O/O THE PRINCIPAL COMMISSIONER (APPEALS), CGST & CENTRAL EXCISE [illegible]

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[illegible]

अपील फाइल संख्या / Appeal File No.	मूल आदेश सं. / O.I.O. No.	दिनांक / Date:
V2/569/BVR/2017 [illegible]	[illegible] 2017-18	19-12-2017
V2/570/BVR/2017 [illegible]	[illegible] 2017-18	20-12-2017
V2/571/BVR/2017 [illegible]	[illegible] 2017-18	[illegible]

[illegible] Order-In-Appeal No.):

BHV-EXCUS-000-APP-023-TO-025-2019

आदेश का दिनांक / Date of Order:	31.01.2019	जारी करने की तारीख / Date of issue:	04.02.2019

कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

ग [illegible]

[illegible] Gujarat [illegible]

घ [illegible] Name & Address of the Appellants & Respondent :-

M/s Gujarat Pipavav Port Limited, Pipavav-Uchhaiya Tal Rajula, Amreli.

[illegible]

(A) [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

(B) [illegible]

:: ORDER IN APPEAL ::

M/s. Gujarat Pipavav Port Limited, Pipavav, Uchchaiya, Ta. – Rajula, Dist. – Amreli (hereinafter referred to as 'appellant') has filed following three appeals against Orders in Originals as shown below (hereinafter referred to as 'impugned order') passed by the Superintendent, Central GST Division, Bhavnagar-III (hereinafter referred to as 'lower adjudicating authority').

S. No	Appeal No	Order-in-Original No & Date	Period	Cenvat credit disallowed (Rs.)
1	569/BVR/2017	5/SUP/CGST/BVR-3/DIV/2017-18 dated 19.12.2017	October, 2009 to March, 2010	2,48,134
2	570/BVR/2017	6/SUP/CGST/BVR-3/DIV/2017-18 dated 20.12.2017	April, 2010 to March, 2011	3,24,302
3	571/BVR/2017	4/SUP/CGST/BVR-3/DIV/2017-18 dated 18.12.2017	April, 2008 to September, 2009	2,67,225

2. The brief facts of the cases are that the appellant was issued 3 demand notices alleging that they have availed cenvat credit of service tax paid on 'Rent-a-cab' service and 'catering service' during the financial years 2008-09 to 2010-11 on the ground that these services were not used by them directly or indirectly in or in relation to providing output services and these services did not fall within the purview of definition of 'input service' under Rule 2(l) of Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004'). Three show cause-cum-demand notices dated 14.10.2010, 5.1.2011 and 4.10.2011 were issued to the appellant for recovery of cenvat credit aggregating to Rs. 8,40,574/- by invoking extended period along with interest under Rule 14 of Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004') read with Section 73/75 of Finance Act, 1994 (hereinafter referred to as "Act") and for imposing penalty under Rule 15(3) of CCR, 2004 read with Section 76/78 of the Act. The impugned orders allowed cenvat credit of service tax of Rs. 913/- on catering service, however, confirmed recovery of cenvat credit of service tax on rent-a-cab service along with interest as proposed in SCNs and imposed penalty equivalent to cenvat credit of service tax availed on rent-a-cab service, under Rule 15(3) of CCR, 2004 read with Section 78 of the Act.

3. Being aggrieved by the impugned orders, the appellant preferred the present appeals, interalia, on the following grounds:

(i) The appellant requested for condonation of delay in filing appeals in view of Section 85(3A) of the Act since the impugned orders received on 26.12.2017 were misplaced due to shifting of appellant's premises at new location.

(ii) The appellant submitted that Commissioner (Appeals), Rajkot has already passed Order-in-Appeal No. RAJ-EXCUS-000-APP-55-2017-18 dated 1.12.2017 in favour of the appellant in similar matter for the financial years 2005-06 to 2008-09 before passing of the impugned orders by the lower adjudicating authority; that the lower adjudicating authority has completely ignored this submission made by the appellant during the personal hearing and the lower adjudicating authority has not bothered to check status of the matter which is against the provision of law and well settled principle that the order passed by the higher authorities or appellant authorities are binding on the adjudicating authority. The appellant relied on decision in the case of E I Dupont India Pvt. Ltd. reported as 2014-VIL-10-GUJ-CE and CBEC Circular F.No. 201/??/2014-CX.6 dated 26.6.2014 to substantiate their contention.

(iii) The SCNs were issued on the ground that the rent-a-cab service was mainly used for administrative staff and not related to input service, whereas the impugned orders have been passed on new ground that the services are provided outside port premises i.e. beyond place of removal and hence not eligible. It has been consistently held by the Courts of Law that an order travelling beyond SCN should be treated as bad in law and should be quashed. The appellant relied on decisions in the case of Consolidated Petrotech Ind. Reported as 2000 (123) ELT 919 (Mum. CEGAT), Gravure Arts reported as 2000 (117) ELT 855 (Mumbai CESTAT) and Manak Chemicals reported as 2000 (118) ELT 686 (New Delhi CESTAT). Further, the restriction in the definition of input service is applicable to the manufacturers of the excisable goods and not to the providers of output services and hence, the impugned orders are passed on wrong ground.

(iv) The term 'input service' is defined under Rule 2(l) of CCR, 2004 to mean any service used by a provider of taxable service for providing output service. Therefore any services which are used by a service provider for providing output service should be treated as input service. The appellant relied on following decisions to say that the terms 'includes' and 'such as' are illustrative in nature and are not an exhaustive in nature and the respective services are not required to be specifically stated in CCR, 2004 so long as the same falls within the definition of input service related to business operation.

- Gramophone Co. of India – 1981 (92) ELT 247
- ITC Ltd. – 2009-TIOL-1169-CESTAT-BANG.
- Coca Cola India Pvt. Ltd. – 2009-VIL-06-HC-BOM-ST
- High Land Coffee Works – 1991 (3) SCC 617
- Good Year India Ltd. – 1997 (95) ELT 450
- All India Federation of Tax Practitioners – 2007-TIOL-148-SC-ST
- GTC Industries Ltd. – 2008 (12) STR 468 (Tri. - LB)
- Deloitte Tax Services India Pvt Ltd. – 2008 (11) STR 266 (Tri. – Bang.)

[signature] Page 4 of 10

(v) The port is located in a remote area where necessary public transportation facilities are not easily available to travel from city or residential area to the port; that the port is spread in wide area and hence the same facilities are required to commute within port; that the said services are provided to all employees; that the facilities are also available to Customs officers as well as to company's executive traveling from the Airport/Railway station to port and the above facility is not limited to the administrative staff only; that it is necessary to provide travelling facilities since the same is very crucial to operate the business efficiently and without availing this service, the respondent will not be able to operate and provide port services in a smooth manner. The respondent relied on the following case-laws:

- Cable Corporation of India Ltd. – 2008- TIOL-1190-CESTAT-MUM
- J.K. Cements – 2009-TIOL-411-CESTAT-DEL
- Mundra Port & Special Economic Zone Ltd. – 2009 (13) STR 178 (Tri.-Ahmd.)
- Haldyn Glass Gujarat Ltd. – 2009-TIOL-378-CESTAT-AHM
- Hindustan Coca Cola Beverages (P) Ltd. – 2010 (18) STR 57 (Tri. – Bang.)
- Dr. Reddy's Lab – 2010 (19) STR 71 (Tri. – Bang.)
- Caliber Point Business Solutions Ltd. – 2010 (19) STR 737 (Tri. – Mumbai)
- HEG Ltd. – 2010 (18) STR 448 (Tri. – Del.)
- Bombay Dyeg. & Castings Ltd. – 2009 (16) STR 708 (Tri. – Del.)
- J.K. Cement Works – 2006 (4) STR 538 (Tri. – Del.)
- Steezr Toyotetsu India Pvt. Ltd. – 2009 (14) STR 310

(vi) The appellant submitted that in order to invoke the extended period of limitation under proviso to Section 73(1) of the Act, there has to be suppression of facts on their part and such suppression of facts should be made by them with intent to evade payment of service tax. The appellant relied on decision in the case of Lubri Chem Industries Limited reported as 1994 (73) ELT 257 (SC) in support of their this contention. It was submitted that the appellant files ST-3 returns wherein details of cenvat credit availed and utilized are appropriately disclosed by them that in order to meet specified by the Board for disclosing the availment and utilization of cenvat credit. Hence, there is no deliberate violation of the provisions and hence, the impugned orders should be quashed.

(vii) The cenvat credit availed on rent-a-cab service was not utilized by the appellant, since the appellant had huge cenvat credit in balance. Since cenvat credit was not utilized by the appellant, no interest is recoverable on availment of cenvat credit under Rule 14 of CCR, 2004. The appellant relied on decisions in the case of Bombay Dyg. & Mfg. Co. Ltd. reported as 2007-TIOL-1758-CESTAT-MUM, Dr. Reddy's Laboratories Ltd. reported as 2007-TIOL-1934-CESTAT-MUM and Ind-Swift Laboratories Ltd. reported as 2009 (240) ELT 328 (P&H).

(viii) The penalty under Rule 15(3) of CCR, 2004 read with Section 78 of the Act can be imposed in a case where cenvat credit on input service has been taken or utilised wrongly by reason of suppression of facts or contravention of the Act or Rules framed thereunder with intent to evade payment of service tax. Further the element of mens rea or malafide intention must be necessarily present in order to justify imposition of penalty. The appellant relied on

decision in the case of Hindustan Steel Ltd. reported at 1978 (2) ELT J159 and submitted that no penalty can be imposed on the appellants on the ground that they failed to pay service tax under the Act. In the present case, CENVAT credit availed on input service is a matter of interpretation of law and therefore, penalty is not justified as held by CESTAT in following cases:

- Electrolux Kelvinator – 2002 ([illegible]) ELT [illegible] (Tri.)
- Punjab Worsted Spg. Mills – 2004 ([illegible]) ELT [illegible] (Tri.)
- Samtel India – 2001 (136) ELT 1009 (Tri.)
- BNK Parts – 2002 (145) ELT [illegible] (Tri. - SMB)

4. Personal hearing in the matter was attended to by Ms. Anni Majumdar, Chartered Accountant, who reiterated the grounds of all three appeals and submitted that all three appeals involve issue of cenvat credit on rent-a-cab service; that OIA dated 5.12.2017 passed by Commissioner (Appeals) on this issue in their own case is relevant and hence produced with the Appeal Memoranda; that there is no change in legal position from 2005-06 to 2008-09 to 2010-11; that the facts of these cases are also similar to the earlier cases; that these appeals have been filed after 60 days but within 90 days; that the orders received in December, 2017 were misplaced and got sent to their sister concern/accounts office in Pune and hence delay, which was requested to be condoned.

FINDINGS: -

5. I have carefully gone through the facts of the cases, the impugned orders, Appeal Memoranda and submissions made by the appellant. The issue to be decided is whether in the facts and circumstances of the present case, the impugned orders passed by the lower adjudicating authority disallowing cenvat credit of service tax paid on rent-a-cab service during the FY 2009-10 to 2010-11 is correct or not.

6. I find that the appellant has filed applications for condonation of delay in filing of appeals under Section 85 (3A) of the Act on the ground that the impugned orders received by them on 28.12.2017 got misplaced during shifting of the appellant's premises at new location and all three appeals have been filed on 27.3.2018 i.e. beyond period of 60 days but within further period of 30 days. Since the appeals have been filed within further time period of 30 days, as prescribed by the Act, I condone the delay in filing of these three appeals on account of impugned orders getting misplaced and propose to decide all three appeals on merits.

7. I find that the facts of the present cases are having identical facts to the proceedings initiated against the appellant vide SCN No. V/15-127/Dem/HQ/2008 dated 30.01.2009 and subsequent SCN No. V/15-87/Dem/HQ/2008 dated 06.10.2009 issued for the period 2005-06 to 2007-08 and the then adjudicating authority vide Orders-in-Original

No. RHV-EXCUS-000-JC-25 to 26-2016-17 dated 03.08.2016 dropped the proceedings initiated vide the said SCNs. The department then challenged the said impugned order before Commissioner (Appeals) Rajkot and Order-in-Appeal No. RHV-EXCUS-000-APP-86-2017-18 dated 1.12.2017 passed by Commissioner (Appeals), Rajkot, wherein it has been held as under:

> *"6 I find that the definition of 'input service' under Rule 2(l) of Rules, 2004, is in two parts. Clauses (i) and (ii) of Rule 2(l) cover the 'service provider' and the 'manufacturer' respectively. The present case relates to output service provider. I would like to reproduce the definition of 'input service' under Rule 2(l) of CCR, 2004 as it was prevailing at the material time, so far as it may relevant for service provider, which reads as under -*
>
> *(i) 'input service' means any service -*
>
> *(ii) used by a provider of taxable service for providing an output service, or*
>
> *(iii) .....*
>
> *and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coasting and pricing, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.*
>
> *(Emphasis supplied)*
>
> *6.1 It could be seen from the above definition that the expression 'any service' if read with 'used by a provider of taxable service for providing an output service' in clause (ii) of Rule 2(l) of the Rules, 2004 has widened the scope of 'input service' in respect of output service provider. Thus, it is clear that any service used by a service provider for providing an output service and includes services used in activities relating to business, is an 'input service' for the service provider. It is well-settled that literal interpretation would prevail, where the plain words of statute are clear and unambiguous.*
>
> *6.2 The department has contended that port o cch services have been used by the respondent for commuting between various place outside port area and not in the port area and therefore, these cannot be considered to be availed in connection with manufacture or business and upto the place of removal hence, cannot be considered as an input service. The respondent has countered this argument that the term 'input service' is defined under Rule 2(l) of CCR, 2004 to mean any service used by a provider of taxable service for providing output service and that any services which are used by a service provider for providing output service should be treated as input service. It has also been contended by the respondent that travelling facilities is very crucial to operate the*

business efficiently, and without availing the service, the respondent cannot operate and cannot provide port services in a smooth manner. I find that the respondent is a service provider providing port services and rent a cab services have been used for transportation of their officials from city to port and work spot to provide their taxable services i.e. port services without which they cannot efficiently carry out their business. The definition of 'input service' does not contain that the services must have been used within the place of removal by the provider of taxable service. I find that Hon'ble High Court of Punjab & Haryana in the case of Maruti Suzuki India Limited reported as 2017 (49) STR 261 (P&H) dismissed department appeal involving identical grounds. The relevant parts of the said decision are reproduced as under: -

> *Cenvat credit - Availment of - Rent-a-Cab services used by executives of assessee for travelling for business meetings, visits to dealerships, visits to vendor sites, dealers meet, business promotion activities, vehicles launch, conferences, etc. - HELD: This expenditure was related to business as it was incurred to promote sales and for efficient running of business. Hence, assessee was entitled to avail Cenvat credit of Service Tax paid thereon - Rule 2 of Cenvat Credit Rules, 2004.*
>
> *2. The appeal was admitted for consideration of the following substantial questions of law arising out of the order dated 14-5-2015 passed by the Customs Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi (for the short 'the Tribunal') in Excise Appeal Nos. 3614-3615 of 2012 pertaining to the assessement years 2009-10 and 2010-11:*
>
> *"ii. Whether the respondent can avail Cenvat credit on account of Service Tax paid on Manpower Keeping Services and Rent-a-Cab Services by treating the same as input services?*
>
> *... ... ...*
>
> *.... ....*
>
> *24. Similarly, the Rent-a-Cab services used by the executives of the respondent for the purpose of travelling required for business meetings, visits to the dealerships, visits to the vendor sites, dealers meet, business promotion activities, vehicles launch, conferences, etc. is a an expenditure in relation to business being incurred by the respondent in order to promote the sales and for efficient running of the business for which they are entitled to avail Cenvat credit.*
>
> *(Emphasis supplied)*
>
> ...
>
> ....

5.4. The Hon'ble CESTAT, New Delhi in the case of HCL Technologies Limited reported as 2015 (40) STR 1124 (Tri. – Delhi) held as under:

> *4. The learned counsel for appellants urged that the refund has been wrongly denied. The disputed period is from October, 2010 to December, 2010. Cenvat credit of Rs. 78,462/- on Rent-a-Cab services has been denied stating the reason that the same has*

on nexus with the provision of output services. It is seen observed by the authorities below that Rent-a-Cab and four operator were used by a particular person/project though on a regular basis and that vehicles are used in the night also. The learned counsel, Ms. Sakili Das, appearing for the appellants explained that appellants are a BPO Company and these services are availed for the purposes of transportation of its employees in and from the workplace and their homes and also for business meetings. Further, that for the safety of lady employees the vehicles are used and plied in the night also. The appellants being a BPO Company the odd working hours and transportation employees, especially the lady employees is a service necessary and indispensable for the activities in which the Company is engaged. The amendment brought forth in the definition of input services w.e.f. 1.4.2011 excludes Rent-a-Cab services. But the department vide Circular No. 943/04/2011-CX, dated 29-4-2011 has clarified that the credit on such services shall be available if the provision had been completed before 1.4.2011. According to the appellants the credit was availed for the period October, 2010 to December, 2010. They also relied upon the judgments rendered in CCE, Bangalore v. Bell Ceramics - 2012 (25) S.T.R. 128 (Kar.), CCE, Bangalore v. Siemens Transcreu India (P) Ltd - 2011 (23) S.T.R. 444 (Kar.) and KPMG v. CCE, New Delhi - 2014 (33) S.T.R. 98 (Tri.-Del.). The learned DR reiterated the findings in the impugned order and contended that credit cannot be availed as these services have no nexus with the output services. On hearing the submissions and perusal of records, the instant case stands covered by the decisions rendered in the above judgments which are held in favour of the assessee. The requirement for availing credit is that the input service must be used for providing the output service. The appellants being a BPO, where the employees have to work in shifts even during night hours, I cannot agree with the view of the authorities below that the such services have no nexus with the output services provided. The refund on these services is allowed.

(Emphasis supplied)

6.5 In view of above factual and legal position, I find no reason to interfere with the findings of the lower adjudicating authority allowing cenvat credit of service tax paid on rent a cab services under Rule 2(l) of CCR, 2004 and therefore, I uphold the impugned order and reject the appeal.

6. I find that in present cases also, the appellant has used rent-a-cab services for transportation of their officials from city to port and within port to enable them to provide their taxable services i.e. port services and without use of this service the appellant cannot efficiently carry out their business. I also find that the definition of input service does not say that the services must be used within the place of removal by the provider of taxable output service. I also find that there is no change in the definition of 'input service' during the period 2005-06 to 2010-11 and therefore, I hold that the rent-a-cab services correctly fall within the ambit of input service as defined

under Rule 9(1) of CCR, 2004 and hence, the appellant is eligible for cenvat credit of service tax paid on rent-a-cab services availed by them during the impugned period.

8. In view of above, I set aside the impugned orders and allow appeals filed by the appellant.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeals filed by the appellant are disposed off in above terms.

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By Speed post

To,

M/s. Gujarat Pipavav Port Ltd.,
Pipavav, Uchhaiya,
Tal. – Rajula,
Dist. – Amreli

मे. गुजरात पिपावाव पोर्ट लिमिटेड,
पिपावाव, उचैया,
तालुका – राजुला,
जिल्ला – अमरेली

Copy to:

1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information please.
2) The Commissioner, CGST & Central Excise, Bhavnagar Commissionerate, Bhavnagar for necessary action.
3) The Assistant Commissioner, Central GST Division, Bhavnagar-II, for necessary action.
4) The Superintendent, Central GST Division, Bhavnagar-II, for necessary action.
5) Guard File.