



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



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan, रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या Appeal / File No.	मूल आदेश सं / O.O. No.	दिनांक / Date
	V2/233 /RAJ/2016	04/ADC/PV/2016-17	26.07.2016

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

RAJ-EXCUS-000-APP-139-2017-18

आदेश का दिनांक / Date of Order:	11.12.2017	जारी करने की तारीख / Date of issue:	12.12.2017
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग) अथवा आयुक्त/संयुक्त आयुक्त/उप-आयुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क, राजकोट / जयजयपुर / गान्धीधाम) द्वारा उपरोक्तित जारी मूल आदेश से स्थित /
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 Appellants & Respondent :-**
M/s. Raviraj Infraprojects Pvt. Ltd., 304-307, Shopping Point, Digjam CircleJamnagar
Khambhaliya Road,Jamnagar

इस आदेश(अपील) से व्यभिक्त 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 अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 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) विशेष न्यायालय से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जाती 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 पैरिग्राफ 1(a) में बताया गए अपील के अलावा बीच सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टम) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामली भवन असावा अहमदाबाद- 380016 को की जाती चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमनवली, 2001, के नियम 6 के अन्तर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रॉज असावा की रॉज और असावा सेवा शुल्क, तथा 5 लाख या उससे कम, 5 लाख तथा 50 लाख तथा तक असावा 50 लाख तथा से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये असावा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक बैंक के बैंक द्वाारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। भुगतान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपया 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) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमनवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ वित्त आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (इनमें से एक प्रति प्रमाणित होती चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की रॉज असावा की रॉज और असावा सेवा शुल्क, तथा 5 लाख या उससे कम, 5 लाख तथा 50 लाख तथा तक असावा 50 लाख तथा से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये असावा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक बैंक के बैंक द्वाारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। भुगतान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपया 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 अन्तर्गत दाये की गई अपील, सेल्वर विधायनी, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T. 7 में की जा सकती एवं उसके साथ अनुबन्ध, केन्द्रीय उत्पाद शुल्क अध्याय अनुबन्ध (अपील), केन्द्रीय उत्पाद शुल्क द्वारा परिणत आदेश की प्रतियाँ संलग्न की (उपरोक्त में एक प्रति प्रस्तुतित होनी चाहिए) और अनुबन्ध द्वारा सहायक अनुबन्ध अध्याय अनुबन्ध, केन्द्रीय उत्पाद शुल्क सेल्वर, को अपीलकर्ता न्यायाधिकारण को आदेश दान 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
 - (ii) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेल्वर अपीलार्थी प्राधिकरण (सेल्वर) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35ए के अन्तर्गत, जो कि वित्तीय अधिनियम, 1994 की धारा 83 के अन्तर्गत सेल्वर को भी लागू की गई है, द्वारा आदेश के प्रति अपीलार्थी प्राधिकरण में अपील करने समय उत्पाद शुल्कवासी कर आय के 10 प्रतिशत (10%), जब आय एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अन्तर्गत जमा कि जाने वाली अपीलित टैक्स यदि टैक्स क्रेडिट बना से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेल्वर के अन्तर्गत 'जमा किए गए शुल्क' में निम्न शामिल है:
 - (i) धारा 11 डी के अन्तर्गत टैक्स
 - (ii) सेल्वर जमा की गई गई मात्रा (रहित)
 - (iii) सेल्वर जमा विधायनी के नियम 6 के अन्तर्गत टैक्स टैक्स
 - बशर्ते यह कि इस धारा के प्राधान्य वित्तीय (नं. 2) अधिनियम 2014 के अन्तर्गत में पूर्व किसी अपीलार्थी प्राधिकारी के द्वारा विचारार्थीन स्थगन अर्जी एवं अपील को लागू नहीं होवे। / 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.
- भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
- (C) इस आदेश की पुनरीक्षण प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35EE के अन्तर्गत भ्रम, त्रुटि, भ्रम, सरकारी, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, गणतंत्र विभाग, शही अड्डा, जीवन टॉप अवन, सड़क नम्बर, 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 में भंडार गृह के परामर्श के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परामर्श 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 भारत के निर्यात में प्रयुक्त कच्चे माल पर अभी नई 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) सुविधागत उत्पाद के उत्पादन शुल्क के अन्तर्गत के लिए जो इच्छा है कि इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और (ए) आदेश जो अनुबन्ध (अपील) के द्वारा वित्त अधिनियम (नं. 2) 1995 की धारा 109 के द्वारा निर्यात की गई मालिक अध्याय न्यायाधिकारण पर या बाद में परिणत 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, 1995
 - (v) उपरोक्त आवेदन की दो प्रतियां फॉर्म नम्बर EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) विधायनी, 2001, के नियम 9 के अन्तर्गत निर्दिष्ट है, इस आदेश के संश्लेष के 3 महीने के अन्तर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की (अपील) के साथ के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
 - (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम है 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 इन में किया जाना चाहिए; इस (अपील) के होते हुए भी की विश्व पट्टी कच्चे से कच्चे के लिए परामर्शित अपीलार्थी न्यायाधिकारण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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 exceeding Rs. 1 lakh fee of Rs. 100/- for each
 - (E) न्यायाधिकारण न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अन्तर्गत मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपए का न्यायालय शुल्क टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended
 - (F) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेल्वर अपीलार्थी न्यायाधिकारण (अपील) विधायनी, 1982 में उचित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले विभागों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
 - (G) उपर्युक्त अपीलार्थी को अपील टिकट करने में संबंधित विभाग, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Raviraj Infraprojects Private Limited, 304-307, Shopping Point, Digjam Circle, Jamnagar – Khambhaliya High-way, Jamnagar (hereinafter referred to as "appellant") filed present appeal against the Order-in-Original No. 4/ADC/PV/2016-17 dated 26.07.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. Briefly stated the facts of the case are that the appellant is a service provider and they availed cenvat credit on imported capital goods and also claimed depreciation under Section 32 of Income Tax Act, 1961 for the duty portion involved in the said capital goods. SCN No. V.ST/AR-IV/Div-JMN/ADC(SS)187/2014-15 dated 15.12.2014 proposed recovery of wrongly availed cenvat credit of Rs. 21,13,182/- under Rule 14 of Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004") read with proviso to Section 73(1) of Finance Act, 1994 (hereinafter referred to as "the Act"), recovery of interest under Rule 14 of CCR, 2004 read with Section 75 of the Act; imposition of penalty under Rule 15 of CCR, 2004 read with Section 78 of the Act. The adjudicating authority, vide impugned order, confirmed demand of Rs. 21,13,182/- along with interest and also imposed penalty of Rs. 42,26,364/- under Rule 15 of CCR, 2004 read with Section 78 of the Act.

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

(i) The lower adjudicating authority has simply relied on the allegations leveled in the SCN and has not independently examined the issue. The lower adjudicating authority has violated principles of natural justice by passing the impugned order without affording sufficient opportunity of being heard to them. Thus, the impugned order being a non-speaking order has been passed in gross violation of principles of equity, fair play and natural justice. The appellant relied on decisions of Hon'ble Apex Court in the case of Cyril Lasardo (Dead) reported as 2004 (7) SCC 431 and Shukla & Brothers reported as 2010 (254) ELT 6 (SC).

(ii) The findings of the lower adjudicating authority that the appellant has never disclosed the fact that they have availed cenvat credit of CVD paid on capital goods to the jurisdictional service tax authorities is incorrect and perverse. The appellant submitted that they have not suppressed any material fact from the department; that they have been filing periodical statutory ST-3 returns and when the primary facts are within the knowledge of the department, the appellant is not under obligation to disclose legal inferences which may be drawn from primary facts; that there is no column in ST-3 return

to disclose categories of the capital goods, etc. The department was aware about the details of cenvat credit taken by the appellant and cannot allege suppression on the part of the appellant. It is well settled that when the return does not prescribe for disclosure of certain particulars, the non-disclosure of the same cannot amount to 'concealment'. The appellant relied on following decisions, in support of this submission.

- P.K. Kochammu Amma – 1981 (1) SCC 241
- Mutiah Chettiar – CIT – 1969 (1) SCC 675
- Calcutta Discount Co. – 1961 (41) ITR 191 (SC)
- Special Coatings & Lamination Ltd. – 2007 (209) ELT 477
- Apex Electricals – 1992 (61) ELT 413 (Guj.)
- Unique Resin Industries – 1995 (75) ELT 861 (T)
- Gufic Pharma – 1996 (85) ELT 67 (T) – Affirmed by Supreme Court
reported as 1997(93) ELT A 186
- Continental Foundation – 2007 (216) ELT 177 (SC)
- Dynamic Industries Ltd. – 2014 (35) STR 674 (Guj.)

(iii) Rule 15 of CCR, 2004 contains different clauses for imposition of penalty depending on the circumstances of each case. However, in the present case no specific clause of Rule 15 of CCR, 2004 is invoked by the service tax authorities. In such a case, the appellant is not put to exact nature of violation of statutory provisions as alleged in SCN. In that case penalty under Rule 15 of CCR, 2004 is not imposable. The appellant relied on decision of Hon'ble Supreme Court in the case of Amrit Foods reported as 2005 (190) ELT 433 (SC).

(iv) The appellant has provided all details as and when desired by the department and the appellant at no point of time had intention to evade service tax or suppressed any fact willfully from the knowledge of the department. The appellant relied on following decisions and submitted that the information is available on record, no suppression can be alleged on the assessee.

- Suvikram Plastex Pvt. Ltd. – 2008 (225) ELT 282 (T)
- Rallis India Ltd. – 2006 (201) ELT 429 (T)
- Patton Ltd. – 2006 (206) ELT 496 (T)
- Satguru Engineering & Consultants Pvt. Ltd. – 2006 (203) ELT 492 (T)
- Indian Hume Pipes Co. Ltd. – 2004(163) ELT 273 (T)

(v) Penalty under Section 78 of the Act can be imposed only if the assessee suppress any information from the department, however, the appellant has not suppressed any fact with intent to evade payment of service tax. Therefore, penalty under Section 78 of the Act cannot be imposed in the present case. Reliance is placed on judgment of Hon'ble Supreme Court in the cases of Akbar Badruddin Jiwani – 1990 (47) ELT 161 (SC), Pushpam Pharmaceuticals Company – 1995 (78) ELT 401 (SC) and Chemphar Drugs and Liniments – 1989 (40) ELT 276 (SC).

(vi) There being no suppression, penalty under Section 78 is not applicable as none of the five conditions for imposition of penalty under Section 78 are applicable. There is no fraud, collusion, willful mis-statement, suppression or contravention of the provisions of Finance Act, 1994 with intent to evade payment of duty in the present case.

(vii) Section 80 of the Act provides that no penalty shall be imposed on the assessee for any failure referred to in Section 76, Section 77 or Section 78 of the Act, if the appellant proves that there was reasonable cause for the said failure. Thus, the act statutorily provides for waiver of penalty. In the present case, there was a bonafide belief on part of the appellant that cenvat credit of capital goods have been correctly availed by them and the appellant still believes the same. Hence, in terms of Section 80 of the Act, penalties cannot be imposed. The appellant relied on following case-laws: -

- ETA Engineering Ltd. – 2004 (174) ELT 19 (Tri. - LB)
- Flyingman Air Courier Pvt. Ltd. – 2004 (170) ELT 417 (Tri. - Delhi)
- Star Neon Singh – 2002 (141) ELT 770 (Tri. - Delhi)
- Avian Overseas Pvt. Ltd. – Final Order No. A-103/KOL/09 dated 06.03.2009.
- Varsana Ispat Ltd. – 2010 (19) STR 359 (Tri. – Ahmd.)

(viii) It is a settled principle of law that in cases where the original demand is not sustainable, interest cannot be levied.

4. Personal hearing in the matter was attended to by Shri Gursharansingh H. Virk, Advocate, who reiterated Grounds of Appeal and emphasized that SCN was first time received by them on 23.02.2016 and no P.H. Notice prior to 12.04.2016 has been received by them; that on 19.04.2016 they responded by a reply letter requesting for 4 weeks for proper reply, which was not accepted and another P.H. notice dated 21.04.2016 issued/received by them also in May, 2016, but impugned order was passed without actual P.H. and in haste without giving them fair opportunities to present their case; that they requested for remanding the case back as they have also not yet been provided relied upon document i.e. Final Audit Report No. D-559/2012-13 dated 16.02.2013 and Annexures thereto.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the written as well as oral submissions of the appellant. The issue to be decided in the present appeal is whether in the facts and circumstance of the case, the impugned order passed by the lower adjudicating authority confirming recovery of wrongly availed cenvat credit on capital goods along with interest under Rule 14 of CCR, 2004 read with proviso to Section 73(1) of the Act and Section 75 of the Act and imposition of penalty under Rule 15 of CCR, 2004 read with Section 78 of the Act is proper or not.

6. The appellant has contended that the lower adjudicating authority has violated principles of natural justice by passing the impugned order without affording sufficient opportunity of being heard to the appellant and that the impugned order being a non-speaking order has been passed in gross violation of principles of equity, fair play and natural justice. The Advocate appeared for personal hearing has also submitted that SCN was first time received by them on 23.02.2016 and impugned order has been passed without holding actual P.H. and without giving them fair opportunities to present their case. I have given due consideration to this plea raised by the appellant and facts have been verified from the lower adjudicating authority and the department. I find that the appellant has received copy of SCN on 16.11.2015. The scanned image of acknowledgment receipt dated 16.11.2015 duly signed by the Authorized signatory of the appellant, received from the department, is reproduced as under for ease of reference.

ACKNOWLEDGEMENT

I, the undersigned, hereby acknowledge the receipt of Show Cause Notice No. M-STAX-2007-114/400(SS)/167/2014-15 dated 15.12.2014 issued by the Additional Commissioner, Central Excise, Rajkot on behalf of M/s. Raviraj Infra Project Pvt. Ltd., Jammagar through the Superintendent, AR-1, Service Tax, Jammagar.

Raviraj Infra Project Pvt. Ltd.

Place - JAMNAGAR
Date - 16.11.2015

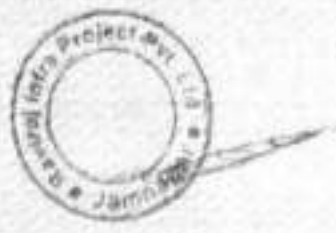
Authorized Signatory

6.1 As regard to opportunities of personal hearing, I find that the lower adjudicating authority has granted as many as 7 opportunities of personal hearing vide letters dated 05.01.2016, 16.02.2016, 04.03.2016, 22.03.2016, 12.04.2016, 21.04.2016 and 05.07.2016. The department has forwarded copy of written acknowledgement in token of having received department's letters dated 04.03.2016 on 09.03.2016, letter dated 22.03.2016 on 29.03.2016 and letter dated 21.04.2016 on 26.04.2016 and this fact clearly indicates that the appellant was provided with sufficient opportunities of personal hearing. Therefore, the argument of the appellant on this count is totally devoid of merits. The scanned image of all these written acknowledgement is reproduced as under for ease of reference: -

(i) Acknowledgement dated 09.03.2016:

ACKNOWLEDGEMENT

I the undersigned, hereby acknowledge further copy of Personal Hearing Letter F No. V.ST/15-173/Adj/2014 dated 04.03.2016 issued by the Superintendent (Adj), Central Excise Service Tax, Rajkot received through Superintendent, Service Tax AR-I, Jamnagar.


 Authorized Signatory


Date: 09.03.2016

(ii) Acknowledgement dated 29.03.2016:

[Handwritten signature]

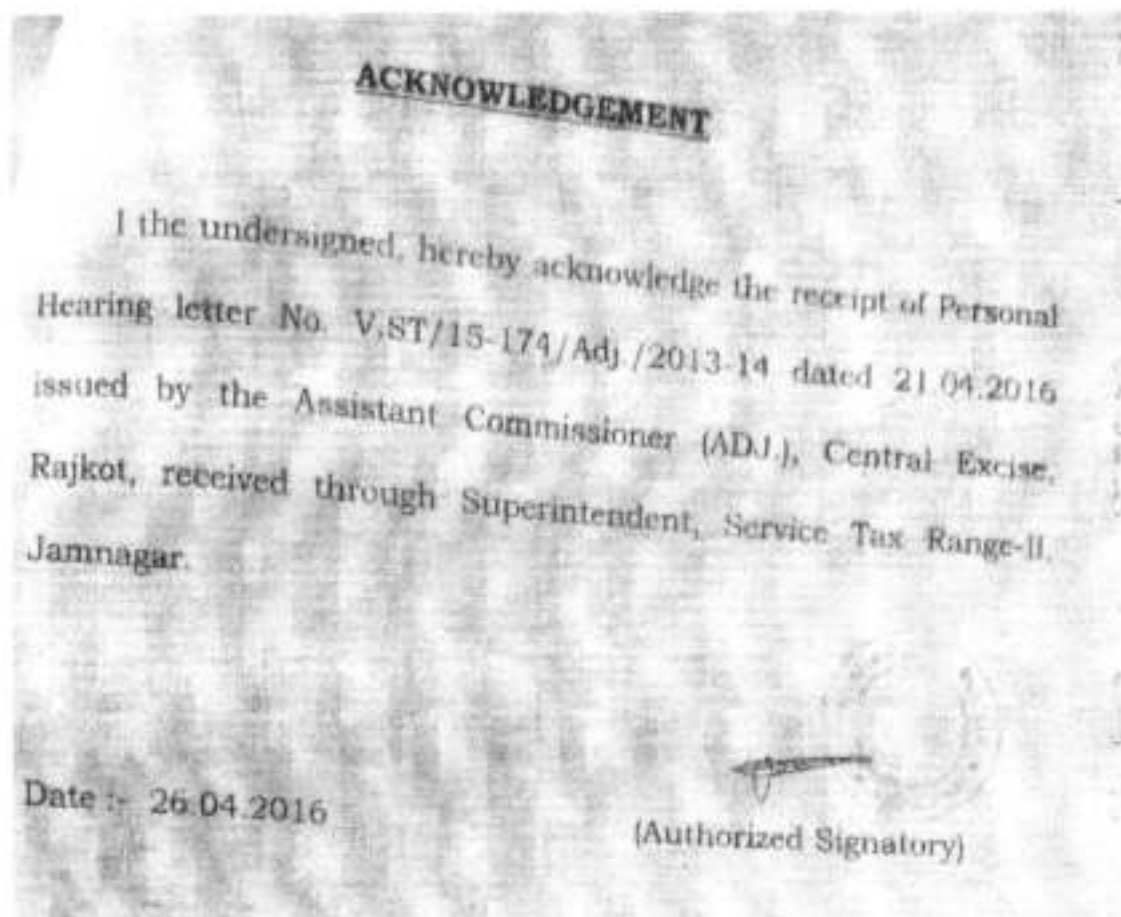
ACKNOWLEDGEMENT

I the undersigned, hereby acknowledge the receipt of Personal hearing letter F. No. V.ST/15-174/Adj/2013 dated 22.03.2016 issued by the Assistant Commissioner (Adj), Central Excise, Rajkot received through Superintendent, Service Tax AR-I, Jamnagar.


 Authorized Signatory with stamp

Date: 29/03/2016

(iii) Acknowledgement dated 26.04.2016:



6.2 The appellant has also contended that they had not been provided relied upon document i.e. Final Audit Report No. D-559/2012-13 dated 16.02.2013 and Annexures thereto. I find no substance in this argument. I find that copy of Final Audit Report No. D-559/2012-13 dated 16.02.2013 was forwarded to the appellant by the jurisdictional Range Superintendent under his letter dated 26.03.2013 which was acknowledged by Shri Amit N. Khakharia. Though the recipient of the letter has inadvertently put date of receipt as 03.04.2012 on the body of the said letter, it is required to be read as 03.04.2013 as he can't receive letter before date of letter which is 26.03.2013. The scanned image of letter dated 26.03.2013 is reproduced on next page -

OFFICE OF THE SUPERINTENDENT OF SERVICE TAX

PRITAM CHAMBERS, OPP. M. SHAH MEDICAL COLLEGE,
JAMNAGAR

PHONE NO. 0285 264113

F.No. AR-ST/JAM/DAT 0147/11

FAX: 0285 2150883

Date: 26.03.2012

BY REGISTERED POST A/D

To:

M/s. Raviraj Infraproject Pvt. Ltd.,
Jamnagar

Gentlemen,

With FAR No. D-359/2012-13 in respect of M/s. Raviraj Infraproject Pvt.
Ltd., Jamnagar - Mreg

Please find enclosed herewith copy of FAR No. D-359/2012-13, dated
16.02.2012 with reference to the audit conducted of your unit on 05.03.2012 and
20.04.2012 covering the period from 2007-08 to 2011-12.

You are requested to pay the short payment paid amount as pointed out in
Revenue Para 01 to 05 at the earliest.

As regards Other Revenue Para, you are requested to provide the following
details of the 10 sub-contractors appearing in the said para:

1. Full Name, Address & Contact No. of the firm & concerned person
2. PAN Details
3. Bank Account Number & Bank Name in which payment is being credited by
you.

Please ensure that the compliance of this letter is received by this office
within 15 days of receipt of this letter.

End: As above.

Yours sincerely,

[Signature]
Superintendent
AR-Service Tax, Jamnagar

Copy submitted to:

The Assistant Commissioner, Service Tax Division, Rajkot.

E:\Raviraj Infraproject\letter\party-264113.doc

[Signature]
26/03/2012
AMIT N. Khatkhatiy

[Signature]

7. The appellant contended that they have not suppressed any material facts from the department as they have been filing periodical statutory ST-3 returns; that the primary facts are within the knowledge of the department, the appellant is not under obligation to disclose legal inferences which may be drawn from primary facts; that there is no column in ST-3 return to disclose categories of the capital goods, etc.; that the department was aware about the details of cenvat credit taken by the appellant and cannot allege suppression on the part of the appellant; that when the return does not prescribe for disclosure of certain particulars, the non-disclosure of the same cannot amount to 'concealment'. I find that in the instant case, the appellant had availed cenvat credit of capital goods on 05.11.2010 and has simultaneously claimed depreciation of capital

goods for the amount representing Central Excise duty involved on these capital goods, which is in clear contravention of Rule 4(4) of CCR, 2004. The appellant has not produced any evidence that the fact of claiming of depreciation was in knowledge of the department as they have never declared the said facts to the department. I find that such act of wrong availment of cenvat credit unearthed at the instance of audit only and therefore the argument of the appellant does not hold any field. The appellant has contravened Rule 4(4) of CCR, 2004 by availing cenvat credit on capital goods and simultaneous availment of depreciation representing central excise duty, under Income Tax Act, 1961 and has suppressed the fact with the department with intent to evade payment of service tax. Hence, I hold that cenvat credit of Rs. 21,13,182/- so fraudulently availed by them is required to be recovered from them under Rule 14 of CCR, 2004 by invoking extended period under proviso to Section 73(1) of the Act. Needless to say, wrongly availed cenvat credit is required to be recovered along with interest under Section 75 of the Act and I order so.

8. The appellant has contended that Section 80 of the Act provides for waiver of penalty as there was a bonafide belief on part of the appellant that cenvat credit of capital goods have been correctly availed by them. I find that language employed in Rule 4(4) of CCR, 2004 is very clear and unambiguous. The said rule provides that cenvat credit on capital goods shall not be allowed in respect of that part of value of capital goods which represents the amount of duty on such capital goods, which the service provider of output service claimed as depreciation under Section 32 of Income Tax Act, 1961. Section 80 of the Act can be invoked only when the appellant is able to prove that there was reasonable cause for failure on their part. In the present case, the appellant has not provided any justified and acceptable reason for availment of cenvat credit of duty paid on capital goods for which depreciation had also been claimed. If they have got any doubt regarding the availment of cenvat credit, they could have inquired from the service tax department, for any clarification which was not done by them. They had suppressed the vital fact of claiming depreciation for Central Excise duty on capital goods right from beginning with intent to evade payment of tax. Thus, the malafide intention of the appellant is proved beyond doubt and therefore the provisions of section 80 cannot be invoked in this case. I rely on the Order passed by the Hon'ble CESTAT, Chennai, in the case of TVS Motor Co. Ltd. reported as 2012 (28) S.T.R. 127 (Tri. - Chennai), which held as under:

"13. So far as ground of no penalty advanced by learned counsel is concerned there is nothing on record to show that the appellant avoided its liability bona fide when it is an established business concern with vast experience in application of provisions of Finance Act, 1994. Its returns did not disclose bona fide omission. Rather facts suggest that knowable breach of law made the appellant to suffer adjudication. Accordingly, no immunity from penalty is possible to be granted on the plea of tax compliances made which was found to be a case no payment of tax on the impugned services provided during the relevant period."

8.1 Considering the facts of the case and evidences available on record, I hold that the present case does not merit invoking of provisions of Section 80. I, therefore, reject the contention being devoid of merits.

9. The lower adjudicating authority has imposed penalty under Rule 15 of CCR, 2004 read with Section 78 of the Act. I find that in a case where cenvat credit has been taken or utilized wrongly by suppression of facts or contravention of any of the provisions of Finance Act with intent to evade payment of service tax, penalty is imposable under Rule 15(3) of CCR, 2004, which reads as under: -

"In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilized wrongly by reason of fraud, collusion or any 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 intent to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of section 78 of the Finance Act."

(Emphasis supplied)

9.1 I would also like to reproduce Section 78 of Finance Act, 1994, which reads as under: -

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 thereunder 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 :

(Emphasis supplied)

9.2 Thus, it is clear that where cenvat credit on capital goods has been taken or utilized wrongly by reason of suppression of facts or contravention of the provisions of the Finance Act and the rules made there under with intent to evade payment of Service Tax, the provider of output service is liable to be imposed penalty in terms of Section 78 of the Finance Act. In the instant case, the appellant had availed cenvat credit on capital goods on 05.11.2010 and submitted many returns from November, 2010 onwards but they never declared that they had claimed depreciation of amount representing central excise duty to the department nor they reversed amount of wrongly availed cenvat credit on their own. The facts came to the knowledge of the department only in February, 2013 when audit was undertaken by the department. The burden of proof that cenvat credit is admissible lies upon the appellant. Therefore, I am of the considered view that the appellant has suppressed the fact of claiming of depreciation of the amount, which represented cenvat credit availed or utilized wrongly by them, with intent to evade payment of service tax. In such circumstances, imposition of penalty under proviso to Section 78(1) of the Act on the ground that the appellant has suppressed the facts that they have also claimed depreciation under Section 32 of Income Tax Act, 1961 (43 of 1961), is in consonance with the provisions of Rule 15(3) of Cenvat Credit Rules.

9.3 I hold that the appellant has evaded payment of Service Tax by way of suppression of facts and hence invocation of extended period under proviso to Section 73(1) of the Act is justified and appellant has rendered themselves liable for imposition of penalty under Section 78 of the Act. My views are supported by the judgments of Hon'ble Supreme Court in the cases of Dharmendra Textile Processors [2008 (231) ELT 3 (SC)] and Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)], which have been rendered in the context of Section 11AC of Central Excise Act, 1944 but the ratio is applicable to Section 78 of the Act and hence, in the present case also. Accordingly, I hold that equal mandatory penalty is imposable under Section 78 of the Act. However, I find that the lower adjudicating authority has imposed penalty which is twice the amount of cenvat credit ordered for recovery, which is not lawful. I find that mandatory penalty equal to amount of cenvat credit only can be imposed under Rule 15 of CCR, 2004 read with Section 78 of the Act. Therefore, I reduce penalty to the extent of Rs. 21,13,182/- in place of penalty of Rs. 42,26,364/- imposed by the lower adjudicating authority.

10. In view of the above factual and legal position, I uphold the impugned order but reduce penalty under Section 78 of the Act to Rs. 21,13,182/-, as discussed in Para 9.3 above.

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

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

(कुमार संतोष)
11/12/2012
आयुक्त (अपील्स)

By Regd. Post AD

To,

M/s. Raviraj Infraprojects Private Limited,
304-307, Shopping Point,
Digjam Circle,
Jamnagar - Khambhaliya High-way,
Jamnagar

मे. रविराज इन्फ्राप्रोजेक्ट्स प्रा. लिमिटेड,
३०४ - ३०७, शॉपिंग पॉइंट,
दिग्जाम सर्कल,
जामनगर - खंभलिया हाइ-वे,
जामनगर

Copy for information and necessary action to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information.
- 2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
- 3) The Deputy Commissioner, GST & Central Excise Division, Jamnagar.
- 4) Guard File.