule 6(3)(b) does not arise in such a situation.

**Sub-rule (1) of Rule 6 is complied where credit availed on common inputs and input services used in rendering exempted services is surrendered in view of law laid down in Chandrapur Magnet.**

H.8 Rule 6(1) of Credit Rules provides that Cenvat Credit **shall not be allowed** on such quantity of input which is used in rendering exempted services. There is thus a bar against allowing of Cenvat Credit on the quantity of input and input services used in rendering exempted services.

H.9 As submitted supra, in view of the judgments of the Hon'ble Supreme Court in Chandrapur Magnet, if Cenvat Credit taken on input services used in the provision of exempted services has been debited, the effect of such debit is that it cannot be said that the assessee had taken such credit.

H.10 As a necessary corollary, it would follow that when such debit / reversal of credit is made the Cenvat credit cannot be said to have been taken. Therefore the bar contained in Rule 6(1) against allowing such credit on input services used in rendering exempted services stands complied with. Thereafter, there is no need to further look at Rule 6(2) or Rule 6(3). These rules need to be seen only when Rule 6(1) is not complied with (by way of reversal of credit).

Decision of Hon'ble Allahabad High Court in Hello Minerals Water (P) Ltd, held that the reversal of credit can be subsequent to the clearance.

H.11 In the case of **Hello Minerals Water (P) Ltd** - 2004 (163) ELT 55 (T), on a similar situation, the Hon'ble CESTAT held that if the credit on input was taken and not reversed before the clearance of finished product, the exemption under Notification No. 15/94 which is available based on the non availing of credit on input, cannot be extended.

H.12 However, on appeal filed against the above order of the CESTAT, the Hon'ble Hon'ble High Court of Allahabad in **Hello Minerals Water (P) Ltd Vs. UOI** - 2004 (175) ELT 422 (All.) after following the decision of the Supreme Court in the case of Chandrapur Magnets held that once the credit is reversed even at the later stage it has to be treated that the condition of the Notification that no credit was taken, is fulfilled. Accordingly, the order of the CESTAT reported at 2004 (163) ELT 55 (T) in the case of Hello Minerals Water (P) Ltd was set aside.

H.13 In the case of **CCE Vs. Ashima Dyecot Ltd.** - 2008 (232) ELT 580 (Guj.), the Hon'ble High Court relied on the judgments in Chandrapur Magnets and Hello Minerals and held that reversal of credit subsequently amounts to non-availment of credit.

H.14 It is submitted that in light of the aforesaid decisions, reversal of credit subsequently amounts to not taking of credit at all.

H.15 In view of the above, the show cause notice proposing to demand 5%/7% under Rule 6(3) is incorrect & unsustainable in law therefore, it is liable to be dropped.

Section 5A enables the Government to exempt products in public interest. Such public interest cannot be lost sight of while interpreting Rule 6. Rule 6 cannot be used a tool of oppression to extract an amount which is much beyond the remedial measure. Rule 6 cannot be interpreted in a manner which frustrates the exemption and in effect taxes the exempted product in an indirect manner. Rule 6 cannot run counter to Section 5A.

H.16 Section 5 A enables the Government to exempt products in public interest. Where a product has been exempted in public interest, any interpretation of sub-ordinate legislation should not result in that product being taxed indirectly since it is well settled that what cannot be done directly, cannot be done indirectly as well.

H.17 The maxim *'quando aliquid prohibetur fieri, prohibitur ex directo et per obliquum'* which means "whenever a thing is prohibited, it is prohibited whether done directly or indirectly" may gainfully be quoted here. Vide **CCE Vs. Acer India Ltd. - 2004 (8) SCC 173, at para 49 and para 84.**

H. 18 Further, Rule 6 cannot be used a tool of oppression to extract an amount which is much beyond the remedial measure. Rule 6 cannot be interpreted in a manner so as to run counter to Section 5A.

Rule 6 is part of delegated legislation (namely Cenvat Credit Rules, 2002) enacted under Section 37(2)(xvia). Section 37(2)(xvia) enables the Central Government to make rules providing for credit of duty paid on the goods used in, or in relation to the manufacture of excisable goods. Rule 6 cannot be employed as a charging section going much beyond the mandate of giving credit.

H.19 Rule 6 is a part of delegated legislation (namely Cenvat Credit Rules, 2002) enacted under Section 37(2)(xvia). Section 37(2)(xvia) enables the Central Government to make rules providing for credit of duty paid on the goods used in, or in relation to the manufacture of excisable goods. Power to give a benefit encompasses within itself power to put conditions and restrictions under which such benefit is available. Power to give a benefit also carries with it power to take it back or withdraw it. Therefore, all these aspects can and does flow from Section 37(2)(xvia) itself.

H.20 Hence, when Cenvat Credit Rules, 2004 grants benefit of credit, it is perfectly legal to put a condition that credit of duty paid on inputs used in exempted final product will not be available. It is also open to legislature to take back the credit.

H. 21 But, in the guise of putting such condition or even taking it back, it is not open to the revenue to state that even when the assessee is willing to forego credit of duty paid on inputs used in the manufacture of exempted final product, the same is not acceptable to the revenue and the assessee should necessarily pay an amount equal to 8% /10% / 5% of the sale price of the exempted final product even if it is many times the credit taken by the assessee. At best, Rule 6(3)(ii) should be read as "amount not exceeding 8% / 10% / 5%".

**The demand is beyond the normal period of limitation and therefore the same is not maintainable. The extended period of limitation is not invokable in the present case since the noticees had not willfully suppressed any fact much less with intention to evade payment of duty.**

I.1 In the present case, the show cause notice is dated 22.04.2016 whereas the period involved in the present case is F.Y. 2011 - 2012 to F.Y. 2015-16. Therefore, the demand for the

period from April 2011 to March 2014 in the present show cause notice is clearly beyond the normal period of limitation.

I.2 In the present case, the extended period of limitation for raising a demand is not invokable as there was no suppression of facts much less with intent to evade payment of duty.

I.3 Further, the Noticees are registered with excise department as well as service tax department. The Noticees were regularly filing their ER-1 returns & ST-3 returns with the department. The department was aware about the aforesaid transactions and the business practices of the Noticees.

I.4 The fact regarding trading of goods was specifically intimated to the department (letters enclosed above) during the course of audit and also by way of audit for previous years **(Annexure-18)** as mentioned from para D.9 to D.13 supra. The Department has already accepted the reversal of proportionate credit made by the noticees for the earlier period under Rule 6(3 A) of the Cenvat Credit Rules, 2004. Further, the details of availment of cenvat credit are given in the ER 1 return also. Therefore, there is no suppression at the noticees end with intent to evade payment of excise duty.

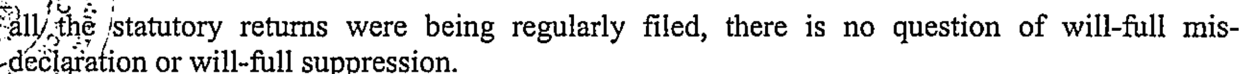
I.5 The noticees submit that the above show cause notice merely makes a bald allegation of suppression. The above show cause notice has not brought on record any evidence to show that the noticees have suppressed any fact from the department & that too with an intention to evade payment of duty. Therefore, the above show cause notice is liable to be dropped on this count alone. All the facts were known to the department and department were conducting periodical audits of the notices.

I.6 Reliance placed on the decision of the Hon'ble Tribunal in case of **Ispat Industries Ltd Vs. CCE - 2006 (199) ELT 509 (T)** wherein the Hon'ble Tribunal held that when the entire facts were placed before the jurisdictional Central Excise officer, and the issue involved is bonafide interpretation of provision of law, extended period cannot be invoked merely because Noticees did not interpret such provisions in the way department sought to interpret the same. Such a demand was held to be barred by limitation by the Hon'ble Tribunal. Similar s ratio was established in case of **NIRC Ltd. Vs. CCE - 2007 (209) ELT 22 (T).**

I.7 At the time of audit in the year 2014, all the information and documents were provided to the Department. Once the information is supplied pursuant to the directions of the revenue authority and information so supplied has not been questioned, a belated demand has to be held to be barred by limitation. **[Commissioner of Central Excise, Chandigarh -Vs- Punjab Laminates Pvt. Ltd.** = 2006- TIOL-109-SC-CX, **Chennai Petroleum Corporation Ltd.** = 2007-TIOL-66-SC-CX, **Chemphar Drugs and Liniments, Hyderabad** = 2002-TIOL-266-SC-CX, **Anand Nishikawa Co. Ltd** = 2005- TIOL-118-SC-CX, **Bajaj Auto Ltd.** = 2010-TIOL-94-SC-CX. relied upon

I.8 There cannot be any intention to evade payment of duty in the present case since there was no evasion of duty as mentioned supra. Therefore, even if there is a suppression of facts, the extended period of limitation cannot be invoked in the absence of intention to evade of duty on the part of the Noticees. The Noticees submit that mere suppression is not sufficient to invoke the extended period of limitation. There should be intention to evade payment of duty coupled with suppression of facts in order to invoke the extended period of limitation. Since in the present case there was no evasion of duty or service tax, the extended period of limitation is not invokable.

I.9 Every omission to disclose certain fact is not sufficient to invoke larger period of limitation on the ground of suppression of fact. Only those omissions to disclose the fact which amounts to willful suppression with an intention to evade payment of duty will enable the Revenue to invoke larger period. In the present case, the willful nature of the omission is not established. In this regard, the Noticees place reliance on the decision of the Hon'ble Supreme Court in the case of **Pahwa Chemicals Vs. CCE - 2005 (189) ELT 257 (SC).** The Hon'ble Supreme Court held that mere failure to declare does not amount to mis-declaration or will-full suppression. There must be some positive act on part of party to establish either will-full mis-declaration or will-full suppression. When all the facts were within knowledge of department and


all the statutory returns were being regularly filed, there is no question of will-full mis-declaration or will-full suppression.

I.10 The Noticees submit that the onus is on the department to prove that the Noticees have wilfully suppressed facts with intent to evade payment of duty. The department failed to prove that the noticees have acted with any malafide intent. There is nothing on record to show the existence of fraud, collusion or suppression of materials facts or information. There cannot be any intention for evasion of duty since by evasion, the noticees is not getting benefit. Therefore, the larger period of limitation is not invokable. Reliance is placed on the following cases in support of this submission:

(i) Shahnaz Ayurvedics Vs.CCE - 2004 (173) ELT 337 (All) Affirmed in 2004 (174) ELT A34 (SC)

(ii) Devans Modern Breweries Vs. CCE-2006 (202) ELT 744 (SC)

**No Suppression of facts since the department was aware of the facts. Hence, extended period cannot be invoked in the present case.**

J.1 The department was fully aware of the facts as the Noticees have been filing periodical returns. The department could have issued show cause notice at that point of time itself for the past period. Having failed to do so, the department cannot now allege suppression of facts.

J.2 The Noticees further rely on the following case law in support of their contention that in case the assessee was under a bona-fide belief, then extended period of limitation is not invokable:

(i) CCE Vs. Vineet Electrical 2002 (144) ELT A292 (SC);

(ii) CCE Vs. Raptakos Brett 2006 (194) ELT 101 (T);

(iii) CCE Vs. Rishabh Velveleen 1999 (114) ELT 839 (T);

(iv) Pee Jay Apparels Vs. CCE 2001 (135) ELT 842 (T);

(v) Cosmic Dye Chemical Vs. CCE 1995 (75) ELT 721 (SC).

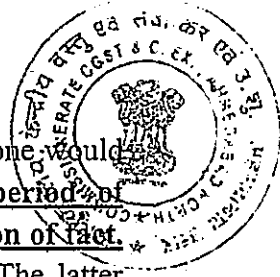
J.3 Further, the Noticees have submitted all the details as and when, demanded by the department. Hence, there can be no allegation of suppression of facts in the present case. Therefore, the entire demand which is beyond the normal period of limitation is not maintainable. It is well settled that when there is any deficiency in the format of return and therefore certain information could not be disclosed cannot be a ground to allege suppression against the Noticees.

J.4 The Noticees have maintained all the statutory records. The books of account are maintained in the usual manner. All transactions have been undertaken transparently and in the usual course of activities. The proposal for denial of Cenvat credit in the present show cause notice is based only on the books of account maintained by the Noticees.

J.5 Moreover, there being no positive act on part of the Noticees to suppress any facts from the department and there being no evidence for such allegation, the Noticees submit that the five year clause is inapplicable. In the present case as well, the issue involved is purely interpretational in nature. Moreover, there being no positive act on part of the Noticees to suppress any facts from the department and there being no evidence for such allegation, the Noticees submit that the five year clause is inapplicable.

J.6 Similarly, the Noticees also rely upon decision of the Hon'ble Supreme Court in the case of **Continental Foundation Vs. CCE - 2007 (216) ELT 177 (SC),** wherein the Hon'ble Apex Court has held as under:

> "10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. **Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty.** Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are



known to both the parties, omission by one party to do what he might have done would not render it suppression. <u>**When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement.**</u> The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

... (Emphasis supplied)

J.7 The present Show Cause Notice has been issued based on the scrutiny of records of the Noticees.

The Noticees therefore submit that all the information were there in the record and audit team had raised objection based on the record. Hence, there is no suppression of fact on the part of the Noticees. The show cause notice proposing to invoke extended period of limitation in therefore liable to be dropped.

<u>The Noticees are being audited by the Department time to time. There cannot be any suppression on the part of the Noticees</u>

J.8 The Noticees further submitted that the Noticees have been audited by the Department from time to time as under:

March 2009 to February 2011:- Audit report no.45/2011-12 dated 26.7.2011 (Annexure-18)

March 2011 to March 2012: - Audit report no.32/2012-13 dated 17.07.2012 (Annexure-19)

November 2011 to October 2013 - Audit report no. 100/2014-15 dated 22.09.2014 (Annexure-5)

2010-11 to 2014-15 - CERA audit report no. 308/15-16 dated 20.01.2016 (Annexure-7)

November 2013 to June 2015 - Audit report dated 02.03.2016 (Annexure-8)

J.9 The Noticees further submit that at the initiation of the audit of the Noticees for each year, the service tax authorities have asked for the copies of agreements for services entered in to by the Noticees with their clients. Audit para is raised for the disputed issue in each audit to which reversal is made by the noticees under Rule 6(3 A) of the Cenvat Credit Rules, 2004 as submitted at para D.9 to D.13 supra.

J.10 As can be seen from the above that the Noticees have been audited by the department time and again. All the activities carried out by the Noticees are well within the knowledge of the service tax authorities. In these circumstances, it is improper to allege suppression, willful misstatement on the part of the Noticees. When the assesse is audited by the service tax authorities, suppression etc. cannot be alleged on the assesse. The Noticees rely on the decision of <u>**Pragathi Concrete Products Pvt. Ltd.**</u>

2015 (322) <u>ELT</u> 819 (SC) wherein it is observed as under:

*3. It is also found as a matter of fact, that the unit o f the respondent was audited during this period several times and there were physical inspections by the Department as well. Therefore, there could not be any case of suppression. We are in agreement with the aforesaid view taken by the CESTAT. As a result, this appeal is dismissed*

J.11 Similar proposition was upheld by Hon'ble Bombay High Court in case of <u>**Rajkumar Forge Ltd. 2010 (262) ELT 155 (Bom).**</u>

J.12 Therefore, the Noticees submit that without prejudice the demand beyond the period of 18 months would not be sustainable.

<u>**The proposal to impose penalty on the noticees under Section 11 AC read with Rule 15(2) of Cenvat Credit Rules, 2004 is not sustainable.**</u>

K.1 The show cause notice proposes to impose penalty on the Noticees under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944.

K.2 As per Rule 15(2) of the Cenvat Credit Rules, 2004, when credit has been wrongly availed or utilized by the assessee on account of fraud, willful mis-statement, collusion or suppression of facts or contravention of any of the provisions of the Central Excise Act or Rules made thereunder with intention to evade payment of excise duty then penalty under Section 11 AC of the Central Excise Act, 1944 is imposable on the manufacturer. Section 11 AC penalty is imposable when there is short payment of duty on account of fraud, willful mis-statement, collusion or suppression of facts or contravention of any of the provisions of the Central Excise Act or Rules made thereunder with intention to evade payment of excise duty.

K.3 In view of the submissions made in paras *supra*, it is submitted that there is no suppression, misstatement with intent to evade payment of duty in the present case. Further, as submitted above, there is no contravention of any of the rules or provisions mentioned under this Act. Therefore, there was no suppression with intent to evade payment of duty.

K.4 In the matter of **Hindustan Steel Ltd. Vs. State of Orissa** reported at **1969 (2) SCC 627,** the Hon'ble Apex Court has observed as under:

> "........ Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, where there is a technical or venial breach of the provisions of the act or where the breach flows form the bonafide belief that the offender is not liable to act in the manner prescribed in the statute."

K.5 The ratio of these decisions squarely applies in all force to the present case. In the present case, there was neither any malafide intention nor any intention to evade payment of duty.

K.6 In view of the aforesaid submissions, the ingredients for imposition of penalty under Rule 15(2) of Cenvat Credit Rules, 2004 as well as Section 11 AC of the Central Excise Act, 1944 are not present in the instant case. Thus, the proposal to impose of penalty on the noticees under Rule 15(2) of Cenvat Credit Rules, 2004 as well as Section 11 AC of the Central Excise Act, 1944 is not sustainable.

K.7 Further, it is submitted that the issue in dispute in the present case involves interpretation of provisions of law. Penalty is not imposable for this reason as well. Reference may be made to the following judgments wherein it has consistently been held that penalty is not imposable when the issue in question involves interpretation of the provisions of law:

(a) C.C.E. Vs. Swaroop Chemicals (P) Ltd., 2006 (204) E.L.T. 492 (Tri.)
(b) Haldia Petrochemicals Ltd. Vs. C.C.E., 2006(197) E.L.T. 97 (Tri.).
(c) C.C.E. Vs. TELCO LTD., 2006 (196) E.L.T. 308 (Tri.)
(d) Siyaram Silk Mills Ltd. Vs. C.C.E. 2006 (195) E.L.T. 284 (Tri.)
(e) CCE Vs. Sikar Ex-Serviceman Welfare Coop. Society Ltd. 2006 (4) S.T.R. 213 (Tri.)
(f) Hindustan Steel Ltd. Vs. State of Orissa 1978 (2) E.L.T. (J 159) (S.C.)
(g) Fibre Foils Ltd. Vs. C.C.E. 2005 (190) E.L.T. 352 (Tri.)
(h) ITEL Industries Pvt. Ltd. Vs. C.C.E. 2004 (163) E.L.T. 219 (Tri.)
(i) Birla Corporation Ltd. Vs. C.C.E. 2002 (148) E.L.T. 1249 (Tri.)

K. 8 In view of the aforesaid submissions, the appellants submit that the proposal to impose penalty on the noticees under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 is not sustainable. Hence, the show cause notice is liable to be dropped.

**Interest is not recoverable from the Noticees.**

L. It is a settled principle of law that in cases where the original demand is not sustainable,

interest cannot be levied. In view of the aforesaid submissions, it is clear that the demand itself is not sustainable and hence, the question of imposing interest does not arise. Hence, the show cause notice is liable to be dropped.

M. The Noticees crave leave to add, alter, amend and/or rescind any of the above submissions at the time of or before the personal hearing.

N. The Noticees crave leave to refer and rely upon any case law and/or judgment, as and when produced.

In view of the foregoing, the Noticees submit that the proceedings initiated in the aforesaid show cause notice are liable to be dropped. In any case, the Noticees may be given an opportunity of personal hearing before passing any order in the subject show cause notice".

## PERSONAL HEARING:

**13.** In this case, personal hearing was fixed for 22.11.2016. The assessee vide their letter dated 21.11.2016 request for further two weeks time as their concerned person incharge of the matter is out of station. Accordingly, another date of hearing was fixed for 15.12.2016. They requested to postpone the hearing due to the ill health of their Advocate. The assessee was also informed about the option to approach the Settlement Commission vide letter dated 19.04.2018. Further hearing was fixed on 20.12.2019. Ms Madhu Jain, Advocate appeared for the personal hearing. She reiterated the submissions made earlier in this regard. She submitted a set of written submission, citing various CESTAT/High Court orders. She specifically laid stress on PCA Alembic Ltd, Mercedes Benz India Vs CCE and Reliance Life Insurance in this regards.

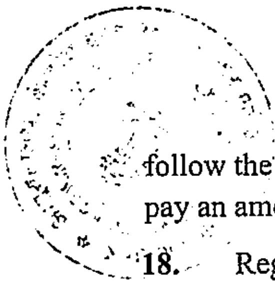
## DISCUSSION AND FINDINGS.

**14.** I have carefully gone through the show cause notice, written submissions made by the assessee in response to this show cause notice and submissions made during the personal hearing held on 20.12.2019 as well as other evidences / documents available on record. I find that the issue involved in this case regarding recovery of an amount of Rs.4,41,54,693 relating to the period April 2011 to March 2016, as they have availed Cenvat Credit on common input services alleged to be used in manufacturing activities and trading activities and failed to reverse the amount of 5%/6%/7% of exempted service as stipulated under clause (i) of sub-rule (3) of Rule 6 of Cenvat Credit Rules, 2004.

**15.** I find that the SCN was issued on the basis of CERA objection as per LAR No.308/2015-16. The SCN was issued on 22.04.2016. The assessee has stated that Lubricant items such as grease and oil, coolant etc. are inputs required for manufacture of air compressors. These lubricants are imported as well as procured from domestic market. Cenvat credit of the same is availed on duty paid on domestic goods and CVD and SAD on imported goods. They sell the purchased lubricant items separately under commercial invoice against the purchase order of the buyer by discharging applicable VAT/CST.

**16** The activity of trading of inputs, i.e., lubricant items, coolant etc, fall under the scope of exempted service under sub-clause (2) of Rule 2(e) of the Finance Act, 1994. They have availed various common input services in relation to manufacturing activity and trading activity such as manpower supply service, courier service, business auxiliary service, consultancy service, security service, legal service, goods transport agency service, clearing and forwarding services etc.

**17.** The show cause notice stated that the assessee was engaged in manufacturing activity as well as involved in trading activity. They had availed Cenvat credit which is used in their factory on various input services. It was alleged that since the activity of trading is an 'exempted services', the assessee has taken cenvat credit on services which are common to both manufacturing activity and exempted services ie. trading activity. Therefore, by virtue of using common input services to manufacturing activity and exempted services, the assessee has to



follow the provisions of Rule 6 (3) of Cenvat Credit Rules, 2004 as per which the assessee has to pay an amount arrived @ 6%/7% on the value of traded goods.

**18.** Regarding the contentious issue of trading, which is an exempted service, I find that the general meaning of the term, 'Trading' is, it is an activity involving purchase and sale of commodities, products or services. In the subject case, the basic record relied for raising the allegation that the activity carried out by the assessee is a 'trading' activity. Moreover, the Central Excise procedures stipulate maintenance of private records by every assessee for accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods, all accounts, agreements, invoice, price-list, return, statement or any other source document like sales invoice, purchase invoice, journal voucher, delivery challan and debit or credit note. It is also a statutory requirement that every assessee has to furnish to the Range Officer, a list in duplicate, of all the records prepared or maintained by him for accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods. However, no such record maintained by the assessee showing receipt and movement of inputs in question was submitted by them, in support of their contention. Thus, though the assessee made lengthy submissions, to show that they complied with the Rule 6(3A) neither any record nor any corroborate evidence in support of the same was submitted during the current proceedings. Therefore, I do not find any justifiable reason for taking a different view and I consider the same as 'trading' of goods.

**19.** Now, I examine treatment given to trading activity under Cenvat Credit Rules, 2004. I find that definition of 'exempted services' given under Rule 2 (e) of Cenvat Credit Rules, 2004 was amended vide Notification No. 3/2011-CE(NT), dated 01-03-2011 ( w.e.f. 01-04-2011) as under :

> Rule 2 (e) - "*Exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under Section 66 of the Finance Act and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.*
>
> *Explanation.—For the removal of doubts, it is hereby clarified that "exempted services" includes trading.*

Consequent to above amendment, the Board vide Circular No.943/04/2011-CX dt. 29-4-2011 further clarified that as under:

| | | |
|---|---|---|
| 6 | Can the credit of input or input services used exclusively in trading, be availed? | Trading is an exempted service. Hence the credit of any inputs or input services used exclusively in trading cannot be availed. |
| 7 | What shall be the treatment of credit of input and input services used in trading before 1.4.2008? | Trading is an exempted service. Hence credit of any inputs or input services used exclusively in trading cannot be availed. Credit of common inputs and input services could be availed subject to restriction of utilization of credit up to 20% of the total duty liability as provided for in extant Rules. |

**20.** Subsequently, consequent to major changes effected under Service Tax provisions w.e.f. 1-7-2012, the activity of 'trading of goods' is brought under Negative List of Services under Section 66D (e) of Finance Act, 1994 and simultaneously the definition of 'exempted services' given under Rule 2 (e) was also amended vide Notification No.28/2012-Central Excise (N.T), Dated -20th June, 2012, as under :

> *'(e) "exempted service" means a-*
>
> *(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*
>
> *(2) service, on which no service tax is leviable under section 66B of the Finance Act; or*
>
> *(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;*

*but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.'*

**21.** Thus, the intention of legislature is to consider the activity of 'trading' as an exempted services at all times. In the subject case, it is not in dispute that the assessee has taken cenvat credit on various input services which are used in their factory and such input services are common input services in relation to manufacturing activity and other activities carried out from their factory premises.

**22.** In view of above and discussions, I hold that the activity carried out by the assessee is nothing but 'trading of goods' which fall within the meaning of 'exempted services' under Rule 2 (e) of CCR 2004. I further find that definition of 'input services' given under Rule 2(1) of CCR 2004, makes it clear that input service would mean only those services which are used by a provider of taxable service for providing output service or used by a manufacturer in or in relation to manufacture. Hence any services used for traded goods would not get covered under the definition of input service and cenvat credit would not be available for the same. Therefore, as per provisions of CCR 2004 and clarification issued by the Board, mentioned hereinabove, I find that cenvat credit is not admissible on input services used in relation to providing trading activity which is notified as an 'exempted services'. However, in the subject case, the input services on which credit was taken by the assessee, are common input services which are used in relation to manufacture of dutiable goods and exempted services. I find that in such cases, provisions have been made under CCR 2004 under Rule 6, for treatment of cenvat credit as under:

> **Rule 6 of Cenvat Credit Rules, 2004: Obligation of a manufacturer or producer of final products and a provider of output service:**
> *(1) The CENVAT credit shall not be allowed on such quantity of* ***input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services,*** *except in the circumstances mentioned in sub-rule (2).*
> *(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for-*
> *(a) the receipt, consumption and inventory of inputs used-*
>
> *(i) in or in relation to the manufacture of exempted goods;*
>
> *(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;*
>
> (iii) *for the provision of exempted services;*
> (iv) *for the provision of output services excluding exempted services; and*
>
> *(b) the receipt and use of input services-*
>
> *(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;*
>
> *(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;*
>
> (iii) *for the provision of exempted services; and*
>
> *(iv) for the provision of output services excluding exempted services,*
>
> and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b);
>
> *(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely:-*

*(i) pay an amount equal to five percent / six per cent of value of the exempted goods and value of the exempted services; or*

*(ii) pay an amount as determined under sub-rule (3A); or*

*(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:*

**23.** The assessee has stated that in light of Rule 6(3)(ii) of Credit Rules, they have calculated the CENVAT reversal on the basis of proportionate reversal method and the amount had been reversed under Rule 6(3A). I find that the said assessee had not followed the conditions of the Rule 6(3)(ii) of the Cenvat Creditn Rules, 2004. Therefore, they are not eligible to avail the benefit of the said Rule. They have also not followed any of the conditions of Rule 6(3) of the Cenvat Credit Rules, 2004. Therefore, their claim in this case is unacceptable. Therefore, I do not agree with the assessee on the work sheet produced by them. On the other hand, the Department has correctly worked out the amount payable by them in terms of Rule 6(3)(1) of Cenvat Credit Rules, 2004 which has been relied in the SCN.

**24.** I find that the assessee has not followed any of the options provided under Rule 6 (3) for reversal of credit. I find that, Rule 6 itself is incorporated as a restrictive provision to safeguard Government revenue against availment and utilization of cenvat credit of input/input services used in manufacture of exempted goods/exempted services. However, considering the fact that many inputs/input services received by an assessee may go into use in relation to both dutiable and exempted activity, option was provided to the assessee to follow either the requirement as per Rule 6(3) of the Cenvat Credit Rules, 2004. Thus, provisions of Rule 6 envisage a mandatory requirement on the part of the assessee for exercising any of the option. Unless option to maintain separate accounts are exercised, the Department is empowered to recover the amount arrived at the prescribed percentage/method. In the subject case, I find that the assessee has not exercised any option. Therefore, proceedings initiated for recovery of amount equal to 6%/7% is well within the framework of Law. Accordingly, I hold that amount of Rs.4,41,54,693/- /- arrived @ 6%/7% on value of traded goods is liable to be paid by the assessee.

**25.** In view of above provisions, as already stated above, cenvat credit is not allowed on input/input services used in or in relation to manufacture of exempted goods or for provision of exempted services. However, in cases where cenvat credit was taken on common input/input services, which are used in manufacture of dutiable goods/taxable output services and also for exempted goods/exempted services, four methods are prescribed for reversal of cenvat credit involved on quantity of input/input services used in manufacture of exempted goods/exempted services.

**26.** In view of the above, the impact of Rule 6 of CCR, 2004 to the subject case is since the trading activity is specifically included in the exempted services and the assessee has taken cenvat credit on input services which are common for manufacturing dutiable goods and trading activity, the provisions of rule 6 of the Cenvat Credit Rules, 2004 will be attracted. Therefore, the assessee cannot take the credit on input services meant for use in trading activity and they are required to either maintain separate records for availment and consumption of the input services meant for trading activity or to pay an amount equal to 6%/7% of the value of trading activity.

**27.** On the basis of details of Sales Value and Purchase Value (Cost of Goods Sold) of Trading of goods for the period April-2011 to March-2016 submitted by M/s. IRIL, the value of Trading Service has been worked out which is the difference between Sales Price and Cost of Goods Sold or ten per cent of the cost of goods sold, whichever is more. M/s. IRIL appeared to be liable to pay an amount equal to five / six / seven per cent of value of such trading service, which is an exempted service.

**28.** During the course of his statement of Shri Yatish Bansal, Senior Manager (Finance) of M/s. IRIL, it was submitted that they had not paid an amount equal to 5% / 6% of the value of

exempted service i.e. trading activity, however, M/s. IRIL had paid some amount from time in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity. It was also been submitted that different systems were followed for payment of amount from time to time, but now they had calculated the proportionate amount required to be paid in respect of common input services used for exempted service i.e. trading activity.

**29.** Though it has been submitted by M/s. IRIL that 'different systems were followed for payment of amount from time to time, but now they had calculated the proportionate amount required to be paid in respect of common input services used for exempted service i.e. trading activity', it appeared that M/s. IRIL had not followed any of the procedure and conditions prescribed under various clauses of sub-rule 3A of Rule 6 of CCR, 2004. As per clause (a), the manufacturer or the provider of output service, while exercising this option, shall intimate in writing to the Superintendent of Central Excise giving the prescribed particulars. However, no such written intimation to the Superintendent of Central Excise has been given by M/s. IRIL. Further, as per clause (b), the manufacturer of goods or the provider of output service shall provisionally determine and pay the amount as calculated in the prescribed manner for every month, but M/s. IRIL had not determined and paid the amount as calculated in the prescribed manner for every month. Instead, M/s. IRIL has paid some amount, on several occasions, without following any particular system for payment of such amount. As M/s. IRIL has not provisionally determined and paid the amount every month, the question of finally determining the amount of Cenvat credit attributable to exempted goods and exempted services for the whole financial year, as provided under clause (c), does not arise. For the same reason, conditions of payment of amount equal to difference between amount provisionally determined and paid and amount finally determined, along with interest, as provided under clause (d) and (e) or taking the credit of excess amount paid as provided under clause (f) etc. have not been fulfilled by M/s. IRIL. As M/s. IRIL not followed any of the procedure and conditions prescribed under various clauses of sub-rule 3A of Rule 6 of CCR, 2004, options provided at clause (ii) or clause (iii) of Rule 3 of CCR, 2004 applicable to M/s. IRIL. Therefore, their contention that they followed the procedure of Rule 6(3A) is not maintainable.

**30.** The whole system of collection of indirect taxes now is based on the trust placed on the assessee. The assessee has to do the self-assessment and various aspects related to Cenvat credit, such as, whether a particular item / service is input / input service or not, whether credit is admissible or not, same can be used or not, whether the document on the basis of which Cenvat credit has been availed is prescribed one or not, whether proper procedure in respect of dutiable and exempted goods and taxable and exempted services has been followed or not, are part of assessment process. The department cannot, nor are they expected to, find out on their own in all cases what each assessee is doing and whether discharging the correct duty liability and availing correct admissible Cenvat credit. Even the audit of records of assessee by Central Excise officers is carried out on test check basis and 100% verification / scrutiny of documents is not carried out. After due verification, the Audit officers have pointed out that the said assessee has neither maintained separate accounts, as provided under sub-rule (2) of Rule 6 of CCR, 2004, nor exercised the option to pay an amount as determined under sub-rule (3A) of Rule 6 of CCR, 2004 provided under clause (ii) of sub-rule (3) of Rule 6 of CCR, 2004, nor followed the procedure prescribed vide clause (iii) of sub-rule (3) of Rule 6 of CCR, 2004 in respect of 'trading of goods'. Though the said assessee was well aware that they were engaged in trading activity, were availing cenvat credit of common input services and hence were required to follow the procedure prescribed under Rule 6 of CCR, 2004, they paid some amount on several occasions in respect of Cenvat credit availed on common input services used in or in relation to manufacture of final goods and for exempted service i.e. trading activity, but they never followed any procedure prescribed under either sub-rule (2), or sub-rule (3) or sub-rule (3A) of Rule 6 of CCR, 2004 and never followed any particular system for payment of amount from time to time, as admitted by their Senior Manager Finance. Further, M/s. IRIL has never informed to the department about the system followed by them for payment of amount from time to time in respect of Cenvat credit availed on common input services used in or in relation to manufacture

of final goods and for exempted service i.e. trading activity. Therefore, M/s. IRIL had contravened the provisions of Rule 6 of CCR, 2004 with intent to avail inadmissible Cenvat credit and thereby evade payment of Central Excise duty in cash and had suppressed the facts from the department in as much as the fact that M/s. IRIL was engaged in trading activity, the value of such exempted service i.e. trading activity, the amount required to be paid under Rule 6 of CCR, 2004 in respect of such exempted service etc. were known to M/s. IRIL which it has never informed to the department and therefore, extended period of five years as provided under sub-section (4) of Section 11A of CEA, 1944, instead of normal period of one year, for demand and recovery of the said amount are correctly mentioned in the Show Cause Notice.

**31.** M/s. IRIL had intimated that they paid / reversed some amount in respect of Common Services utilized for manufacturing of goods and trading activity during the period from April – 2011 to March – 2016. M/s. IRIL, vide letter dated 07.04.2016 without following the procedure laid down under Rule 6(3) of the Cenvat Credit Rules, 2004 which is to be appropriated against the amount payable by them.

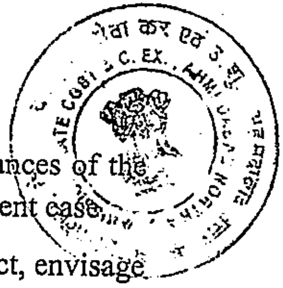
**32.** From the aforesaid details submitted by M/s. IRIL it appeared that they opted to pay the amount equal to five / six per cent of exempted service i.e. trading activity as required under Rule 6(3)(i) of CCR, 2004 for the period April-2011 to March-2013 as well as for the period from April-2013 to March-2015, though they had not paid the correct amount under Rule 6(3)(i) of CCR, 2004 in as much as they calculated the amount equal to five / six per cent of sales value of trading goods from which the amount of Central Excise Duty / Cenvat credit involved on those goods was reduced.

**33.** It also appeared that in respect of amount of Rs. 1,86,375/- paid on 31.03.2013 and Rs. 16,30,724 paid on 31.12.2013 for the period April-2011 to March-2013 and amount of Rs. 2,92,066/- paid on 31.12.2013 and Rs. 3,31,107/- paid on 11.01.2016 for the period April-2013 to March-2015 by M/s. IRIL purported to be under Rule 6(3A) of CCR, 2004, they had not followed any procedure as required under sub-rule (3A) of Rule 6 of CCR, 2004. Similarly, M/s. IRIL has not followed any procedure as required under sub-rule (3A) of Rule 6 of CCR, 2004 in respect of the amounts of Rs. 3,47,707/- paid on 31.10.2015, Rs. 4,42,168/- paid on 11.01.2016, Rs. 7,09,233/- paid on 13.01.2016 and Rs. 7,68,075/- paid on 31.03.2016 for the period April-2015 to March-2016.

**34.** It, therefore appeared that M/s. IRIL was required to pay an amount equal to five / six / seven per cent of value of exempted services i.e. trading activity, as required under clause (i) of sub-rule (3) of Rule 6 of CCR, 2004, which they have failed to pay. Therefore, in terms of Explanation – III below sub-rule 3A of Rule 6 of CCR, 2004, the said amount of Rs. **4,41,54,693/-**, is required to be recovered from M/s. IRIL under Rule 14 of CCR, 2004 read with Section 11A of the CEA, 1944 and the amount of Rs. 93,71,347/- already paid by them from time to time under Rule 6 of CCR, 2004, is required to be appropriated against the aforesaid demand.

35 As already stated above, the assessee has stated that the extended period of limitation of five years under the proviso to 11AC of the Act cannot be invoked in this case and in terms of the provision, the extended period of five years can only be invoked where there is suppression of facts. I find that the assessee was well aware that the trading activity is an exempted service. They did not inform the Department or followed the conditions of Rule 6(3) of the Cenvat Credit Rules, 2004. These facts came into light only after Audit and CERA officials carried out the audit of the records of the assessee. Further, before the Audit, the assessee had not informed that they are providing exempted Service and therefore, they deliberately suppressed the facts from the Department. Therefore, I find that in the present case, the SCN has rightly proposed by the Department invoking the extended period of five years. As the demand invoking extended period is sustainable, therefore, interest and penalty has rightly proposed in the SCN.

36. I find that the assessee has relied a number of judgments in their defence regarding non-sustainability of the demand, interest, penalty and also against invoking the extended period of limitation. I find that the said case laws are not applicable to the present case as the facts,



circumstances and period involved are different. Therefore, I hold that the circumstances of the present case are not comparable with those cases and hence, not applicable in the present case.

37. Regarding, recovery of interest and penalty, I find that Section 11AA of the Act, envisage mandatory recovery of interest in case of short levy/non levy of duty by any reason. This provision was also made applicable in case of wrong availment of cenvat credit under Rule 14 of CCR 2004 and for recovery of amount liable to be paid under Rule 6 (3) of CCR 2004. In view of findings and discussions made hereinabove, since the assessee has wrongly availed cenvat credit on input services used in traded goods they are liable to pay amount equal to 6%/7% of value of traded goods in terms of Rule 6 (3) of CCR 2004, I propose to recover interest on the said amount, in accordance with the mandatory provisions of Section 11AA of the Act.

38. I find that penalty has been proposed in the show cause notice in terms of the provisions of Section 11AC 1( c ) of the Central Excise Act, 1944. Section 11AC 1 (c ) reads as under:-

"where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, by reason of fraud or collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined;

*Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty percent of the duty so determined".*

39. I find that M/s. IRIL have taken and utilized Cenvat credit wrongly, as discussed herein above, they are liable to pay interest under Section 11AA of CEA, 1944 read with Rule 14 of CCR, 2004 and the amount of interest of Rs. 23,25,069/- already paid by them from time to time, required to be appropriated against the aforesaid demand of interest.

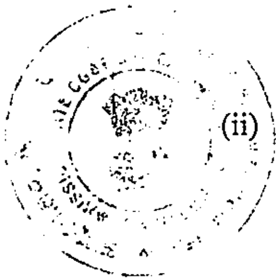
40. The acts of omission and commission on the part of M/s. IRIL mentioned hereinabove, attract penalty in terms of Rule 15(2) of CCR, 2004 read with clause (c) of sub-section (1) of Section 11AC of CEA, 1944 in as much as they contravened the provisions of Rule 6 of CCR, 2004 with intent to avail inadmissible Cenvat credit and thereby evade payment of Central Excise duty and have also suppressed the facts from the department and the amount of penalty paid by them from time to time, is required to be appropriated against the penalty so imposed. In the reply dated 14.12.2016 submitted by the assessee, they stated that the amount of penalty paid by them is Rs.13,47,160/- and in the SCN it was wrongly mentioned as Rs.25,27,806/-. Therefore, I consider the penalty paid by the assessee as Rs.13,47,160/- and the said penalty deposited by the assessee is required to be adjusted and appropriated towards the penalty payable by them.

41. In the instant case, as per findings and discussions made hereinabove, since the assessee has wrongly availed cenvat credit on input services used in traded goods and is liable to pay amount equal to 5%/6%/7% of value of traded goods in terms of Rule 6 (3) of CCR 2004, I propose to impose penalty in accordance with the mandatory provisions of Section 15 of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

In view of my above findings, I pass the following orders:-

## ORDER

(i) I confirm the amount of Rs. 4,41,54,693/- (Rupees Four Crore Forty One Lakh Fifty Four Thousand Six Hundred Ninety Three only) required to be paid by M/s.Ingersoll Rand (I) Ltd, under clause (i) of sub- rule (3) of Rule 6 of Cenvat Credit Rules, 2004, under sub-section (4) / (5) of Section 11A of Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004.



(ii) the amount of Rs. 93,71,347/- (Rupees Ninety Three Lakh Seventy One Thousand Three Hundred Forty Seven Only) already paid by them from time to time under Rule 6 of CCR, 2004, is appropriated and adjusted against the aforesaid demand mentioned at (i) above.

(iii) I order that interest be charged from them under Section 11AB/11AA of the Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004 on the amount mentioned at (i) above.

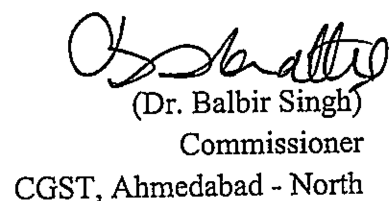
(iv) The amount of interest of Rs. 23,25,069/- (Rs. Twenty Three Lakh Twenty Five Thousand Sixty Nine Only) already paid by them is appropriated against the aforesaid demand of interest mentioned at (iii) above.

(v) I impose a penalty of Rs.2,75,55,420/- (Rupees Two Crores Seventy Five Lakhs Fifty Five Thousand Four Hundred Twenty Only) i.e. 50% of Rs.3,31,98,545/- upto May 2015 + 100% of Rs.1,09,56,147 for June 2015 to March 2016 under Section 11AC(1)(c) of Central Excise Act, 1944, read with Rule 15(2) of the Cenvat Credit Rules, 2004 upon them.

(vi) the amount of penalty of Rs. 13,47,160/- (Rupees Thirteen Lakhs Forty Seven Thousand One Hundred Sixty Only) already paid by them is appropriated and adjusted against the penalty imposed upon them at (v) above.

In terms of Section 11AC (1) (e) of the Central Excise Act, 1944, if M/s. M/s Ingersoll Rand (India) Ltd., pays the duty determined at Sl. No. (i) above and interest payable thereon at (iii) above within thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s. Ingersoll Rand (India) Ltd., shall be twenty-five per cent of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified.

**42.** The Show Cause Notice bearing **SCN No.V.30/15-51/OA/2016** dated **22.04.2016** is accordingly disposed off in the above manner.



(Dr. Balbir Singh)
Commissioner
CGST, Ahmedabad - North

Date. 17 .2.2020

F.No. V.30/15-51/OA/2016

**BY REGISTERED POST AD**

To,

M/s Ingersoll Rand (India) Ltd.

Plot No 21-30, GIDC, Naroda,

Ahmedabad - 382330

**Copy to-**

1. The Principal Chief Commissioner, Central GST & Central Excise, Ahmedabad zone.
2. The Assistant Commissioner, CGST & Central Excise, Division–I, Ahmedabad–North.
3. The Superintendent, CGST & C.Excise, Range- IV, Div-I, Ahmedabad-North.
4. Guard File.