CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 16/5/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ **70195/2016 DB** dated 09/05/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/4101/2012	PALIWAL GLASS WORKS C/O SSH SRIPAL SHARMA ANAND NIKETAN, DAMPIER NAGAR, MATHURA(UP)

Name and Address of Respondent	COMMISSIONER OF CENTRAL EXCISE, KANPUR 117/7, SARVODAYA NAGAR KANPUR

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s SH ABHISHEK JAJU,ADV
472, DELHI APARTMENTS
PLOT NO 15-C, SECTOR-22
DWARKA, NEW DELHI

4 Bar Association, CESTAT, ALLAHABAD

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi -- 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File.
17.M.S KNOWLEDGE PROCESSING PVT LTD(TAMMANAGEMENTINDIDA.COM)

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Ex. Appeal No.4101/12

Arising out of O/O No.5-CE/Commissioner/2012 dated 04.09.2012 passed by Commr. of Central Excise & S.Tax, Kanpur

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3. Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4. Whether Order is to be circulated to the Departmental Authorities?	: Yes

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M/s Paliwal Glass Works ...APPELLANT(S)

VERSUS

Commissioner of Central Excise & S. Tax, Kanpur RESPONDENT (S)

APPEARANCE

Shri Abhishek Raju, Advocate for the Appellant (s)
Shri Rajeev Ranjan, Joint Commr. (D.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 09. 05. 2016

Final ORDER NO. 70195/2016

CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

Per Mr. Anil Choudhary :

The appellant, a manufacturer of glassware, is in appeal against order-in-original dated 4/9/12 passed by the Commissioner of Central Excise, Customs and Service Tax, Kanpur, by which he has rejected the application dated 2/7/2010 filed by the appellant under Section 69 (2) of the Finance Act, 2010 read with Rule 57CC of the erstwhile Central Excise Rules, 1944.

2.1 The brief facts are that the Appellant M/s Pallwal Glass Works having Central Excise Registration No. 2/SKB/92 dated 01.07.1992 was engaged in the manufacture of Glass and Glassware falling under Central Excise Tariff Heading Nos. 7007.90, 7008.10 and 7015.00 of the CETA, 1985. The Appellant was availing MODVAT credit facility and taking MODVAT credit in respect of various inputs including cullet and other waste scrap of glass in terms of the provision of the Central Excise Rules, 1944.

2.2 The Appellant for modernization of the unit applied for a loan of Rs. 75 lakhs from the Uttar Pradesh Finance Corpn. (UPFC). UPFC vide its letter dated 05.1.1996 sanctioned the said loan to the Petitioner for the said amount of Rs. 75 lakhs. As a security to the said loan, the Appellant mortgaged the property situated at Plot No. 429 at Village Mehrabad, Shikohabad, UP. It is pertinent to note that only Plot No. 429 (and not Plot No. 428) was mortgaged as a collateral security. It is submitted that the other Plot No. 428 was mortgaged not as security to the loan given by UPFC but for getting free and proper approach to Plot No. 429. It is submitted that the Appellant had out of the said loan amount of Rs. 75 lakhs had paid up about Rs. 30 lakhs of the loan (principal plus interest) and thereafter due to financial crunch defaulted in payment of instalment to the UPFC for reasons beyond his control and as such UPFC auctioned the mortgaged plots.

2.3 That the relevant period under consideration of the present appeal is from December, 1997 to March, 1998.

2.4 On 08.11.2002 the Uttar Pradesh Financial Corporation auctioned the said mortgaged property.

2.5 That one Mrs. Neelam Yadav (successful bidder) filed writ petition number 1546 (M/B) of 2003 before the Honourable Allahabad High Court and admitting the writ petition, vide order dated 24/3/2003, the Honourable High Court restrained the O.P. concerned from transferring or alienating the property in question to any person exccept to the petitioner and the Collector-Firozabad was directed to proceed in accordance with law, ignoring any direction of the State Government. The decision to be taken by Collector in respect of sale in question, shall be subject to further orders in the writ petition. In spite of letter dated 28/2/2003 by the MD of UPFC, requesting him not to confirm the sale and return the Recovery Certificate, the Collector ignoring the said letter, confirmed the same and got the deed executed in favour of the said Neelam Yadav and forcefully handed over the possession of the said property to Mrs. Neelam Yadav.

2.6 Against the said Interim Order dated 24/3/2003 passed by the Honourable High Court in writ petition number 1546 (M/B) of 2003, the present appellant filed SLP (C) No.7660 of 2003 wherein direction for *status quo* have been passed by the way of Interim order by the Apex Court on 6/5/2003.

2.7 Or scrutiny of the RT-12 returns filed for the period from December, 1977 to March, 1998 by the Applicants, it was observed by the Central Excise Officers that they availed modvat credit in respect of inputs namely 'cullet' and 'other waste of glass' falling under Tariff Item No. 7001.10 and used the same in the manufacture of final products which were chargeable to duty and other final products which were not chargeable to duty. They did not maintain separate accounts in respect of the said inputs used in the manufacture of dutiable goods and exempted goods, as envisaged under sub-rule (9) or rule 57CC of the erstwhile Central Excise Rules, 1944. They, however, determined the quantity of 'cullet and other waste and scrap of glass' consumed in the manufacture of exempted final product on proportionate basis by calculating the ratio of the said input i.e. 'cullet and other waste and scrap of glass' gone into consumption of total quantity of final product manufactured and then applying the said ratio to the quantity of exempted final product manufactured. The quantity of cullet and other waste and scrap of glass' so consumed in the manufacture of final products which were chargeable to duty and other final products which were not chargeable to duty, as calculated, is shown in the following chart:

Chart - A

Month	Amount of Modvat credit availed Rs.	Total wt. Of cullet consumed MT	Total wt. Of final products mfd. MT	Ratio of Cullet & final product mfd.	Wt. Of dutiable goods mfd. MT	Wt. Exempted goods mfd. MT	Wt. Of cullet consumed in dutiable goods MT	Wt. Of cullet consumed in exempted goods MT
1	2	3	4	5	6	7	8	9
Dec/97	7,404.00	36.936	427.405	0.0864052	364.545	62.860	31.499	5.431
Jan/98	12,527.00	53.215	644.900	0.0825167	530.090	114.810	43.740	9.474
Feb/98	16,756.00	80.820	755.993	0.1069058	683.678	72.315	73.089	7.731
Mar/98	3,356.00	11.300	750.370	0.0150592	624.760	125.610	9.408	1.892
TOTAL	40,056.00	182.668	2,578.668		2,203.073	375.595	157.737	24.528

2.8 After determining the quantity of cullet and other waste and scrap of glass' gone into production of the exempted goods and dutiable goods, the amount of modvat credit taken was calculated on prorata basis on the said quantity and the month as shown in the following chart 'B' and the same was reversed.

Chart -B

Month	Total credit availed Rs.	Quantity of inputs used				Amount of credit attributable to	
		Total MT	Dutiable goods MT	Exempted goods MT	Ratio Exempted goods dutiable goods	Dutiable goods Rs.	Exempted goods Rs.
1	2	3	4	5	6	7	8

Dec/97	7,404.00	36.936	31.499	5.431	1:5.818	6,318.00	1,086.00
Jan/98	12,527.00	53.215	43.740	9.474	1:4.627	10,301.00	2,226.00
Feb/98	16,758.00	80.820	73.089	7.731	1:9.474	15,158.00	1,600.00
Mar/98	3,356.00	11.300	9.408	1.892	1:4.982	2795.00	561.00
TOTAL	40,056.00	182.668	157.737	24.528	1:6.431	34572.00	5473.00

2.9 However, the department was holding the view that where separate Accounts were not maintained in respect of the inputs used in the manufacture of Exempted goods, as laid down in sub rule (9) of Rule 57CC of the Central Excise Rules, 1944, the manufacturer shall pay an amount equal to eight percent of the price of the final products which were not chargeable to duty at the time of their clearance from the factory, as per sub-rule (1) of rule 57CC. The Assistant Commissioner of Central Excise, Agra issued Show cause Notice under C No. V(3) DMD/67/98 dated 23.09.98 wherein it was alleged that in view of the provisions of sub-rule (1) read with sub-rule (9) of rule 57CC of the Central Excise Rules, 1944 if the Inputs on which modvat credit has been availed are used in the manufacture of dutiable and exempted goods both, the Applicant should have paid an amount equal to 8% of the value of the exempted category of the goods, at the time of clearance from the factory as separate accounts were not maintained in respect of such inputs used in the manufacture of exempted goods. It was further alleged that the Applicant cleared exempted goods valuing Rs. 96,32,854/- during the said period and exempted goods valuing Rs. 20,45,749/- were in balance. The amount @ 8% on the total value (Rs. 1,16,78,603/-) of the said exempted goods worked out to Rs. 9,34,288/-) which was payable by the

Appellant. Instead, they reversed an amount of Rs. 5,473/- only. Hence they were liable to reverse the balance amount of Rs. 9,28,815/- or pay the said amount in cash.

2.10 The Deputy Commissioner of Central Excise, Agra decided the case vide his Order-in-Original No. 87/DC/DMD/15/2000 dated 23.02.2000 and held that the Applicant was required to pay an amount equal to 8% of the value of the said exempted goods cleared from the factory as per provisions of sub-rule (1) of rule 57CC of the Central Excise Rules, 1944 as Modvat credit was availed in respect of input used in the manufacture of the same. He confirmed the demand of an amount of Rs.9,28,815/-(after deducting the amount of Rs.5,473/- already reversed through RG23A from Rs. 9,34,288/-), the amount calculated at the rate of 8% of the exempted goods manufactured), and ordered payment of the said amount from the RG 23 A Pt. II Account or through cash. He also imposed a Penalty of Rs. 1,00,000/- under Rule 173 Q of the Central Excise Rules, 1944.

2.11 Applicant, after rejection of his appeal by the ld. Commissioner of Central Excise (Appeals), Kanpur has preferred an Appeal before this Tribunal, New Delhi which had been registered as Appeal No. 2828/2009 dated 06.10.09. The Appeal is pending before the Hon'ble CESTAT, New Delhi and hence the dispute relating to adjustment of credit on inputs used in or in relation to exempted final products is still pending.

2.12 In the meantime, the Assistant Commissioner of Central Excise, Agra, resorted to coercive measures for recovery of dues adjudged in the Order-in-Original cited above and in the process attached residential house of proprietor for recovery of the said dues.

2.13 Though the matter was still under dispute and Applicant's appeal challenging the impugned Order of the ld. Assistant Commissioner, was still pending before CESTAT, the Applicant had no alternative but to make the payment in cash, in lieu of the order of reversal of Modvat credit (or deposit in cash) Penalty imposed, to ward of immense pressure of the department and also to protect themselves from any further coercive action by the Department.

3.1 The ld.Counsel for appellant humbly submits that vide sub-section(1) of Section 69 of the Finance Act, 2010, erstwhile Central Excise Rules, 1944 have been amended with retrospective effect by insertion of Rule 57CCC as giver in Fourth Schedule of the Finance Act, 2010, which reads as under:

> "**Rule 57CCC-Reversal of Actual Credit**- Where a dispute relating to adjustment of credit on inputs used in or in relation to exempted final products relating to the period beginning on the 1st day of March, 1997 and ending with the 31st day of March, 2000 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2) of rule 57C and sub-rule (1) and sub-rule (9) of rule 57CC, a manufacturer availing credit of specified duty in respect of any inputs, other than inputs used as fuel, and manufacturing final products which are chargeable to duty and also other final products

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products which are not so chargeable to duty, shall pay an amount equal to such credit attributable to inputs used in or in relation to the manufacture of, such final products which are not chargeable to duty, before or after the clearance of such goods: Provided that the manufacture shall pay an interest at the rate of twenty four per cent per annum from the date of clearance of goods till the date of payment of the said amount."

3.2 The procedure for opting to pay the amount in accordance with the provisions of the Central Excise Rules, 1944 as amended by sub-section (1) is laid down in sub-section (2) and (3) of Section 69 of the Finance Act, 2010 which reads as under:

"(2) Where a person opts to pay the amount in accordance with the provisions of the Central Excise Rules, 1944, as amended by sub-section (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of the final products, which are exempted from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty within a period of six months from the date on which the finance Bill, 2010 receives the assent of the President.

(3) The Commissioner of Central Excise shall on receipt of an application under sub-section (2), verify the correctness of the

amount paid within a period of two months from the date of receipt of the application and in case the amount so paid is found to be less than the amount payable, he shall call upon the applicant to pay the differential amount along with interest, which shall be paid within a period of ten days from the date of receipt of the communication from the Commissioner in this regard."

3.3 In nutshell, the following procedure has to be adopted by the manufacturer/person that opts to pay the amount in accordance with the provisions of rule 57CCC as inserted from retrospective effect:

He shall

(i) Pay an amount equal to such credit attributable to inputs used in, or in relation to the manufacture of, such final products which are not chargeable to duty, before or after the clearance of such goods;

(ii) Also pay interest at the rate of 24% per annum from the date of clearance of goods till the date of payment of the said amount;

(iii) Make an application to the Commissioner of Central Excise within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President;

(iv) Submit documentary evidence to prove the payment;

(v) Submit a Certificate from the Chartered Accountant or Cost Accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of the final products, which are exempted from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty.

3.4 In this regard, an appeal No. 2828/2009 dated 06.10.09 preferred by the Appellant before CESTAT, New Delhi against the Order-in-Appeal of the Commissioner of Central Excise (Appeals), Kanpur was still pending. Hence the dispute in relation to adjustment of credit on inputs used in or in relation to exempted final products, relating to the period from December, 1997 to March, 1998 was pending on 08th May, 2010, when the Finance Bill, 2010 received the assent of the President (and is still pending).

3.5 Appellant submits that he has already paid the amount in accordance with the provisions of the Central Excise Rules, 1944 as amended by sub-section (1) of Section 69 of the Finance Act, 2010, as is shown in para 3.3, infra.

3.6 Applicant submits that during the relevant period he was availing Modvat credit in respect of inputs used in or in relation to the manufacture of final products. During the period from December, 1997 to March 1998, he used cullet and other waste and scrap of glass' in the manufacture of glass & glass ware, both, which were chargeable to duty and also other glass & glassware which were not chargeable to duty (exempted from duty) but did not maintain separate accounts as required under sub-rule (9) of rule 57CC of erstwhile Central Excise Rules, 1944. He, however, calculated the amount of credit attributable to the inputs (cullet and other waste and scrap of glass') used in the manufacture of final products (glass & glassware) which were exempted from duty/not chargeable to duty on prorata basis according to the weight of dutiable and non-dutiable final products manufactured. The amount so calculated was paid by making a debit entry in the RG23 Pt. II account as under:

Sl No.	Month	Amount Calculated on prorata basis Rs.	Debit Entry in RG23A Part II
1.	December, 1997	1,086.00	1258 date 31.03.1998
2.	January, 1998	2,226.00	215 dated 16.05.1998
3.	February, 1998	1,600.00	386 dated 24.06.1998
4.	March, 1998	561.00	494 dated 20.07.1998
	TOTAL	5,473.00	

3.7 The authenticity of the figures in chart A and Chart B is verifiable from the charts given in the Show Cause Notice and in the Order-in-Original.

3.8 Reversal of proportionate Modvat credit is admitted in the Show Cause Notice and Order-in-Original.

4.1 Accordingly, the appellant filed a representation dated 4/5 July 2010 for acceptance of his option exercised by paying the amount in accordance with the provisions of said Rules, 1944 as amended by sub-section 1 of Section 69 of Finance Act 2010 and since the amount and interest as envisaged under Rule 57CC read with Rule 57CCC, have already been paid to settle the issue finally, and as such further relief, consequential in nature, more particularly the grant of refund of the amount paid during pendency of the dispute in appeal stage.

4.2 Vide the impugned order-in-original, the ld.Commissioner rejected the application filed under Sub-section 2 of Section 69 of the Finance Act, 2010 read with Rule 57CCC of CER, 1944, observing that although the appellants have filed application within the stipulated period of 6 months from the date of enactment (8/5/10) of the Finance Act, 2010, but so far the second condition is concerned, as regards modvat credit attributable to inputs consumed in or in relation to manufacture of final product, should be certified by a Cost Accountant or a Chartered Accountant. He further observed that the Certificate of Chartered Accountant states that the figures are based on the basis of show cause notice issued by the Central Excise Department dated 23/9/98 and the figures mentioned therein are relied upon, in absence of books of accounts, which are not in the possession of the appellant as the same have been resumed by some other Government Department. The books could the books could not be examined for verification. The ld. Commissioner observed that he does not intend to rely upon the said Certificate of Chartered Accountant having been issued without verification of books of accounts, accordingly held that the second condition is not fulfilled.

4.3 So far the 3rd condition that the Commissioner should verify the correctness of the amount paid or debited or reversed, he observed that the appellant has submitted that the books of accounts of the appellants had been seized by U.P.Financial Corporation and further report called for from the Deputy Commissioner/Range Officers, it was replied that they are unable to verify the same because the concerned records which are more than 10 years old, were not available in the Divisional/Range Office. Accordingly, it was held that the appellant have failed to substantiate the correctness of the amount mentioned in the application and had also failed to produce the relevant records, even on demand by the Central Excise Department. With these observations, the application was held not maintainable and hence, rejected.

5. Being aggrieved, the appellant is before this Tribunal.

6. The learned Counsel, Shri Abhishek Jaju, appearing for the appellant, submitted that the amendment brought by Section 69 of the Finance Act 2010, giving retrospective effect and as such the demand raised earlier by the Department is no longer tenable under the provisions of the Finance Act 2010 read with the provisions of Central Excise Rules 1944 read with Article 165 of the Constitution of India. He further urges that the substantive law having been changed the very basis of issue of show cause dated 23/9/98 have attained nullity. Further, under the facts and circumstances, the ld. Commissioner have accepted the applicability of the amendment brought into force by Finance Act 2010 in the facts of the appellant's case, but have denied the benefit on flimsy ground. Further, the ld. Counsel urges that the revenue having relied upon the figures as mentioned in the returns filed with it, by the appellant, which is the basis of the earlier show cause notice, cannot reject the representation under Section 69 (2) of the Finance Act, 2010 by saying that that the data in the show cause notice are not verifiable. It is further urged that the Chartered

Accountant have stated in the Certificate that the data in the SCN are acceptable to the assessee as the same being based on RT-12 Returns and further no verification is possible in absence of the books of accounts when the Certificate was issued. It is further urged that the ld. Commissioner have arbitrarily rejected the application disbelieving the data relied upon by the Revenue in the show cause notice dated 23/9/98, without any ostensible reason and the same is not permissible as it is further urged that the data in the show cause notice being accepted by the appellant and also relied upon by the Revenue as is evident vide order of adjudication dated 28/2/2000 passed by the Deputy Commissioner, Agra. The ld. Commissioner has erred in not relying on the same although the same have been relied upon by the appellant in the representation under Section 69 (2) of the Finance Act 2010. The ld. Counsel further points out that after filing of the representation under Section 69 (2) of the Finance Act 2010, when they were informed by revenue that the application shall be considered only after disposal of the appeal pending before the CESTAT against order of the Commissioner (Appeals), the appellant had approached the Honourable Allahabad High Court in the Writ Tax number 711 of 2012 and vide the final order dated 1/6/2012 the Honourable High Court was pleased to hold that a dispute was pending between the appellant and the Revenue on the date when the Finance Act, 2010, was assented to by the Honourable President of India. Thus, the very basis of the contention of revenue to knock out the application submitted by the appellant under Rule 57CCC is unfounded. Further, the Honourable High Court was of the view that the appellant is entitled to take benefit under Section 69 (2) of the Finance Act, 2010 read with Rule 57CCC as on the relevant date that is 8/5/2010. Disposing of the Writ Petition, the Honourable High Court directed the Respondent Commissioner to consider the application of the appellant under Section 69 (2) of the Finance Act read with Rule 57CCC of the Rules expeditiously in accordance with law. The ld. Counsel further states that in view of the observation and directions of Honourable High Court, the order of ld. Commissioner is bad and fit to be set aside and the Appeal be allowed with consequential benefits including allowing of the refund of the amount deposited during the pendency of the dispute in appellate stage.

7. The ld. In AR for Revenue relies on the impugned order.

8. Having considered the rival contentions, we find that the appellant had reversed the proportionate Cenvat credit on taxable input during the relevant period within the spirit of Rule 57CCC as introduced with retrospective effect vide the Finance Act, 2010. We further hold that the ld. Commissioner have erred in disbelieving the Certificate of Chartered Accountant which was based on the data and facts contained in the SCN dated 23/9/98 which, after verification, had been accepted by the Revenue in the subsequent order of adjudication. Thus, we hold that there was nothing much left for the ld. Commissioner to examine the same and except arithmetical accuracy of the amount reversed and interest if any, paid. Accordingly, we allow ~~the allow~~ the appeal on merits. We remand the matter to the ld.Commissioner only for verifying the arithmetical accuracy of the

amount reversed and the interest, if any, payable. We further hold that the appellant shall be entitled to refund of the amount deposited during the pendency of the appellate proceedings, with interest as per Rules after adjustment of dues, if any, payable pursuant to this order and passing of consequential order by the ~~adjudicat~~ing authority.

(Pronounced in the open Court)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Anil Choudhary)
Member (Judicial)

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