142

::आयुक्त (अपील) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील फाइल संख्या / Appeal File No	मूल आदेश सं / O.I.O. No	दिनांक / Date
	V2/250/RAJ/2016	**24/D/AC/2016-17**	**29/9/2016**

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-093-2017-18

आदेश का दिनांक / Date of Order: **10.10.2017** जारी करने की तारीख / Date of issue: **12.10.2017**

कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त संयुक्त आयुक्त उपायुक्त सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name&Address of the **Appellant &** Respondent :-

M/s. Ganga Technocast, Plot No. 2091, Kishan Gate, Opp : Fisfa Rubber,Metoda GIDC, Rajkot

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) क्षतीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above.

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग ,ब्याज की मांग और लगाया गया अर्थदंड, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ,ब्याज की राशि और लगाया गया अर्थदंड, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवेट जमा की ली गई गलत राशि

(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

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

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

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

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।/

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

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।

जहां संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /

In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Ganga Technocast, Plot No. G-2091, Kishan Gate, Opp. Fisfa Rubber, Metoda GIDC, Rajkot (hereinafter referred to as "the appellant") filed the present appeal against the Order-in-Original No. 24/D/AC/2016-17 dated 29/30.09.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Division-I, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. SCN No. C.Ex/Audit-III/Circle-II/DC-07/2015-16 dated 27.01.2016 had alleged that the appellant availed cenvat credit of duty paid on capital goods during financial year 2013-14 and also claimed depreciation of the said capital goods including central excise duty, under Section 32 of Income Tax Act, 1961 (43 of 1961) as shown in Form No. 3CB of the Tax Audit Report 2013-14 issued by statutory Chartered Accountant in contravention of Rule 4(4) of the Cenvat Credit Rules, 2004(hereinafter referred to as "the CCR"), which is reproduced as below:

> *"In current financial year, assesse has availed Cenvat Credit of Rs.4,84,118/- on capital goods purchased in the previous financial year. Depreciation on these capital goods had been claimed including the amount of duty in that financial year itself. As per rule 4(4) of cenvat credit rules, if depreciation is claimed on total value of capital goods u/s 32 of the Income Tax Act, Cenvat credit cannot be allowed. Therefore, we are of the opinion that the assesse should not have taken the credit of Rs.4,84,118/- on capital goods which pertains to previous financial year for payment of duty in the current financial year"*

2.1 The SCN proposed recovery of wrongly availed cenvat credit of Rs. 4,84,118/- under Rule 14 of the CCR read with Section 11A(4)(e) of Central Excise Act, 1944 (hereinafter referred to as "the Act") along with recovery of interest under the provisions of Section 11AA of the Act and imposition of penalty under Rule 15(2) of the CCR read with Section 11AC of the Act. The lower adjudicating authority, vide impugned order, confirmed demand of Rs. 4,84,118/- under Rule 14 of the CCR read with Section 11A(4) of the Act, along with interest recovery under Rule 14 of the CCR read with Section 11AA of the Act and imposed penalty of Rs. 4,84,118/- under Rule 15(2) of the CCR read with Section 11AC of the Act.

3. Being aggrieved with the impugned order, the appellant filed the present

appeal, *interalia*, on the following grounds:-

3.1 There was never any intention to claim dual benefit. When the depreciation was claimed no cenvat credit was availed and later on when the appellant got registered with Central Excise, they became eligible to avail cenvat credit. Hence, the only legal option available to them was to reverse the depreciation claimed under Income Tax Act, 1962 and this was done. The appellant had claimed Rs. 30,863/- as depreciation on the cenvat credit portion of the value of the machinery i.e. Rs. 4,84,118/-. The appellant reversed amount of Rs. 30,863/- in P & L Account for A.Y. 2015-16 and filed revised Income Tax Return for A.Y. 2015-16.

3.2 The appellant submitted a copy of Certificate dated 03.03.2016 issued by the Statutory Chartered Accountant, which reads as under:

> *"We hereby certify that M/s Ganga Technocast situated at plot no.20191, opp.Fishfa Rubber,B/h Kadvani Forging, Metoda GIDC, Rajkot-360021 and certify that due to accounting error in F.Y. 2012-13 depreciation of Rs. 30,863/- was taken on machinery of the CENVAT Credit of Rs. 4,84,118/-. The said depreciation was not to be taken, as cenvat has already been taken on the machinery. Hence, the said depreciation has already been reverted back to Profit and Loss account in the current year under the head other income and company has now properly accounted and availed the Cenvat credit since its inception as the rectification entry has been reverted back from its origin. Revised income tax return also been enclosed herewith and we remove the qualification made in our earlier report for the F.Y.2013-14."*

3.3 From the above, it is evident that the appellant had not taken double benefit and availed cenvat credit on capital goods but reversed the depreciation claimed by them earlier.

3.4 The appellant pleaded that despite these submissions along with supporting documents, the lower adjudicating authority did not consider the same and observed that the appellant had not produced any proof or verification from Income Tax department regarding reversal of amount of depreciation that was originally claimed in financial year 2012-13. The appellant argued that there is no mechanism available in the Income Tax department, which issues verification certificate for reversal of depreciation.

3.5 The appellant relied on following case laws, in support to their claim, which allowed such reversal of depreciation and consequently allowed Cenvat credit:

(i) S. L. Lumax Ltd. reported as 2016 (337) E.L.T. 368 (Mad.)

(ii) Nish Fibers reported as 2010(257) ELT 81 (Guj)

(iii) Utsav Silk Mills reported as 2009 (245) E.L.T. 246 (Tri. - Ahmd.)

(iv) Terna Shetkari S.S.K. Ltd. reported as 2003 (159) E.L.T. 777 (Tri. - Mumbai)

(v) Terna Sethkari Sahakari Sakhar Karkhana Ltd. reported as 2015 (318) E.L.T. 628 (Bom.)

(vi) Maharashtra Electrosmelt Ltd. reported as 2008 (224) E.L.T. 391 (Bom.)

(vii) Pasari Spinning Mills Ltd. reported as 2002 (141) E.L.T. 172 (Tri. - Bang.)

3.6 The appellant also argued that the department itself had accepted in past that when depreciation was foregone, there was no requirement to demand cenvat credit. In support of their claim, the appellant relied on Order-in-Original No. 04/D/2011-12 dated 20.08.2011 passed by the then Assistant Commissioner, Central Excise Division-I, Rajkot (the lower adjudicating authority himself) in case of M/s. Marc Industries and Order-in-Original No. 19/ADC/2012 passed by the Additional Commissioner, Central Excise, Rajkot in case of M/s. Zeal Polymers, and stated that both cases have been accepted by the department.

3.7 The appellant pleaded that it has been alleged that they suppressed the fact of availing depreciation on the value of the said capital goods under the provisions of the Income Tax Act, 1961 to invoke extended period whereas the fact is that they availed depreciation under Income Tax Act when they were not registered with central excise department and the fact of claiming depreciation was well known to the Income Tax department and there is no provision in the Central Excise to intimate claim of depreciation to the Central Excise department, even when it was not registered with Central Excise department. Further, the fact of claim of depreciation was not unearthed by the department but it came to know from the observations made by their Chartered Accountant in the audit report of the appellant and in such a case to allege 'suppression' is not justified. In support of their claim, the appellant relied on case law of Hindalco Industries reported as 2003 (161) ELT 346 (CEGAT), which was followed in case of Martin & Harris Laboratories reported as 2005 (185)ELT 421 (CESTAT).

3.8 The appellant submitted that the lower adjudicating authority erred in

invoking the extended period of limitation and therefore, the impugned order should be declared as bad in law and relied upon following judicial pronouncements:

(i) Cosmic Dye Chemical reported as 1995 (075) ELT 0721 (S.C.)

(ii) Rolex Logistics Pvt. Ltd. reported as 2008 (09) LCX 0162

3.9 The appellant also submitted that they had correctly availed cenvat credit of capital goods and penalty imposed under Rule 15 read with Section 11AC in the impugned order is not justified in absence of any ingredients for imposition of penalty under the said provisions. Since there was no malafide intention on part of the appellant. There is no fraud, willful misstatement, collusion, suppression of facts or contravention of provisions with intent to evade payment of duty on part of the appellant and hence the said penalty cannot be imposed as per following case laws:

(i) Hindustan Steel Ltd. reported as 1978 ELT (J159) (SC)

(ii) Tamil Nadu Housing Board reported as 1994 (74) E.L.T. 9 (SC)

(iii) Town Hall Committee, Mysore City Corporation reported as 2011 (24) S.T.R. 172 (Kar.)

(iv) BSNL reported as 2008 (9) S.T.R. 499 (Tri. - Bang.)

(v) Instant Credit reported as 2010 (17) S.T.R. 397 (Tri. - Del.)

4. Shri R. C. Prasad, Consultant attended personal hearing, who reiterated the grounds of Appeal and submitted that Income Tax Return for F.Y. 2014-15(A.Y. 2015-16) has already been revised by them on 03.03.2016 and depreciation claimed on parts and machinery including excise duty has been corrected by reducing excise duty element from depreciation and submitted copy of ITR Return (Revised) for F.Y. 2014-15 (A.Y. 2015-16); that Hon'ble Madras High Court has already held in the case of M/s. Cassel Research Laboratories Pvt. Ltd. reported as 2017-TIOL-762-HC-MAD-CX that subsequent reversal of depreciation amount in subsequent Income Tax Returns is enough evidence; that they submitted revised copy of Income Tax Return filed and also assessment order issued by the Income Tax Authorities; that CESTAT in the case of M/s. Pearl Poly Film reported as 2017-TIOL-1645-CESTAT-AHM; Larsen & Toubro Ltd. reported as 2016-TIOL-3119-CESTAT-MUM has also already decided in their favour.

4.1 The appellant submitted written personal hearing submissions dated 12.09.2017 as under:

4.1.1 The Income Tax department issued assessment order under Section 143 of the Income Tax Act, 1961 on the basis of their revised return reversing the benefit of depreciation and it is revealed from the assessment order that their revised return has

been accepted. A copy of assessment order issued under Section 143 of the Income Tax was enclosed by the appellant.

4.1.2 The following case laws allowed such reversal of depreciation and consequently allowed cenvat credit.

(i) Cassel Research Laboratories Pvt. Ltd. reported as 2017-TIOL-762-HC-MAD-CX

(ii) Pearl Poly Film, Milan B Solanki reported as 2017-TIOL-1645-CESTAT-AHM

(iii) Larsen & Toubro Ltd. reported as 2016-TIOL-3119-CESTAT-MUM

4.1.3 The appellant pleaded that in view of their submissions, documentary evidences and judicial orders, it had rightly claimed the cenvat credit and demand of cenvat credit, payment of interest and imposition of penalty are not correct.

Findings:-

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the written as well as oral submissions of the appellant. The issue to be decided in the present appeal is whether the appellant is eligible for cenvat credit of duty paid on capital goods, on which depreciation including on central excise duty was availed under Section 32 of Income Tax Act, 1961 (43 of 1961) even after they reverse the same or not.

6. It is a fact that the appellant had availed cenvat credit of duty of Rs.4,48,118/- paid on capital goods during F. Y. 2013-14 and simultaneously had claimed depreciation on that part of the value of the capital goods which represents the amount of duty on such capital goods, as noted by the statutory Chartered Account of the appellant under the head "Qualification on availment of duty credit on capital goods" of Form 3CB of Tax Audit Report 2013-14, which is reproduced below:

> "In current financial year, assessee has availed Cenvat Credit of Rs.4,84,118/- on capital goods purchased in the previous financial year. Depreciation on these capital goods had been claimed including the amount of duty in that financial year itself. As per rule 4(4) of cenvat credit rules, if depreciation is claimed on total value of capital goods u/s 32 of Income Tax Act, cenvat credit cannot be allowed. Therefore, we are of the opinion that the assessee should not have taken the credit of Rs.4,84,118/- on capital goods which pertains to previous financial year for payment of duty in the current financial year."

6.1 Rule 4(4) of Cenvat Credit Rules, 2004 is as under:

"The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under Section 32 of the Income Tax Act., 1961 (43 of 1961)."

6.2 The above provision in Cenvat Credit Rules, 2004 does not allow cenvat credit on capital goods if the manufacturer has claimed depreciation on that part of the value of capital goods which represents the amount of duty on such capital goods. However, I find that the appellant had taken depreciation when they were not registered with the central excise department. Later on, when the appellant got registered with central excise department they became eligible for cenvat credit and they availed cenvat credit, and also reversed the depreciation claimed under Income Tax Act. I find that the appellant had claimed Rs. 30,863/- as depreciation on capital goods during F.Y. 2012-13 but not availed cenvat credit on those capital goods as they were not registered with the central excise department. When they got central excise registration on 28.06.2013, they availed cenvat credit on those capital goods during F.Y. 2013-14 and the appellant reversed this amount of Rs. 30,863/- and they filed revised Income Tax Return for F.Y. 2014-15. I also find that the said revised Income Tax Return has been accepted by the Income Tax Authorities as per assessment order dated 09.04.2016 under Section 143(1) of the Income Tax Act as produced by the appellant.

6.3 I find that the appellant has also produced a copy of certificate dated 03.03.206 issued by Shri Hemant Busa, Chartered Accountant (who had prepared their Tax Audit Report for F.Y. 2013-14) wherein it is certifie that the appellant has reduced the claim of depreciation by foregoing the benefit of depreciation to the extent of cenvat credit of Rs. 4,84,118/- on the machinery received by them, which is reproduced below:

"We hereby certify that M/s. Ganga Technocast situated at Plot No. 20191, opp. Fishfa Rubber, B/h. Kadvani Forging, Metoda GIDC, Rajkot-360021 and certify that due to accounting error in F.Y. 2012-13 depreciation of Rs.30,863/- was taken on machinery of the CENVAT Credit of Rs.4,84,118/-. The said depreciation was not to be taken, as cenvat has already been taken on the machinery. Hence, the said depreciation has

already been reverted back to Profit and Loss account in the current year under the head other income and company has now properly accounted and availed the Cenvat credit since its inception as the rectification entry has been reverted back from its origin. Revised income tax return also been enclosed herewith and we remove the qualification made in our earlier report for the F.Y.2013-14."

6.4 In view of the fact that the appellant has foregone claim of depreciation under Income Tax Act, they become eligible to retain cenvat credit on the capital goods as they have reversed depreciation and have also filed revised Income Tax Return. The Assistant Commissioner, Income Tax (CPC) vide office letter CPC/1516/V5/1549933286 dated 09.04.2016 has conveyed that the said revised return filed on 03.03.2016 has been processed under Section 143(1) of Income Tax Act. In view of this factual position, I hold that the appellant is not hit by the condition prescribed in Rule 4(4) of the Cenvat Credit Rules, 2004 and is very much eligible to claim benefit of cenvat credit on the capital goods purchased. In this regard, I rely on the judgment in case of Nish Fibers reported as 2010 (257) ELT 81 (Guj), relevant portion is as under:

"13. *In view of the above discussion, we are of the view that the position is well settled in law. The whole idea is that the assessee should not be permitted to claim double benefit, i.e. under the Income Tax Act as well as Central Excise Rules. Admittedly, the appellant has not claimed the benefit under the Income Tax Act and the claim regarding depreciation was withdrawn by filing the revised return and that revised return has been accepted. Considering these undisputed facts, there is no reason to deny the Modvat credit to the respondent assessee. We therefore do not find any substance in this appeal and no substantial question of law arises out of the order of the Tribunal. The appeal therefore stands dismissed."*

(Emphasis supplied)

6.5 I further hold that once the demand is not sustainable, there is no question of payment of interest or imposition of penalty on the appellant.

7. I would like to record that the lower adjudicating authority has passed a very illegal order without verifying the facts and completely ignoring the position of law well settled long back. Such orders must be avoided to be passed by the lower adjudicating authorities as it unnecessarily increases the futile litigation and also tantamounts to harassment of the tax payers.

133

8. In view of above findings, I set aside the impugned order and allow the appeal filed by the appellant, with consequential benefit, if any.

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

9. The appeal filed by the appellant stands disposed off in above terms.

10/10/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By Speed Post

To,

M/s. Ganga Technocast, Plot No. G-2091, Kishan Gate, Opp. Fisfa Rubber, Metoda GIDC, Rajkot.	मे. गंगा टेक्नोकास्ट, प्लॉट नं. जी-२०९१, किशन गेट, फिसफा रबर के सामने, मेटोडा जीआईडीसी, राजकोट.

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3) The Assistant Commissioner, GST & Central Excise Division-I, Rajkot.
4) Guard File.