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::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 / 2<sup>nd</sup> Floor, GST Bhawan,  
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 कायदा संख्या Appeal File No. V2/53/GDM/2016	मूल आदेश नं / Order No. 06/JC/2016	दिनांक / Date 29.07.2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**KCH-EXCUS-000-APP-011-2017-18**

आदेश का दिनांक / Date of Order:	<b>16.08.2017</b>	जारी करने की तारीख / Date of issue:	<b>17.08.2017</b>
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**कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

ग अपर आयुक्तों/सहायक आयुक्तों/उपायुक्तों/सहायक आयुक्तों, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गणधाम, द्वारा उपरोक्तित जारी मूल आदेश से श्रुति: /  
Arising out of above mentioned O/O 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. Shiv Krupa Logistics P. Ltd., Office No. 67, Shakti Shopping Centre Shakti Nagar Mundra District- Kutch-370421.**

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके से उपरोक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दाखल 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 अपीलविभाग, 1944 की धारा 35B के अन्तर्गत एवं वित्त अपीलविभाग, 1994 की धारा 86 के अन्तर्गत 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) विशेषीकरण शुल्कांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 बतलाए गए अपीलों के अलावा ही सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, बहामली भवन असावा अहमदाबाद को की जानी चाहिए। /  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bahamali Bhawan, Asawa Ahmedabad 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 अन्तर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दाखल किया जाना चाहिए। प्रत्येक से कच्चे से कच्चे एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा व्याज की सीमा और न्याया नया जुर्माना, रुए 5 लाख या उससे कम, 5 लाख रुए या 50 लाख रुए तक अथवा 50 लाख रुए से अधिक है तो कमर: 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 सर्वोच्चतम क्षेत्र के बैंक द्वारा जारी रेकॉर्डेड 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। रकम आदेश (स्टे ऑर्डर) के लिए अर्बेटन-पर के साथ 500/- रुपये 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 अपीलविभाग, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है 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 प्रत्येक से कच्चे से कच्चे एक प्रति के साथ, जहां सेवाकर की सीमा व्याज की सीमा और न्याया नया जुर्माना, रुए 5 लाख या उससे कम, 5 लाख रुए या 50 लाख रुए तक अथवा 50 लाख रुए से अधिक है तो कमर: 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 सर्वोच्चतम क्षेत्र के बैंक द्वारा जारी रेकॉर्डेड 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। रकम आदेश (स्टे ऑर्डर) के लिए अर्बेटन-पर के साथ 500/- रुपये 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 fee 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) विल अपीलियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दाय की गई अपील, सेवाकर नियमकारी, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती एवं उसके साथ आवृत्त, केन्द्रीय उत्पाद शुल्क अध्यादेश आवृत्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करे (जसमें से एक प्रति प्रमाणित होनी चाहिए) और आवृत्त द्वारा सहायक आवृत्त अध्यादेश आवृत्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलिय न्यायाधिकरण को अपील दाय करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न कराती 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 अपीलिय प्रणिकरण (सेन्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अपीलियम 1944 की धारा 35ए के अंतर्गत जो की विलीय अपीलियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलिय प्रणिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर भाग के 10 प्रतिशत (10%), जब भाग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जसा कि जमाने वाली अपीलिय देय तबि इस कटौत स्तर से अधिक न हो।

- (i) केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'जमा किए गए शुल्क' से रिजून शक्ति है
  - (ii) धारा 11 डी के अंतर्गत रकम
  - (iii) सेन्टेट जसा की नी गई गलत तरी
  - (iv) सेन्टेट जसा नियमकारी के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्राधान्य विलीय (स. 2) अपीलियम 2014 के अंतर्गत ही पूर्व किसी अपीलिय प्रणिकारी के जसस विचारणीय स्थगन जारी एवं अपील की 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 Central Credit taken;
- (iii) amount payable under Rule 6 of the Central 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 प्रणिकरण विनियमित मामलों में, केन्द्रीय उत्पाद शुल्क अपीलियम, 1994 की धारा 35EE के प्रथम पारुक्त के अंतर्गत अपील अपील, भारत सरकार, पुनरीक्षण आवेदन इकाई, विल संसाधन, टावर विडिंग, चौकी भोजिन, जीवन दीप भवन, सहद 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 जमान के किसी नुकसान के मामले में, जहां नुकसान किसी जमान 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 जमान के प्रवर्तन के दौरान, किसी कारखाने या किसी भंडार गृह में जमान 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 जमान के विधिवत में प्रयुक्त करने जमान पर लगी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की जाती 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 जमान निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) मुनिशिल उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो सुवर्ती कटौत इस अपीलियम एवं इसके विभिन्न प्राधान्यों के तहत जमान की गई है और ऐसे आदेश जो आवृत्त (अपील) के द्वारा विल अपीलियम (स. 2), 1998 की धारा 109 के द्वारा जमान की गई तरीक अध्यादेश प्रणिकरण पर का बंद में पारित किए गये 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमकारी, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के प्रेषण 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 अपीलियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के समय 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 CoO 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 विनियमित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहां 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 जो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त इस में किया जाना चाहिए। इस लक्ष्य के होते हुए भी की विच्छा पूरी करने के लिए प्रत्येक अपीलिय अपीलिय न्यायाधिकरण को एक प्रतिय या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order, an 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 filed to avoid scriptoria work if excessing Rs. 1 lakh fee of Rs. 100/- for each.

(E) प्रमाणित न्यायालय शुल्क अपीलियम, 1975, के अनुसूची-1 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-1 in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलिय न्यायाधिकरण (कार्य विधि) नियमकारी, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले नियमों की और भी ध्यान अवगत 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 अपीलिय प्रणिकारी को अपील टाकिस करने में संबंधित स्टाफ, विस्तृत और नवीनतम प्राधान्यों के लिए, अपीलिय विभागीय वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in)

:: ORDER IN APPEAL ::

M/s. Shiv Krupa Logistic Pvt. Ltd., 67, Shakti Shipping Centre, Shakti Nagar, Mundra – 370 421 holding Service Tax Registration No. AAQCS0123DSD001 (hereinafter referred to as 'the appellant') has filed the present appeal against Order-in-Original No.06/JC/2016 dated 29.07.2016 (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Central Excise, Gandhidham (hereinafter referred to as 'the lower adjudicating authority').

2. Briefly stated, facts of the case are that the appellant was rendering taxable services of Cargo Handling Service and Manpower Supply Agency Service falling under Section 65 (105) (zr) of the Finance Act, 1994 (hereinafter referred to as 'the Act') and Section 65 (105) (k) of the Act respectively. The Department conducted inquiry on intelligence that the appellant was indulging in evasion of service tax, which revealed that the appellant charged and collected service tax but not paid it to the Government exchequer. Accordingly, a demand Show Cause Notice bearing No. V.ST/AR-STIIR/ADC/220/2013 dated 08.10.2013 for service tax of Rs. 42,72,737/- for the period from April 2012 to October 2012 was issued to the appellant, which was adjudicated vide OIO No. 7/ADC/2015 dated 20.01.2015.

2.1 It is on record that the appellant had also wrongly availed cenvat credit on the bills issued by their service provider i.e. M/s. Shiv Enterprises, Mandvi, who was neither registered with the department nor was paying service tax mentioned in such bills, which resulted into issuance of another Show Cause Notice bearing No. V.ST/AR-STIIR/ADC/225/2013 dated 08.10.2013 for the period from April 2012 to October 2012 to the appellant proposing recovery of wrongly availed cenvat credit of Rs.8,58,265/- along with interest, appropriation of cenvat credit of Rs. 8,58,265/- already reversed and interest of Rs. 95,504/- already paid, which was adjudicated vide OIO No. 16/ADC/2015 dated 23.02.2015. The said order was and upheld vide OIA No. KCH-EXCUS-000-APP-45-15-16 dated 23.02.2016.

2.2 The department gathered further intelligence that the appellant was not paying service tax correctly even for the subsequent period and hence the department again initiated another inquiry against the appellant and statement of Shri Mohd. Asif

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Kutchi, Accountant and Authorized Person of the appellant was recorded on 26.08.2013 and further statements of Shri Batuksinh Sodha, Authorized Representative of the appellant were recorded on 28.10.2013 & again on 31.12.2013 wherein they, inter-alia, stated that the appellant was providing service of loading and unloading of cargo and manpower; that earlier a case had been booked against them for non-payment of service tax though they had collected the same for the period from April 2012 to October 2012; that the appellant paid service tax in November 2012 and December 2012; that they collected service tax for the period from January 2013 to June 2013 also but did not pay to the Government exchequer even though they availed cenvat credit. As per provisions of Section 68 of the Act read with Rule 6 of the Rules, they being a private limited company were required to pay service tax by 5<sup>th</sup> of the following month whereas the appellant had collected service tax but not deposited to the Government exchequer to the extent of Rs. 19,71,429/- and paid entire amount of Rs. 19,71,429/- through challans dated 02.09.2013 and dated 04.09.2013 only after further inquiry by the department.

2.3 The appellant had also received manpower supply service for providing their out put service and hence, as per Notification No. 30/2012 – ST dated 20.06.2012, the appellant was liable to pay service tax from July 2012 onwards as a service recipient of manpower supply service on reverse charge basis. The appellant accepted their service tax liability of Rs. 10,09,421/- as recipient of manpower service under reverse charge basis during the period from July 2012 to June 2013 and paid Rs. 9,66,130/- through challans dated 12.10.2013 and dated 18.10.2013. Thus, total service tax of Rs. 29,80,850/- (Rs. 19,71,429/- + Rs. 10,09,421/-) was required to be paid by the appellant, out of which Rs. 29,37,559/- (Rs. 19,71,429/- + Rs. 9,66,130/-) was paid by them after inquiry by the department which resulted in short payment of service tax of Rs. 43,291/-.

2.4 The appellant availed cenvat credit of Rs. 17,44,569/- of input service rendered by M/s. Shiv Enterprise, Mandvi (hereinafter referred to as M/s. Shiv Enterprise) for the period from December, 2012 to June, 2013. However, inquiry revealed that M/s. Shiv Enterprise, Mandvi had collected service tax from the appellant without obtaining service tax registration and without paying service tax to the Government Exchequer from April 2012. The appellant had reversed credit availed on the said bills issued by M/s. Shiv Enterprise, Mandvi. M/s. Shiv Enterprise, Mandvi obtained service tax registration on 24.12.2012 but continued non payment of service

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tax and the appellant availed cenvat credit on the bills even prior to December, 2012 on ground that the old bills have become legally recognized/correct after obtaining service tax registration by M/s. Shiv Enterprise, Mandvi. The appellant was aware of the fact that M/s. Shiv Enterprise had collected service tax without obtaining service tax registration and not deposited service tax with the government exchequer.

2.5 M/s. Shiv Enterprise, Mandvi had filed an application under VCES – 2013 for outstanding service tax payable up to December 2012.

2.6 The present appeal is against the impugned order dated 29.07.2016 under F. No. V.ST/15-06/Adj/2014-15 passed in respect of Show Cause Notice bearing No. V.ST/AR-GDM/ADC(SS)/93/2014-15 dated 19.08.2014, wherein the lower adjudicating authority has (i) confirmed demand of service tax of Rs. 29,80,850/- (as detailed in Para 2.3) under Section 73(1) of the Act; (ii) appropriated service tax of Rs. 29,37,559/- already paid; (iii) ordered recovery of interest under Section 75 of the Act; (iv) imposed penalty of Rs. 29,80,850/- under Section 78 of the Act; (v) disallowed credit of Rs. 17,44,569/- under Rule 14 of the Cenvat Credit Rules, 2004; (vi) ordered interest on Rs. 17,44,569/- under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Act; (vii) imposed penalty of Rs. 17,44,569/- under Rule 15 of the Cenvat Credit Rules, 2004 but did not give option of reduced penalty as provided under Section 11AC of the Central Excise Act, 1944.

3. Being aggrieved by the impugned order, the appellant has preferred the present appeal on the grounds as under:

3.1 They availed cenvat credit of Rs. 17,44,569/- on invoices issued by M/s. Shiv Enterprise, Mandvi, who paid service tax under VCES Scheme. The said credit is available to them as per Board's Circular No. 176/2/2014 – S. T., dated 20.01.2014. Hence, the said credit should be allowed to them.

3.2 They paid Service Tax of Rs. 29,37,559/- along with interest before issuance of SCN on 13.08.2014. Hence, no SCN should have been issued as per provisions of Section 73(3) of the Act and no penalty should have been imposed on

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them. They relied on the following judgments:-

- (i) 2012 – TIOL – 37 CESTAT – AHM
- (ii) 2011 – TIOL – 1522 – CESTAT – MAD
- (iii) 2011 – TIOL – 6356 – HC – KAR – ST
- (iv) 2011 – TIOL – 175 – CESTAT – AHM

4. Personal Hearing in the matter was held on 28.06.2016 wherein Shri R. Subramanya, Advocate, appeared on behalf of the appellant and submitted that they have no dispute on liability of service tax on cargo handling service and hence they paid the same before issue of SCN but they dispute imposition of penalty under Section 78 of the Act as they had paid the entire service tax and interest before issue of SCN. He also submitted that they had taken cenvat credit Rs. 17.11 lakhs paid under VCES scheme, which cannot be denied as per Board's clarification that cenvat credit will be available (Reference - answer to question No. 22 of FAQ issued by Board dated 08.08.2012) and CBEC Circular No. 176/2/2014 – S. T., dated 20.01.2014.

#### Findings:

5. I have carefully gone through the impugned order, appeal memorandum, records of personal hearing and the documents submitted by the appellant. The issues to be decided in the present appeal are as to whether the appellant is (i) liable to penalty of Rs. 29,80,850/- under Section 78 of the Act even if when service tax of Rs. 29,37,559/- stand paid before issue of SCN; (ii) eligible to avail input service credit of Rs. 17,44,569/-; (iii) liable to interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Act; and (iv) liable to penalty under Rule 15 of the Cenvat Credit Rules, 2004 or otherwise.

6. I find that the lower adjudicating authority confirmed demand on the ground that service tax though collected by the appellant was not paid and the fact of collection of service tax was suppressed with intent to evade payment of service tax. The appellant has also not disputed payment of service tax but has disputed imposition of penalty under Section 78 of the Act on the ground that the appellant paid entire service tax before issuance of show cause notice and, therefore, no penalty could be imposed upon them as per various case laws already decided and contended that once the service tax along with interest is paid and also duly intimated to the authorities, sub-section 3 of Section 73 comes into operation.

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6.1 For clarity, sub-section (3) and sub-section (4) of Section 73 of the Finance Act, 1994 are re-produced hereunder:-

*"(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :*

*Provided that the [Central Excise Officer] may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*

*Explanation.[1] — For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.*

*[Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.]*

*(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —*

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax."*

6.2 I find that sub-section (3) of Section 73 of the said Act provides that the Central Excise officer shall not serve any notice under Section 73(1) of the said Act, when any service tax not levied or not paid or has been short-levied or short-paid or erroneously refunded, is paid along with interest, prior to issuance of notice. However, sub-section (4) of Section 73 also provides that nothing contained in sub-section (3) of Section 73 shall not apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud; collusion; wilful mis-statement; suppression of facts with intent to evade payment of service tax.

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6.3 I find that this case was detected by the department after it made inquiry that the appellant collected service tax from their customers but did not deposit the

same into Government account. These facts have been narrated in the impugned show cause notice and also in the impugned order which confirmed demand under proviso to Section 73(1) of the said Act. I, therefore, hold that the present case does not come under purview of Section 73(3) of the Finance Act, 1994.

6.4 The records of this case evidently make it clear that the appellant was liable to deposit the amount of service tax on due dates in 2012 & 2013 and before but did not pay and paid on 02.09.2013; 04.09.2013; 12.10.2013 and 18.10.2013 only when department initiated investigation. It is also found that the appellant had paid service tax of Rs. 29,37,559/- only out of total service tax of Rs. 29,80,850/-, thus the appellant short paid their service tax liability by Rs. 43,291/- and also not paid interest liability for delayed payment of service tax.

7. I find that Section 78 of the Act was amended with effect from 14.05.2015 and it was provided that where a notice has been served under sub-section (1) of Section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of Section 73, before the date on which the Finance Bill, 2015 receives the assent of the President, then the provisions of amended Section 76 or Section 78, as the case may be applicable. In the instant case, the impugned order has been issued on 29.07.2016, penal provisions will be governed under amended Section 78 of the Act, as amended w. e. f. 14.05.2015. Amended Section 78 is reproduced below for ready reference:-

**SECTION [78. Penalty for failure to pay service tax for reasons of fraud, etc.]** — (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made there under with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

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

**Provided** further that where service tax and interest is paid within a period of thirty days of —

- (i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such

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*service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;*

- (ii) *the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :*

**Provided** also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :

**Explanation.** — For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

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7.1 It is a fact that the appellant did not pay service tax liability in full as well as did not pay interest liability before issuance of impugned show cause notice and also failed to pay any amount towards penalty. They failed to pay penalty @15% of service tax within a period of thirty (30) days of the date of service of notice or penalty @25% of service tax within a period of thirty (30) days of the date of receipt of the impugned order and reduced penalty is available only when reduced penalty is also paid within such specified period of 30 days.

7.2 It is on record that the appellant has not paid service tax on their own even though collected from their customers. Further, even though they paid service tax but they did not pay full amount of service tax and did not pay interest also before issuance of impugned show cause notice. It is evident from records that the facts of collection of service tax and non-payment thereof were suppressed by the appellant with intent to evade payment of service tax. I find that the case laws relied upon by the appellant are not applicable to the cases after 14.05.2015 i. e. date of amendment of Section 78 of the Act. It is also on record that the appellant did not pay full service tax and also did not pay interest. The show cause notice has been issued proposing imposition of penalty under Section 78 of the Act because appellant failed to pay penalty @15% of service tax before issuance of SCN. The appellant also did not pay penalty @15% of service tax within 30 days from date of receipt of SCN and hence imposition of penalty equal to service tax evaded under Section 78 of the Act is legal and proper and I uphold the impugned order in this regard.

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8. The lower adjudicating authority vide impugned order has denied cervat credit of Rs. 17,44,569/- in terms of Rule 9(1)(bb) of Cenvat Credit Rules, 2004, which reads as under.

*"(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax."*

(Emphasis supplied)

8.1 The lower adjudicating authority has found that the disputed credit was availed on invoices issued by M/s. Shiv Enterprises, Mandvi which was not registered with service tax authorities with intent to evade payment of service tax. The appellant has pleaded that M/s. Shiv Enterprises, Mandvi had subsequently made entire payment under VCES, 2013 and hence needs to be considered as voluntary payment of service tax and hence cervat credit taken by the appellant cannot be denied. The appellant has relied upon CBEC Circular No. 176/2/2014 – ST, dated the 20th January, 2014. The relevant portion of the said Circular, is reproduced below:-

*"Trade and Industry has sought clarification as to whether the first installment of tax dues paid under Voluntary Compliance Encouragement Scheme (VCES), 2013 would be available as Cenvat Credit immediately after payment or Cenvat credit can be availed only after payment of tax dues in full and receipt of Acknowledgement of Discharge in form VCES-3.*

*2. The issue has been examined. As per VCES, under Section 108 (2) of the Finance Act, 2013, a declaration made under Section 107 (1) shall become conclusive only upon issuance of acknowledgement of discharge under Section 107 (7). Further, in terms of Rule 7 of the Service Tax VCES Rules 2013, the acknowledgement of discharge in form VCES-3 shall be issued within a period of 7 working days from the date of furnishing of details of payment of tax dues in full along with interest, if any, by the declarant.*

*3. It would be in the interest of VCES declarants to make payment of the entire service tax dues at the earliest and obtain the discharge certificate within 7 days of furnishing the details of payment. As already clarified in the answer to Question no. 22 on FAQs issued by CBEC dated 08.08.2013, eligibility of CENVAT credit would be governed by the CENVAT Credit Rules, 2004."*

(Emphasis supplied)


8.2 I find that the inquiry by the department had been initiated for the bills raised by M/s. Shiv Enterprises, Mandvi before the outstanding service tax liability was declared by M/s. Shiv Enterprises, Mandvi under VCES, 2013 and was settled through VCES, 2013. Rule 9(1)(bb) of Cenvat Credit Rules, 2004 denies cervat credit where tax became recoverable on account of non-levy or non-payment by reason of fraud or contravention of any of the provisions of the Finance Act or the rules made thereunder

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with intent to evade payment of service tax. In the instant case, the service tax liability on M/s. Shiv Enterprises, Mandvi has been established as stated in Para 2.1 on account of contravention of service tax law by not getting registered under service tax and even then issuing invoices and collecting service tax from customers but not paying to the central government account. The appellant has availed cenvat credit of service tax paid by M/s. Shiv Enterprises, Mandvi after evasion being detected by the department. Thus, cenvat credit availed by the appellant cannot be allowed under Rule 9(1)(bb) of Cenvat Credit Rules, 2004 read with clarification issued by CBEC vide Circular dated 20.01.2014. Therefore, I have no option but to uphold the impugned order on this account also. Since cenvat credit has been taken in defiance of Rule 9 (1)(bb), penalty under Rule 15 of Cenvat Credit Rules, 2004 is held as legal and proper. The cenvat credit of Rs. 17,44,569/- has been taken and also utilized by the appellant and thus, they are also liable to pay interest under Rule 14 of Cenvat Credit Rules, 2004.

9. In view of facts of the case and legal position discussed as above, I uphold the imposition of penalty of Rs. 29,80,850/- under Section 78 of the Act as well as disallowing cenvat credit of Rs. 17,44,569/-. The order for payment of interest under Rule 14 of Cenvat Credit Rules, 2004 and imposition of penalty of Rs. 17,44,569/- under Rule 15 of Cenvat Credit Rules, 2004 due to disallowance of cenvat credit is also upheld.

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

  
(कुमार संतोष)  
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Shiv Krupa Logistic Pvt. Ltd.,  
67, Shakti Shopping Centre,  
Shakti Nagar,  
Mundra - 370 421.

मे. शिव कृपा लोजिस्टिक प्रा. ली.,  
67, शक्ति शॉपिंग सेन्टर, शक्ति नगर,  
मुंद्रा - 370 421.

**Copy to:**

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham.
3. The Joint Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham.
4. The Assistant Commissioner, GST & Central Excise Division, Gandhidham.
5. Guard File.


with intent to evade payment of service tax. In the instant case, the service tax liability on M/s. Shiv Enterprises, Mandvi has been established as stated in Para 2.1 on account of contravention of service tax law by not getting registered under service tax and even then issuing invoices and collecting service tax from customers but not paying to the central government account. The appellant has availed cenvat credit of service tax paid by M/s. Shiv Enterprises, Mandvi after evasion being detected by the department. Thus, cenvat credit availed by the appellant cannot be allowed under Rule 9(1)(bb) of Cenvat Credit Rules, 2004 read with clarification issued by CBEC vide Circular dated 20.01.2014. Therefore, I have no option but to uphold the impugned order on this account also. Since cenvat credit has been taken in defiance of Rule 9 (1)(bb), penalty under Rule 15 of Cenvat Credit Rules, 2004 is held as legal and proper. The cenvat credit of Rs. 17,44,569/- has been taken and also utilized by the appellant and thus, they are also liable to pay interest under Rule 14 of Cenvat Credit Rules, 2004.

9. In view of facts of the case and legal position discussed as above, I uphold the imposition of penalty of Rs. 29,80,850/- under Section 78 of the Act as well as disallowing cenvat credit of Rs. 17,44,569/-. The order for payment of interest under Rule 14 of Cenvat Credit Rules, 2004 and imposition of penalty of Rs. 17,44,569/- under Rule 15 of Cenvat Credit Rules, 2004 due to disallowance of cenvat credit is also upheld.

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

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

सत्यापित,

  
17/08/2017

आर. पी. शाह,

अधीक्षक (अपील)

  
16/8/2017

(कुमार संतोष)

आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Shiv Krupa Logistic Pvt. Ltd.,  
67, Shakti Shopping Centre,  
Shakti Nagar,  
Mundra - 370 421.

मे. शिव कृपा लोजिस्टिक प्रा. ली.,  
67, शक्ति शॉपिंग सेंटर, शक्ति नगर,  
मुँदरा - 370 421.

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