



::आयुक्त (अपील्स) 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

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/214/BVR/2017

मूल आदेश सं /
O.I.O. No.
05/Demand/Supdt/16-17

दिनांक /
Date
28.02.2017

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

BHV-EXCUS-000-APP-224-2017-18

आदेश का दिनांक / Date of
Order: 16.03.2018

जारी करने की तारीख /
Date of issue: 23.03.2018

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १६.१०.२०१७ के साथ पठे बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्जे की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

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 :-**

1. M/s Hans Industries P. Ltd., Plot No. 107,108 & 109, Sihor Ghanghli Road, Village : Ghanghli Taluka Sihor, Dist : Bhavnagar.

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 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 अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhāumali 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 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती 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/-.

- (ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 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 प्रतियों 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 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 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 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 केंद्रीय उत्पाद शुल्क के छुट (रिवेट) 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 समायाविधि 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 केंद्रीय 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 केंद्रीय 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, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी 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-1 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, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित 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, अपीलाधी 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 Hans Industries Pvt. Ltd., Plot No. 107,108 & 109, Sihor- Ghanghali Road, Village Ghandhali, Taluka, Sihor, Dist.: Bhavnagar-364240 (hereinafter referred to as "the appellant") has filed the present appeal along with an application for condonation of delay dated 27.05.2017 against Order-in-Original No.05/Demand/Superintendent/2016-17 dated 28.02.2017 (hereinafter referred to as the "impugned order") passed by the Superintendent (Adjudication), Central Excise, City Division-Bhavnagar. (here in after referred to as "the Adjudicating Authority").

2. The appellant firm was engaged in the manufacturing of excisable goods falling under Chapter Heading 72 of the Central Excise Tariff Act, 1985; registered under the Central Excise Registration No. AABCH7616RXM001; availing CENVAT Credit of Central Excise duty and Service Tax paid on inputs, capital goods and input services under Rule-3 of the Cenvat Credit Rules, 2004. In the ER-1 Excise Return for the month of February,2015, it was observed that the appellant had declared closing balance of Education Cess Rs.71,294/- and Secondary& Higher Education Cess of Rs. 35,660/- on account of input and capital goods credit, which were admissible under Rule-3 of CCR,2004 for payment of Education Cess and Secondary& Higher Education Cess, as notified under Notification No. 27/2007-CE(NT) dated 12.05.2007. Later on, scrutiny of the ER-1-Excise Return for the month of April, 2015 filed by the appellant, it was revealed that the appellant utilized the aforesaid closing balance of Education Cess and Secondary& Higher Education Cess, for payment of Central Excise Duty. As the said act of utilization was in contravention of the provisions of Rule-3 of CCR,2004 read with the Notification No. 27/2007-CE(NT) dated 12.05.2007, Show Cause Notice No. V/15-03/Demand-Hans/2016-17 dated. 19.4.20016 was issued by the Assistant Commissioner, Central Excise City Division, Bhavnagar to the Appellant. Consequent to issuance of corrigendum dated 18.11.2016 in view of the revised monetary limits for adjudication vide CBEC Circular dated 29.9.2016 the above said Show Cause Notice fell under the competence the Superintendent(Adjudication), Central Excise, City Division-Bhavnagar and accordingly, it was further adjudicated. The adjudicating authority under the impugned order disallowed the Cenvat Credit utilization for Rs. 1,06,954/- and ordered for its recovery under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Notification No. 27/2007-CE(NT) dated. 12.5.2007 & Section 11A(1) of the Central Excise Act, 1944;also ordered for recovery of interest on the amount so confirmed under rule 14 of Cenvat



Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944; also imposed penalty of Rs. 1,06,654/- under Rule 15 of Cenvat Credit Rules, 2004 read with Section 11AC(1)(a) of the Central Excise Act, 1944; also gave option for 25% penalty in terms of Section 11AC(1)(b) of the Central Excise Act, 1944.

3. Being aggrieved by the impugned order, the Appellant filed the present appeal along with an application for Condonation of Delay dated 27.5.2017, inter alia, mainly on the following grounds;

- (i) There were delay of 27 days in filing the appeal as their consultant was busy with Adjudicating proceedings of various authorities due to drive of adjudication and further their consultant being a Chartered Account firm, were busy with the reply work of notices issued by the Income Tax department due to demonetization of currency and statutory audit work of Nationalized Banks. Apart, the delay was not intentional and if not condoned, there would be irreparable loss to them. Also place reliance on various decisions of the higher judicial forum in support of their above contention.
- (ii) The impugned order is non speaking as the adjudicating authority had not considered/overlooked their submission and oral arguments put forth by them.
- (iii) When the Credit for Education Cess and Secondary & Higher Education Cess in respect of input/capital goods and input services received on or after 01.03.2015/01.06.2015 can be permitted for payment of CENVAT and Service Tax, then there should be no embargo in permitting the utilization of the said accumulated credit of Education Cess and Secondary & Higher Education Cess, lying in their balance as on 28.02.2015.
- (iv) Further, adjudicating authority has not given any grounds in his findings that for which rule or for what act, the appellant was liable for penalty under Rule 15(1) of the Rules and accordingly to the legal precedence no penalty can be imposed on them. There was no intention on the part from the appellant side to defraud the revenue or evade payment of duty. The duty involved in the case was of Rs. 1,06,954/- and penalty imposed on the appellant is of Rs.



1,06,954/-, the penalty imposed is beyond the provisions of the Rule 15(1) of the Rules.

4. Hearing in the matter was held on 23.02.2018, wherein Shri Sarju Mehta, Chartered Accountant and Authorized Representative appeared on behalf of the appellant and reiterated the submission of their appeal memorandum and also filed additional submission of dated. 23.2.2018, wherein he submitted that;

4.1 the judgment of Hon'ble High Court in case of M/s Shankeshwar Fabrics Pvt. Ltd., Vs Union of India (2002(142)ELT 42(Raj.), wherein it was concluded that the right to MODVAT credit accrues to assessee on the date he pay tax on raw materials or inputs and if the credit has been validly earned, the same cannot be denied to him. Further submitted that this decision was given by placing reliance on the Hon'ble Supreme Court judgment in the case of M/s Eicher Motors Ltd. Vs Union of India(1999(106)ELT 3(SC), wherein it was held that the MODVAT credit can not be declared as lapsed because provision of facility of credit is as goods as tax paid till it is adjusted for future liability.

4.2 tariff conference did not specifically state that the credit balance of Education Cess and Secondary & Higher Education Cess would be lapsed but put restriction as regards utilization tantamount to treating the accumulated Education Cess and Secondary & Higher Education Cess credit as lapsed because the said credit could be utilized only for payment of Education Cess and Secondary & Higher Education Cess itself and not for other duties like Excise duty, Service tax etc. Accordingly, conclusion of the meeting renders the analogy of the above cited decision as futile and meaningless.

4.3 By placing reliance on the decision in the case of Maruti Suzuki Ltd. V/s CCE, Delhi-III- 2009(240) ELT 641(SC) submitted that the penalty cannot be imposed as there was an ambiguity and matter was relevant to interpretation.

5. I have gone through the appeal memorandum, written and oral submission made as well as documents submitted during personal hearing. Since the appellant has made payment of mandatory deposit of Rs.8042/- (7.5% of the Cenvat Credit of Rs.1,06,954 vide SBI Challan No. 00360 dated. 25.5.2017 and thereby complied with the requirement of mandatory pre

deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act, 1944. I proceed to decide the case on merits

6. I find that the appellant filed appeal on the 87th day from the date of their receipt of impugned order and for such 27 days delay in the aforesaid manner, the appellant has filed Application for condonation of delay wherein, it is submitted that as their consultant was busy with the adjudicating proceedings of various authority and also busy in the Income Tax matters post demonetization, the appeal could not be filed in time. Finally, requested to condone the delay of 27 days. I find the reason to be genuine and simultaneously find that delay is well within the prescribed time limit of 30 days for which Commissioner (Appeals) is empowered to grant extension as per Section 35 of the Central Excise Act, 1944. Accordingly, I condone the delay and proceed further on merits.

7. The issue to be decided in the present appeal is

- a. whether the Adjudicating Authority had correctly disallowed utilization of Cenvat credit to the tune of Rs.1,06,954/- (Education Cess Rs.71,294/- and Secondary & Higher Education Cess of Rs. 35,660/-) or not?
- b. whether the adjudicating authority had correctly imposed the penalty?

7.1 I find that there is no dispute that the appellant was having a balance of Cenvat Credit of Rs.1,06,954/- (Education Cess of Rs.71,294/- and Secondary & Higher Education Cess of Rs. 35,660) on 28.02.2015. The Adjudicating Authority has observed that as per ER-1 Excise Returns for the month of April, 2015, the appellant had utilized the said balance of unutilized cenvat credit for Rs.1,06,954/- for payment of Central Excise duty due for the month of April, 2015.

7.2 For better appreciation of the issue on hand, the relevant portion of the provisions of Rule-3 of the CCR, 2004 duly amended vide Notification No.27/2007-CE(NT) dated 12.05.2007 and Notification No.27/2007-CE(NT) dated 12.05.2007 are reproduced as under.

"Rule-3 of the CCR, 2004

(7) Notwithstanding anything contained in sub-rule (1) [, sub-rule (1a)] and sub-rule (4), -

(a) ----

[(b) CENVAT credit in respect of -

(iii) ...

Provided that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services :] “.

From above provisions of CCR,2004, I find that the first and second Proviso, were inserted in the said Rule-3 (7) (b) of CCR,2004 vide Notification No.27/2007-CE(NT) dated 12.05.2007 from which it is crystal clear that the credit of the Education Cess on excisable goods and the Education Cess on taxable services can be utilized, either for payment of the Education Cess on Excisable Goods or for the payment of the Education Cess on taxable services and similarly, the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services. Thus, it is clear that during the relevant period, credit in respect of Education Cess and SHE Cess could not be utilized for payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985. Further, levy of Education Cess and SHE Cess on goods cleared on or after 01.03.2015 had been dispensed with. In view of these provisions, the balance of unutilized cenvat credit for Rs.1,06,954/- (Education Cess Rs.71,294/- and Secondary & Higher Education Cess of Rs.35,660/-) as on 28.02.2015 can not be utilized for payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985 on or after 01.03.2015.

7.3 Further, the following proviso inserted in the said Rule-3 vide Notification No. 12/2015-CE (NT) dated 30.04.2015.

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act.

From the above, it is clear that credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods can be utilized towards payment of the duty of excise leviable under the First Schedule to the

Excise Tariff Act, provided the inputs or capital goods the credit of Education Cess and Secondary and Higher Education Cess paid thereon, are received in the factory of manufacture of final product on or after the 01.03.2015. Since, balance credit of Rs. 1,06,954/- was in respect of Education Cess and SHE Cess in respect of inputs/capital goods which were received before 01.03.2015, hence, this balance credit can not be utilized towards payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act.

7.4 Thus, combined reading of the above provisions of Rule-3 *ibid*, makes it amply clear that the utilization of cenvat credit for Rs.1,06,954/- (Education Cess Rs.71,294/- and Secondary & Higher Education Cess of Rs. 35,660/-) lying in balance as on 28.02.2015, for the payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985 in the month of April, 2015 was wrong. The decision of the Tariff Conference held on 28th & 29th of the October, 2015 circulated by CBEC vide letter F.No. 96/85/2015-Cx.1 dated 07.12.2015 also supports my above conclusion.

7.5 As far as the contention of the appellant by placing reliance on the judgement of Hon'ble High Court in the case of Shankeshwar Fabrics Private Ltd. Vs Union of India [2002 (142) ELT 42 (Raj.)] of the appellant is concerned, I found that is clearly distinguishable on the following two count; **1st** the judgment is given in context to MODVAT regime whereas in the present case issue in question is in respect to the Cenvat Credit rules, 2004 and **2nd** on the basis of the observation given by Hon'ble High Court of Gujarat in case of COMMISSIONER OF C. EX., AHMEDABAD-II vs. INDUCTOTHERM (I) PVT. LTD.[2012 (283) E.L.T. 359 (Guj.)] wherein it was observed that

"Para -17. The decisions of the Apex Court cited before us and that of the Rajasthan High Court, at best may suggest that the payment made through Cenvat credit is as good as actual payment, however, such payment should be for the purpose for which it is Authorized under the Rules."

Similarly, in the present case dispute is not regarding legitimacy/wrong accrual of the Cenvat Balance but the utilization is question as rule does not authorize the appellant for utilization of the Cenvat credit in question.

7.6 In view of the facts and discussion herein above, I uphold the impugned order disallowing cenvat credit utilized for Rs.1,06,954/- as well ordering the recovery of the same alongwith interest under the provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Notification No. 27/2007-CE(NT) dated 12.05.2007.


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Appeal NO. V2/214/BVR/2017
Appeal filed by M/s Hans Industries Pvt. Ltd.

7.7 With regards to the imposition of penalty, the appellant had contended as interalia mentioned at para-3 (iv) & 4.3 above. However, I do not find force in the arguments of the appellant in view of the discussion given in the foregoing paras; looking to the fact that it was amply clear and there was no ambiguity on this issue. Further the contention that **the penalty imposed is beyond the provisions of the Rule 15(1) of the Rules**, I found that the adjudicating authority has correctly imposed the penalty equal to amount of duty involved **as per the provision of Section 11AC(1)(a) of Central Excise Act,1944 existed at the relevant time**. Accordingly, I uphold the impugned order relevant to imposition of the penalty in terms of Rule 15 of Cenvat Credit Rules,2004 read with Section 11AC(1)(b) of the Central Excise Act,1944.

7.8 In view of the facts and discussion herein above, I uphold the impugned order and reject the appeal filed by the appellant.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeal filed by the appellant stands disposed off in above terms.


(गोपी नाथ) 16/3/18

अपर महानिदेशक ऑडिट / आयुक्त (अपील्स)

By Regd. Post A.D. /Speed Post

F.NO.V2/214/BVR/2017

BY R.P.A.D.

Dated 16.3.2018

To,
M/s Hans Industries Pvt. Ltd.,
Plot No. 107,108 & 109,
Sihor-Ghanghali Road,
Village: Ghaghali,
Taluka: Sihor,
Dist.: Bhavnagar-364240.

Copy To:-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner (Appeals), Central Taxes, Rajkot.
- 3) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 4) The Assistant Commissioner, GST & Central Excise, Division.....,Bhavnagar.
- 5) The Superintendent, Range-....., GST & Central Excise, Division.....,Bhavnagar.
- 6) Guard File.
- 7) Guard File for O/o the Additional Director General (Audit),Ahmedabad Zonal Unit, Ahmedabad.