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::आयुक्त (अपील) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & 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



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O No.	दिनांक / Date
	V2/112/BVR/2016	09/AC/RURAL/BVR/RR/2016- 17	31.05.2016

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

BHV-EXCUS-000-APP-025-2017-18

आदेश का दिनांक / Date of Order:	28.08.2017	जारी करने की तारीख / Date of issue:	29.08.2017
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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 Appellants & Respondent :-**
Apollo Vikas Steel Pvt. Ltd., Plot No. 26., Soshiya Ship Recycling Yard, P.O. Manar, Alang.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में 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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा 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) नियमवली, 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 जुर्माना, 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 रजिस्टार 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 नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र 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 मांग और लगाया गया जुर्माना, 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 रजिस्टार 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 उपधाराओं (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 सकती एवं उसके साथ आयुक्त केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (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 देते 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 Form 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 अपील 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, बशर्त 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
- बशर्त यह कि इस धारा के प्रवधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थान अर्ज एव अपील को लागू नहीं होगी।
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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परतक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जेवन दीप भवन, ससद 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 इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। / 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 संश्लेषण 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।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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 चाहिये। इस तथ्य के होने हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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 टिकट 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 संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर 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

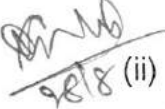
:: ORDER-IN-APPEAL ::

M/s. Apollo Vikas Steel Pvt. Ltd., Plot No. 26, SBY, Alang, Distt. Bhavnagar (hereinafter referred to as "the appellant") filed the present appeal against the Order-in-Original No. 9/AC/Rural/BVR/RR/2016-17 dated 31.05.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority").

2. The SCN No. V.73/03-22/D/Rural/2015-16 dated 05.11.2015 has alleged that the appellant availed cenvat credit {@50%} of duty paid on capital goods during the month January-2013 and balance 50% of duty paid on that capital goods was availed in the month of April-2013 and they also claimed depreciation of the said capital goods including central excise duty, under Section 32 of Income Tax Act, 1961 (43 of 1961) in their Balance Sheet for the FY 2012-13 & 2013-14 in contravention of Rule 4(4) of the Cenvat Credit Rules, 2004. The SCN proposed recovery of wrongly availed cenvat credit of Rs. 74,927/- under the provisions of Section 11A of Central Excise Act, 1944, recovery of interest under the provisions of Section 11AA of the Act; imposition of penalty under Section 11AC of the Act and appropriation of Rs. 74,927/- paid by the appellant on 26.03.2014. The adjudicating authority, vide impugned order, confirmed demand of Rs. 74,927/- along with interest and also imposed penalty of Rs. 37,464/- under Section 11AC of the Act and appropriated Rs. 74,927/- towards wrongly availed cenvat credit confirmed, subject to verification.

3. Being aggrieved by the impugned order, the appellant filed the present appeal against imposition of penalty under Section 11AC of the Act, *inter alia*, on the following grounds:-

(i) The impugned order is not proper, legal and sustainable within the eyes of the statutory provisions of the Cenvat Rules so far as the imposition of penalty of Rs. 37,464/- under Section 11AC of the Act even though there is specific provision of imposition of penalty under Rule 15(2) of the Cenvat Credit Rules.

 (ii) Due to slip of pen, the amount of cenvat credit had been accounted for under the provisions of Section 32 of Income Tax Act. Such mistake had taken place while preparing the Balance Sheet pertaining to FY 2012-13. There was no intention of the appellant to avail such benefits under the Cenvat Rules as well as to avail such benefit under Income Tax Act.

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(iii) As soon as, the Central Excise Audit Officer had pointed out such omissions, the appellant paid the disputed cenvat credit vide Challan No. 102 dated 26.03.2014. The appellant is ready to pay the interest of Rs. 14,615/- for this wrong availment of cenvat credit.

(iv) It is admitted fact that such charge of wrong availment of cenvat credit had been proposed to be recovered along with interest thereon under Section 11A readwith Section 11AA of the Act. But, such recovery action for wrong availment of cenvat credit has been statutorily provided under Rule 14 of Cenvat Rules and such penal provision has been statutorily provided under Rule 15 of Cenvat Rules. In the present SCN, the amount of wrong availment of cenvat credit had been proposed to be recovered under Section 11A was not proper and legal in the circumstances that the issue was pertaining to "wrong availment of cenvat credit" by violating the provisions of Cenvat Rules. The penal provisions for imposition of penalty had been made under Section 11AC(1)(b) of the Act was also not proper and legal. Both the Rules i.e. (i) Central Excise Rules, 2002 and (2) Cenvat Credit Rules, 2004 are the independent machineries provided under the Act. This fact was appraised before the adjudicating authority but not considered by him.

(v) It is established that appellant had not suppressed any facts. All particulars pertaining to wrong availment of cenvat credit were noted in statutory records as well as in the Cenvat Credit records. Such particulars had also been disclosed in the audited Balance Sheet pertaining to the FY 2012-13, which is now a days is the 'public document'. Therefore, it is settled law that there was no suppression of facts by them.

(vi) The adjudicating authority cannot go beyond the provisions mentioned in the SCN and accordingly wrongly and without any authority of law has imposed penalty under Section 11AC. The appellant relied on following case laws:-

- BPL Sanyo Utilities & Appliances Ltd. – 2002 (140) ELT 249 (Tri.-Bang.)
- S.K. Sacks (P) Ltd. – 2008 (226) ELT 38 (P&H)
- Kesarwani Zarda Bhandar – 2013 (289) ELT 331 (Tri.-Del.)

[Handwritten signature]
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Personal hearing in the matter was held on 28.07.2017 which was attended by Shri N.K. Maru, Consultant, who reiterated grounds of Appeal. He submitted that entire cenvat credit of Rs. 74,927/- already reversed, during audit itself, by way of payment through challan. He requested to set aside penalty in view of above payment by him showing full respect to law.

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Findings:-

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the submissions of the appellant. The limited issue to be decided in the present appeal is whether in the facts and circumstance of the case, the imposition of penalty of Rs. 37,464/- under Section 11AC of the Act for wrong availment of cenvat credit, is proper or not.

6. I find that the appellant has preferred this appeal with limited objective to get imposition of penalty under Section 11AC of the Act set aside and they are ready to pay interest for delayed payment. It has been submitted by them that the impugned order is not sustainable as per statutory provisions of the Cenvat Credit Rules so far as the imposition of penalty of Rs. 37,464/- under Section 11AC of the Act even though there were specific provisions for imposition of penalty under Rule 15(2) of the Cenvat Rules for wrong availment of cenvat credit. I would like to reproduce Rule 15(2) of Cenvat Rules, which reads as under:-

"In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of section 11AC of the Excise Act."

(Emphasis supplied)

6.1 Thus, it is clear that where cenvat credit on capital goods has been taken or utilized wrongly by reason of suppression of facts or contravention of any of the provisions of the Central Excise Act or the rules made there under with intent to evade payment of duty, then the manufacturer shall be liable to pay penalty in terms of clause (c), clause (d) or clause (e) of sub-section (1) of Section 11AC of the Central Excise Act is imposable necessarily. Now, the question is if a manufacturer takes cenvat credit of duty and also claims depreciation under Income Tax Act, 1961 on the amount inclusive of Central Excise duty and does not inform Central Excise Department in writing by letter or in returns and does not reverse on its own but reverses after being pointed out by the department after months altogether, then should it be called mistake by slip of pen or should be treated as contravention of provisions of Cenvat Credit Rules with intent to evade payment of duty. In my view, position is clear, when we see the time frame. The 50% of credit has been taken in January, 2013, Balance Sheet for the FY 2012-13 has been prepared in 2013, balance 50% of credit has been taken in April, 2013, but department points out in March, 2014, almost after a year. The appellant has submitted so many returns from

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February/March, 2013 onwards but they did not reverse on their own. In such circumstances, imposition of penalty under proviso to Section 11AC(1)(c) of the Act holding that the appellant has suppressed the facts that they have also claimed depreciation under Section 32 of Income Tax Act, 1961 (43 of 1961), is in consonance with the provisions of Rule 15(2) of Cenvat Credit Rules. Therefore, the arguments of the appellant are devoid of merits and cannot be allowed to be sustained.

6.2 The appellant argued that all particulars pertaining to wrong availment of cenvat credit were recorded in statutory books of account as well as in Cenvat Credit account and had also been disclosed in the audited Balance Sheet pertaining to the FY 2012-13, which is a 'public document'. It is on record that the department has initiated proceedings for recovery of wrongly availed cenvat credit alongwith interest only when departmental audit officers pointed out that the appellant had also claimed depreciation of the amount which represent the amount of cenvat credit, which is in contravention of Rule 4(4) of the Cenvat Credit Rules. I find that the appellant failed to produce any cogent documentary evidence to establish that they had informed the fact of claiming depreciation of the amount under Section 32 of Income Tax Act, 1961 (43 of 1961), which represent cenvat credit availed on capital goods. The burden of proof regarding admissibility of cenvat credit lies upon the appellant. Therefore, I am of the considered view that the appellant has suppressed the fact of claiming of depreciation of the amount which represented the cenvat credit availed and utilized by them, with intent to evade payment of central excise duty. Thus, the adjudicating authority has correctly invoked extended period for recovery of wrongly availed cenvat credit alongwith interest and have correctly imposed penalty under proviso to Section 11AC (1)(c) of the Act by treating the availment of cenvat credit as recorded transactions.


6.3 However, the lower adjudicating authority was duty bound to give option to the appellant in his Order – in - Original dated 31.05.2016 discussing relevant clause (e) of Section 11AC (1) to specifically say that if the appellant pays full interest and reduced penalty @ 25% of duty confirmed within 30 days from the receipt of his adjudication order then penalty would get reduced to Rs. 18,732/- i.e. 25% of amount of wrongly availed cenvat credit, so determined, as has been held by the Hon'ble Supreme Court in the cases of Rajasthan Spinning & Weaving Mills reported as 2009 (238) ELT 3 (S.C.) and R. A. Shaikh Paper Mills P. Ltd. reported as 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular dated 22.05.2008. Having not been done so by the lower adjudicating authority, option of payment of full interest liability as well as reduced penalty @ 25% of Rs. 74,927/- can be availed by the appellant within 30 days of receipt of this order, as per ratio of the judgment of the

Hon'ble Supreme Court in the case of R. A. Shaikh Paper Mills P. Ltd. reported at 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular F. No. 208/07/2008 – CX – 6 dated 22.05.2008.

7. In view of the above discussion and findings, I uphold the impugned order with modifications as stated in Para 6.3 above.

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

7.1. The appeals filed by the appellant stands disposed off in above terms.


(कुमार संतोष)

आयुक्त (अपील्स)

By Speed Post

To,

M/s. Apollo Vikas Steel Pvt. Ltd.,
Plot No. 26, SBY, Alang, Distt.
Bhavnagar

मे. अपोलो विकास स्टील प्रा. लिमिटेड,
प्लॉट न. २६, एस.बी.वाय. अलंग,
डिस्ट्रिक्ट - भावनगर

Copy to:

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