NATION TAX MARKET

::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
	V2/206 /RAJ/2016	07/D/AC/2016-17	15.06.2016

35829 TO 35832

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

RAJ-EXCUS-000-APP-030 -2017-18

आदेश का दिनांक / Date of Order: **27.07.2017** जारी करने की तारीख / Date of issue: **31.07.2017**

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

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name&Address of the **Appellant &** Respondent :-
M/s. Fieldman Engineers P. Ltd., Plot No. 171/172, Aji GIDC, Aji Industrial Area Phase-II,Rajkot 360 003,

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

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अलावा वित्त अधिनियम, 1994 की धारा 86 के अलावा 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 पीरच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावी अहमदाबाद को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa 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) नियमावली, 2001, के नियम 6 के अलावा 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 माँग ,ब्याज की माँग 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 अलावा सेवाकर नियमावली, 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 माँग ,ब्याज की माँग 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 उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न 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 अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहा 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 भंडारगृह 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 (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदनें 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, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की 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 वैबसाइट 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. Fieldman Engineers Pvt. Ltd., Plot No. 171/172, Aji G.I.D.C., Aji Industrial Area Phase-II, Rajkot – 360 003 (hereinafter referred to as "the appellant") filed the present appeal against the Order-in-Original No. 07/D/AC/2016-17 dated 15.06.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise Division-I, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. Brief facts of the case are that the appellant utilized credit of Education Cess and Secondary & Higher Secondary Education cess towards payment of basic excise duty in violation of the provisions of Rule 3(7)(b) of the Cenvat Credit Rules, 2004 and thereby short-paid Central Excise duty of Rs. 1,83,043/-. The SCN No. V.84(4)-28/MP/D/15-16 dated 18.02.2016 proposed recovery of Central Excise duty of Rs. 1,83,043/- under Section 11A of the Central Excise Act, 1944 readwith Rule 8 of the Central Excise Rules, 2002 alongwith interest under Section 11AA of the Act and imposition of penalty under Rule 8(3A) of the Rules. The lower adjudicating authority, vide impugned order, confirmed demand of Central Excise duty alongwith interest and also imposed penalty @ 1% per month of the defaulted amount under Rule 8(3A) of the Rules.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal, *interalia,* on the grounds that the impugned order failed to discuss the changes brought into by the Budget-2015 and he decided the case on the basis of old provisions, which are legally not sustainable; that the fact of genuineness of credit of cess is not disputed; that it is a fact on record that once the levy of education cess and SHE cess is taken away, the provisions of Cenvat Credit Rules, 2004 restricting the utilization of cenvat credit of cesses becomes redundant or non practicable; that by keeping this provision alive, there would be cascading effect as the unutilized credit of cess(es) will be added to the cost and there would be levy of tax again on tax, which is against the spirit of Cenvat Credit Rules, 2004; that the appellant relied on decisions in the case of British Airways PLC – 2002 (139) ELT 6 (SC); GTC Industries Ltd. – 2008 (12) STR 468 (Tri.-LB); that the said proviso to Rule 3(7) of the Cenvat Credit Rules, 2004 became *ultra vires*; that the appellant also relied on decision in the case of Zenith Spinners – 2015 (326) ELT 97 (Guj.) in this regard; that the cenvat credit rightfully earned cannot lapse as held in Madhusudan Industries Ltd. – 2014 (309) ELT 54 (Guj.), Omkar Textile Mills Pvt. Ltd. – 2010 (262) ELT 115 (Guj.), S.V. Business Pvt. Ltd. – 2007 (220) ELT 443 (Tri – Mumbai); that the above discussions were not considered while passing the impugned order; that the validity of these decisions have been brushed aside simply by saying that the Cenvat Credit Rules framed are very lucid; that such a literal interpretation of rules which defeat the intention of law makers is not viable; that such interpretation of rules was valid until the announcement of Budget-

2015; that once the levy of both the cesses is withdrawn, the question of utilization and restrictions put thereupon also becomes redundant as it will lead to lapse of credit validly earned; that the appellant relied on decision in the case of Srikumar Agencies – 2008 (232) ELT 577 (SC) and submitted that the case laws cited by the appellant are to be discussed and distinguished while passing the order; that the intention of Government is not to take away the right acquired legally in form of accumulated Cenvat credit; that the appellant also relied on decision in the case of Sardara Singh – 2008-TIOL-160-SC-NDPS; that since the credit in respect of cesses cannot be utilized after the announcement of Budget-2015, Government has issued Notification No. 12/2015-CE(NT) dated 30.04.2015 and Notification No. 22/2015-CE(NT) dated 29.10.2015, which state that the Cenvat credit availed on these two cesses can be utilized in payment of excise duty or service tax; that the decision in the case of PSL Ltd. – 2014 (312) ELT 245 (Tri-Bang.) relied upon in the impugned order pertains to year 2014 i.e. before the announcement of Budget, 2015 which has changed the entire scenario; that impugned order has also imposed penalty under Rule 8(3A) of the Central Excise Rules, 2002, however no reasons have been assigned to impose penalty under this rule; that the penalty under this rule is imposable if the assessee "fails" to pay duty; that it has not been alleged that the assessee has not paid the duty; that there was not any "non-payment or failure to pay the duty", rather the duty was paid, however it was paid on improper manner, the penalty cannot be imposed; that there is no malafide intention to evade duty or to suppress facts from the department as there was balance of around 60 lacs in the basic excise duty; that the appellant relied on decisions in the case of Sanjiv Fabrics – 2010 (258) ELT 465 (SC), UT Ltd. – 2007 (207) ELT 27 (P&H), Kamal Kapoor – 2007 (5) STR 251 (P&H), Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC), J.R. Fabrics – 2009 (238) ELT 209 (P&H), Thirumala Alloys Castings – 2009 (238) ELT 226 (Mad) and K.P. Pouches – 2008 (228) ELT 31 (Del.)

4. Personal hearing in the matter was held 03.07.2017 which was attended to by Shri K. M. Purohit, Advocate who reiterated Grounds of Appeal and submitted a written submission dated 03.07.2017 emphasizing that the unutilized credit of cess should be allowed to be used for payment of central excise duty in view of examples of demonetization where the Government has given proper time to utilize or exchange demonetized currencies and repeal of major indirect taxes where the Government has given way to carry forward balance credit as on 30.06.2017 to be utilized for GST payment liabilities. He relied on the decisions in the case of Natco Pharma Limited – 2011 (274) ELT 438 (T), Peerless Co. – (1987) 1 SCC 424, Hyderabad Asbestos Cement Products Ltd. – 1987 (32) ELT 28 (A.P.).

FINDINGS:

5. I have carefully gone through the facts of the case, impugned order, grounds of appeals and submissions made by the appellant. I find that the issue to be decided in the present appeal is that whether the impugned order confirming recovery of central excise duty for the months of Feb-2015 & May-2015, though paid from credit of CESS account is correct or not, and whether imposing penalty under Rule 8(3A) of the Central Excise Rules, 2002 on the appellant, is proper or otherwise.

6. The lower adjudicating authority vide impugned order held that the proviso of Rule 3(7)(b) of Cenvat Credit Rules, 2004 is clear wherein it has been specified that the Education Cess can be utilized for payment of Education Cess and S&Hsc. Education Cess can be utilized for payment of S&Hsc. Education Cess only and that any deviation in this aspect would tantamount to violation of Central Excise Act and Rules framed thereunder. I would like to reproduce Rule 3(7)(b) of Cenvat Credit Rules, 2004, substituted by, Notification No. 13/2005-CE(NT) dated 01.03.2005 and Notification No. 27/2007-CE(NT) dated 12.05.2007, which reads as under:-

"3(7)(b) : CENVAT credit in respect of -

(i) .....;

(ii) .....;

(iii) the education cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

(iiia) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(iv) .....;

(v) .....;

(vi) the education cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(vii) .....

shall be utilised towards payment of duty of excise or as the case may be, of service tax leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 or the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), or the education cess on excisable goods leviable under section 91 read with section 93 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education

Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007) or the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003), or the education cess on taxable services leviable under section 91 read with section 95 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007), or the additional duty of excise leviable under section 85 of the Finance Act, 2005 (18 of 2005) ***respectively,*** *on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves, if such inputs are removed as such or after being partially processed or on any output service :*

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."*

(Emphasis supplied)

6.1 I find that 1st and 2nd proviso to Rule 3(7)(b) of the Cenvat Credit Rules, 2004 clearly provide that credit of Education Cess and credit of S&Hsc. Education Cess on excisable goods/taxable services can be utilized for payment of Education Cess and S&Hsc. Education Cess only on excisable goods/taxable services. The proviso to Rule 3(7)(b) of the Rules *ibid*, were not amended or rescinded by the Central Government till Cenvat Credit Rules, 2004 was in force. Therefore, the contention of the appellant that the said interpretation of rules was valid until the announcement of Budget-2015 only and not after is not correct. The contention that once the levy of both the cesses is withdrawn, the question of utilization and restrictions put thereupon have also become redundant, appears incorrect conclusions. It is well-settled principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and not in any other manner. The reading of the provisions of Rule 3(7)(b) of the Cenvat Credit Rules, 2004, reveals that the wordings used there in is very clear and there is no reason to read the said provision in any other manner to conclude that the appellant is entitled to utilize accumulated credit of Education Cess and S&Hsc. Education Cess towards payment of central excise duty after budgetary changes made in 2015. Therefore, I find that the arguments of the appellant are devoid of merits.

6.2 The Central Government vide Notification No. 14/2015-CE and Notification No. 15/2015-2015-CE, both dated 01.03.2015 exempted all goods from

whole of the Education Cess and S&Hsc. Education Cess leviable thereon. The Central Government issued Notification No. 12/2015-CE (NT) dated 30.04.2015, which reads as under:-

> *2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, in sub-rule (7), in clause (b), after the second proviso, the following shall be substituted, namely :-*
>
> *"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 ;*
>
> *Provided also that the credit of balance fifty per cent. Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final product in the financial year 2014-15 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act ;*
>
> *Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacturer of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act.".*
>
> (Emphasis supplied)

6.3 CBEC vide letter D.O. F.No. 334/5/2015-TRU dated 30.04.2015, has also clarified that:-

> (1) Rule 3(7)(b) of the CCR, 2004 has been amended so as to allow utilisation of credit of Education Cess and Secondary & Higher Education Cess for payment of basic excise duty in the following situations :
>
> a. Education Cess and Secondary & Higher Education Cess on inputs or capital goods **received in** the factory of manufacture of final product on or after the 1st day of March, 2015;
>
> b. Balance 50% Education Cess and Secondary & Higher Education Cess on capital goods **received in** the factory of manufacture of final product in the financial year 2014-15; and
>
> c. Education Cess and Secondary & Higher Education Cess on input services **received by** the manufacturer of final product on or after the 1st day of March, 2015.
>
> (Emphasis supplied)

6.3.1 In view of above, the appellant contention that accumulated Education Cess and S&Hsc. Education Cess on inputs received in the factory of manufacture of final products even before 01.03.2015 can also be used for payment of basic excise duty after 01.03.2015 is legally not correct/tenable.

6.4 The Hon'ble Bombay High Court in the case of *Greatship (India) Pvt. Ltd.* v. *Commissioner of Service Tax, Mumbai-I*, 2015 (39) S.T.R. 754 (Bom.) on the principle of interpretation of Taxing statutes observed as :

> *"34. It would thus appear that it is settled position of law that in taxing statute, the Courts have to adhere to literal interpretation. At first instance, the Court is required to examine the language of the statute and make an attempt to derive its natural meaning. The Court interpreting the statute should not proceed to add the words which are not found in the statute. It is equally settled that if the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. It is further settled that an equitable construction, is not admissible in a taxing statute, where the Courts can simply adhere to the words of the statute. It is equally settled that a taxing statute is required to be strictly construed. Common sense approach, equity, logic, ethics and morality have no role to play while interpreting the taxing statute. It is equally settled that nothing is to be read in, nothing is to be implied and one is required to look fairly at the language used and nothing more and nothing less. No doubt, there are certain judgments of the Apex Court which also holds that resort to purposive construction would be permissible in certain situation. However, it has been held that the same can be done in the limited type of cases where the Court finds that the language used is so obscure which would give two different meanings, one leading to the workability of the Act and another to absurdity."*

6.5 The Hon'ble Apex Court has already settled legal position that the law must be interpreted the way it is stated and conditions must be followed.

DHARAMENDRA TEXTILE PROCESSORS – 2008 (231) ELT 3 (S.C.)

> *Interpretation of statutes - Principles therefor - Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous - A statute is an edict of the legislature - Language employed in statute is determinative factor of legislative intent.*

PARMESHWAR SUBRAMANI 2009 (242) ELT 162 (S.C.)

> *Interpretation of statutes - Legislative intention - No scope for court to undertake exercise to read something into provisions which the legislature in its wisdom consciously omitted - Intention of legislature to be gathered from language used where the language is clear - Enlarging scope of legislation or legislative intention not the duty of Court when language of provision is plain - Court cannot rewrite legislation as it has no power to legislate - Courts cannot add words to a statute or read words into it which are not there - Court cannot correct or make assumed deficiency when words*

are clear and unambiguous - Courts to decide what the law is and not what it should be - Courts to adopt construction which will carry out obvious intention of legislature.

6.6 The Hon'ble Bombay High Court has also decided that hardship can't brought to interpret the rules/law differently.

NICHOLAS PIRAMAL (INDIA) LTD. - 2009 (244) E.L.T. 321 (Bom.)

Interpretation of statutes - Hardship, relevance in construction of rule - Hardship cannot result in giving a go-by to language of the rule and making rule superfluous - Assessee to represent to rule making authority pointing out defects - Court in the guise of interpretation cannot take upon task legislative function - Difficulties in few cases cannot result in departing from normal rule of construction. - The rule must ordinarily be read in its literal sense unless it gives rise to an ambiguity or absurd results

Statutory provisions - Rules when not absurd or unjust - Not possible for Legislature to conceive every possible difficulty - Provision or rule can occasion hardship to a few, that cannot result in rule being considered as absurd or manifestly unjust. - Hardship or breaking down of the rule even if it happens in some cases by itself does not make the rule bad unless the rule itself cannot be made operative.

7. The appellant has relied on a decision in the case of British Airways PLC – 2002 (139) ELT 6 (SC), however, I find that in this case, the Hon'ble Apex Court decided whether penalty under Section 116 of Customs Act, 1962 would be imposable upon the carrier of the conveyance or not, which is not the case here. The Hon'ble CESTAT (Larger Bench), Mumbai in the case of GTC Industries Ltd. – 2008 (12) STR 468 (Tri.-LB) decided whether the services provided by the outdoor caterers in the canteen of the manufacturer is input service, in respect of which credit can be taken by the manufacturer; the decision in the case of Zenith Spinners – 2015 (326) ELT 97 (Guj.) whereby the Hon'ble High Court of Gujarat, held Notification No. 10/2004-CE(NT) dated 03.06.2004 issued under Rule 19 of Central Excise Rules, 2002, *ultra-vires*, wherein it has been prescribed that goods must be exported under bond if manufactured from goods procured duty free under Notification No. 43/2001-C.E(NT) dated 26.06.2001, which are distinguishable on facts and circumstances of the present case. The decision of Hon'ble High Court of Gujarat in the case of Madhusudan Industries Limited – 2014 (309) ELT 54 (Guj.) dealt with the issue of utilization of accumulated money credit. The decision of Hon'ble High Court of Gujarat, Ahmedabad in the case of Omkar Textile Mills Pvt. Ltd. – 2010 (262) ELT 115 (Guj.) and the decision of Hon'ble CESTAT, Mumbai in the case of S.V. Business Pvt. Ltd. – 2007 (220) ELT 443 (Tri.-Mum.), ordered that deemed credit earned by the appellant before withdrawal of deemed credit scheme, could not lapse. The appellant has also relied on decision in the case of Srikumar Agencies – 2008 (232) ELT 577 (SC) wherein Hon'ble Apex Court decided whether the printing on the package is merely incidental or primary. The above referred decisions, relied upon by the appellant carry different facts and circumstances and therefore, ratio of the said decisions cannot be made applicable. I

also find that in the decision in the case of Srikumar Agencies *ibid*, held as under:-

> *"4. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.*

7.1 In view of the aforesaid facts, I find that the appellant cannot utilize credit of Education Cess and S&Hsc. Education Cess accumulated before 01.03.2015, towards payment of central excise duty on excisable goods as per provisions of Rule 3(7)(b) of the Rules *ibid*.

8. The wrong utilization of credit of Education cesses towards payment of duty resulted into short payment of duty as held in the impugned order and hence the appellant is liable for penal action under Rule 8 (3A) of the Central Excise Rules, 2002. I find that the Central Government substituted the provisions of Rule 8(3A) of the Central Excise Rules, 2002 vide Notification No. 19/2014-CE(NT) dated 11.07.2014, which reads as under:-

> *"(3A) If the assessee fails to pay the duty declared as payable by him in the return within a period of one month from the due date, then the assessee is liable to pay the penalty at the rate of one per cent on such amount of the duty not paid, for each month or part thereof calculated from the due date, for the period during which such failure continues."*
>
> (emphasis supplied)

8.1 The provisions of Rule 8(3A) of Central Excise Rules, 2002, referred above, states that in the event of failure of payment of duty within a period of one month from the due date, then the assessee is liable to pay the penalty @ 1% on such amount of the duty not paid, for each month or part thereof calculated from the due date. Since the appellant has wrongly utilized credit of Education Cess & S&H Education Cess towards payment of duty, the same cannot be validated and the same tantamount to short payment of Central Excise duty payable for the months under reference. Therefore, the appellant rendered themselves liable for penal action under Rule 8(3A) of the Central Excise Rules, 2002 and accordingly, I uphold the impugned order.