::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर 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 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/ 110 & 111/RAJ/2019	**03 & 04/ADC-RKC/Sub-Commr/2019-20**	**29/05/2019**

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

RAJ-EXCUS-000-APP-057-TO-58-2020

आदेश का दिनांक / Date of Order:	**29.04.2020**	जारी करने की तारीख / Date of issue:	**29.04.2020**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, 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/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants** & Respondent :-

M/s Gujarat NRE Coke Ltd, Village- Dharampur, Taluka: Jam Khambhalia, Jamnagar-361140.

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

(A) सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की 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 क्रमश: 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 सार्वजिनक 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 dutydemand/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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 क्रमश: 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 सार्वजिनक 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,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 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 Commissionerauthorizing 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" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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 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 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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-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 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 ::

The present two appeals have been filed by **M/s Gujarat NRE Coke Ltd,** (*hereinafter referred to as* "Appellant") against Orders-in-Original as detailed in Table below (hereinafter referred to as 'impugned orders') passed by the Additional Commissioner of Central GST & Central Excise, Rajkot (hereinafter referred to as adjudicating authority'):-

Sr. No.	Appeal No.	OIO No.	OIO Date
1	V2/110/RAJ/2019	03 & 4 /ADC-RKC/ Sub-Commr/2019-20	29.05.2019
2	V2/111/RAJ/2019	03 & 4 /ADC-RKC/ Sub-Commr/2019-20	29.05.2019

2. Briefly stated facts of the case are that during the course of audit it was observed that the appellant was recipient of certain taxable services viz. GTA, Rent-a-cab, Work contracts, Manpower Recruitment/Supply Agency, etc. being Public Limited Company, the appellant was liable to discharge service tax liability as a recipient of taxable services as specified in Notification No. 30/2012-ST, as amended. Further, as provided under explanation to Rule 3(4) of Cenvat Credit Rules, 2004, the said payment is required to be made only through GAR-7 challan without utilizing cenvat credit. However, the appellant during the period from **December-2013 to September-2014** have not made service tax payment liable for reverse charge payment through GAR-7 challan but made the same from their cenvat credit accounts. Further, the appellant had taken the credit on such service tax paid immediately in their cenvat credit account in the next month, which is in violation of proviso to Rule 4(7) read with Rule 9(1)(e) of Cenvat Credit Rules, 2004. The said observation led into issuance of two Show Cause Notices both dated 20.01.2015 for recovery of service tax amounting to Rs. 19,98,733/- under Section 73 of the Finance Act, 1994 alongwith interest under Section 75 and for imposition of penalty under Section 76 of the Finance Act, 1994; as well as recovery of wrongly availed cenvat credit amounting to Rs. 18,57,591/- alongwith interest under Rule 14 and imposition of penalty under Rule 15 of Cenvat Credit Rules, 2004. The demands were confirmed by the adjudicating authority vide Order-in-Original No. 03/ADC/PV/2015-16 & 04/ADC/PV/2015-16 both dated 28.04.2015. Being aggrieved, the appellant preferred an appeal before Commissioner (Appeal) Rajkot who upheld the orders of the adjudicating authority. Thereafter, the appellant preferred an appeal before CESTAT, Ahmedabad. CESTAT vide order dated 04.01.2018 remanded the matter back, to the adjudicating authority to examine the eligibility to pay service tax on reverse charge mechanism under Notification No. 30/2012, in detail to reconsider the issues afresh. In *de novo* adjudication, the adjudicating authority vide impugned orders confirmed

the demand of service tax alongwith interest and penalty and also disallowed the wrongly availed cenvat credit and ordered to recover the same alongwith interest and penalty.

3. Aggrieved, the Appellant preferred these appeals on various grounds, as under:

(i) that Adjudicating authority has failed to take cognizance of the fact that appellant, before visit of Audit Team to its premises on 06.10.2014, had already informed the jurisdictional authorities vide its letter dated 28.01.2014 that it had started to make payment of service tax by utilizing Cenvat Credit with effect from December-2013 in view of judicial rulings of Hon'ble High Court of Punjab & Haryana in the case of Nahar Industrial Enterprise and Hon'ble High Court of Himachal Pradesh in the case of Deepak Spinners Limited and that they would avail cenvat credit as per Rule 7 of Cenvat Credit Rules, 2004. In fact, the above letter dated 28.01.2014 of appellant has been acknowledged in the SCN and also in the impugned orders. However, while discussing the findings, the adjudicating authority has conveniently overlooked the same in gross violation of principles of natural justice. The dispute could have been solved long before audit, had the Department objected at the material time after receipt of its letter dated 28.01.2014 that payment of Service Tax on reverse charge method on services received by it, was required to be paid through GAR-7 only as recipient of service. The allegation of the adjudicating authority that appellant has willfully failed to discharge service tax liability by not paying in cash in terms of Explanation to Rule 3(4) of the Cenvat Credit Rules, 2004 is not only erroneous but also unwarranted and unjustified. In fact, adjudicating authority has failed to maintain judicial discipline by not discussing the correspondence exchanged with the appellant on the disputed issue in his findings. Therefore, the present orders deserve to be set aside on this ground alone.

(ii) That the explanation to Rule 3(4) of the Cenvat Credit Rules, 2004 was inserted in the said Rules vide Notification No. 28/2012-CE (NT) dated 20.06.2012. However, even before insertion of this explanation, manufacturers were denied utilization of Cenvat credit for payment of GTA and other services by the department in many cases. Few of such cases were also contested before different High Courts either by assessee or by the department and the same were allowed in favour of assesses. The appellant cited following decisions in support of their contention.

- Nahar Industrial Enterprises Ltd. – 2012 (25) STR 129 (P&H)
- Cheran Spinners Limited – 2014 (33) STR 148 (Mad.)
- Deepak Spinners Limited – 2013 (32) STR 531 (H.P.)

(iii) That the entire exercise is revenue neutral in as much as if it had paid service tax on GTA etc. services in cash, in that case also it was also always entitled to take credit of such payment in the Cenvat Credit account after making payment through GAR-7 or else it could have applied for refund of such credit under Rule 5B if it was not possible to utilize the same. It is not a case that by making payment of service tax from Cenvat Credit account it has gained any extra undue or illegal monetary benefit. Therefore, even if department's allegation is considered to be true for sake of argument, even then at the most, it can be said to be a procedural lapse, especially when appellant had informed the jurisdictional authorities about utilization of cenvat credit for payment of service tax at the material time. It is not a case that no service tax was paid by appellant and the same was demanded from it. The appellant further clarified that since certain provisions made/amended by Notification No. 28/2012-CE(NT) are not in tune with settled principles of law it has already challenged the vires of the said notification before the Hon'ble High Court of Calcutta by preferring an application under Article 226 of the Constitution of India and the same being WP No. 1689 (W) of 2015 is presently pending before the Hon'ble Court.

(iv) That the action of the adjudicating authority on one hand to order recovery of service tax under Section 73(1) of the Finance Act, 1994 by holding that it was non-recovered as the same was not paid through GAR-7 and on the other hand to order recovery of Cenvat Credit of Service Tax paid on certain services under Rule 14 of Cenvat Credit Rules, 2004 amounts to double recovery. It can be inferred from the above that appellant is directed to make cash payment of service tax alongwith interest on one hand and is further directed to pay the amount alongwith interest towards wrong availment of Cenvat credit on the other hand.

(v) That it was alleged in the SCN that the appellant has not discharged liability of paying service tax in terms of Rule 3(4) of the Cenvat Credit Rules, 2004 but the department in the notice did not subscribe any reason for proposing penalty on it under Section 76. In the present case there is no short payment of service tax as due amount of such tax was paid from Cenvat Credit at the material time. Even if payment was made from wrong account, it remains a fact that due amount of service tax was paid. It has consistently been held by higher appellate forum that in such cases where any assessee has erred in following the provisions of law under reasonable bonafide belief, penalty cannot be imposed under Section 76 of the Finance Act, 1994. In support of their contention, the appellant placed reliance on following decisions.

- Rishi Shipping – 2014 (33) STR 595 (Tri-Ahmd.)
- S.R. Gupta & Sons – 2012 (27) STR 501 (Tri-Del.)

- Ess Engineering – 2010 (20) STR 669 (Tri-Del.)

(vi) That the appellant had availed Cenvat credit based on invoices of service provider. It was not a matter of dispute that it has received service under proper invoice which is a specified document under Rule 9(1)(f) of the Cenvat Credit Rules, 2004. The payment of service tax is made by way of debit from Cenvat Credit account, therefore it cannot be said that they have availed Cenvat credit without making payment of service tax. Thus, there was no violation of any provisions not to speak of proviso to sub-rule (7) of Rule 4 of the Cenvat Credit Rules, 2004. In a similar situation, when the dispute arised at supplier's end about payment of Central Excise duty, demand was always raised against the supplier/manufacturer and no cenvat credit was denied at buyers end. When duty is paid by the supplier/manufacturer, it automatically become good.

(vii) That the impugned order imposing penalty under Rule 15(1) of the Cenvat Credit Rules, 2004 is erroneous in as much as adjudicating authority has failed to take cognizance of the fact that appellant had availed Cenvat credit with bonafide belief and before visit of the Audit Team to its premises. In any case matter is of interpretation of provisions and also when divergent views are prevailing, no penalty is imposable. The appellant placed reliance on following decisions.

- Infosys Limited – 2015 (37) STR 862 (Tri-Bang.)
- SRF Limited – 2014 (36) STR 830 (Tri-Del.)
- BSNL – 2014 (36) STR 445 (Tri-Del.)

4. Personal hearing was attended by Shri P.D. Rachchh, Advocate on behalf of the appellant. He reiterated the Grounds of Appeal for consideration and requested to drop the proceedings.

5. I find that the present appeals have been filed by the Appellant on 30.08.2019 whereas the impugned order issued on 29.05.2019 shown to have been received on 07.06.2019 by the appellant in their Appeal Memorandum, which clearly established that the appellant has filed these appeals after 84 days from the date of receipt of order. I further find that these appeals have been filed beyond the stipulated period of sixty days from the date of receipt of the impugned order. The appellate authority has in terms of Section 35 of the Central Excise Act, 1944, power to condone delay in filing appeal for a further period of thirty days, if sufficient cause has been submitted. Since the grounds shown by the appellant for delay in filing appeals are justified and the delay is within the stipulated time period of further thirty days, I condone the delay in filing these appeals in terms of Section 35 of the Central Excise Act, 1944 read with Section 85 of the Finance Act, 1994.

6. I have carefully gone through the facts of the case, the impugned orders, the Appeal Memoranda and submissions made by the Appellants. The issue to be decided is whether the Appellants correctly discharged service tax liability from Cenvat credit account on services availed as recipient of service and whether the Appellants were eligible to avail Cenvat credit on such debit made in Cenvat credit or not.

7. On going through the records, I find that the Appellants had availed GTA Service, Rent-a-Cab Service, Manpower Recruitment and Supply Agency Service etc on which service tax was to be discharged by the service recipient in terms of Notification No. 30/2012-ST dated 20.6.2012. I find that the Appellants had utilized Cenvat credit for discharge of their service tax liability on said services and again availed Cenvat credit thereof in their Cenvat account. The adjudicating authority confirmed service tax demand on the said services on the ground that the Appellants cannot utilize Cenvat credit for discharge of their service tax liability in view of explanation to Rule 3(4) of CCR,2004.

8. I find that receipt of GTA Service, Rent-a-Cab Service, Manpower Recruitment and Supply Agency Service etc by the Appellants and liability to pay service tax by the Appellants on reverse charge mechanism in terms of Notification No. 30/2012-ST dated 20.6.2012, are not under dispute. I find that an explanation was inserted in Rule 3(4) of CCR, 2004 w.e.f. 1.7.2012 vide Notification No. 28/2012-CE(NT) dated 20.6.2012, which reads as under:

> "Explanation - CENVAT credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient."

8.1 The above explanation makes it clear that the service tax cannot be paid by utilizing Cenvat credit account in respect of services where the person liable to pay service tax is the service recipient. Therefore, only alternative left with the Appellants to discharge their service tax liability was to pay such service tax in cash only. However, the Appellants debited from Cenvat credit account and thereby contravened the provisions of Rule 3(4) *supra*, and hence, it cannot be regarded as correct discharge of service tax liability and it has to be considered as if no service tax was paid. Hence, the adjudicating authority is justified in confirming service tax demand. I, therefore, uphold confirmation of service tax demand in the impugned orders.

9. I have examined relied upon case laws of Nahar Industrial Enterprise Ltd-2012(25)STR 129, Cheran Spinners Ltd- 2014(33) STR 148 and Deepak Spinners-

2013(32) STR 531. I find that in said cases, period involved was prior to 1.7.2012 i.e. prior to insertion of explanation in Rule 3(4) of CCR, 2004 whereas in the present case, the period involved is from December, 2013 to September, 2014. Hence, said case laws are not applicable to the facts of the present case.

10. I find that the Appellants had availed Cenvat credit after debit of service tax in their Cenvat Credit account on reverse charge mechanism. The Adjudicating authority disallowed Cenvat credit availed by the Appellant in view of the provisions contained in Rule 4(7) and Rule 9(1)(e) of the Cenvat Credit Rules, 2004 and held that the Appellants had wrongly availed the amount of Cenvat credit so debited towards payment of service tax on reverse charge mechanism. I find it is pertinent to examine the provisions of Rule 4(7) and Rule 9(1)(e) of the Cenvat Credit Rules, 2004, which are reproduced as under:

"RULE 4. Conditions for allowing CENVAT credit:

(7) The CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received :

Provided that in respect of input service where whole or part of the service tax is liable to be paid by the recipient of service, credit of service tax payable by the service recipient shall be allowed after such service tax is paid :"

"RULE 9. Documents and accounts. — (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(a) ...

...

(e) a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax;"

(Emphasis supplied)

10.1 On harmonious reading of both the above provisions, it transpires that the Appellants were required to make payment of service tax in cash through challan where they were liable to pay service tax as recipient of service and on the basis of the said challan evidencing payment of service tax, they could have availed Cenvat credit. I am in agreement with the findings of adjudicating authority that by utilizing Cenvat credit for discharge for their service tax liability on reverse charge mechanism and again availing Cenvat credit of such debit of service tax, the

Appellants had contravened the provisions of Rule 4(7) and Rule 9(1)(e) of the Cenvat Credit Rules, 2004 *supra* and that the appellants wrongly availed Cenvat credit of service tax and the same was required to be recovered from them. I, therefore, uphold the impugned order disallowing Cenvat credit under Rule 14 of CCR,2004.

11. The Appellants contended that entire exercise is revenue neutral inasmuch as if they had paid service tax in cash on reverse charge mechanism, they would have been eligible to avail Cenvat credit in their Cenvat credit account. I do not find any merit in the contention of the Appellants. First, they had not made payment of service tax in cash but utilized Cenvat credit in contravention of provisions of Rule 3(4) of CCR, 2004 as detailed in para *supra*. Further, when payment is not made in cash but through debit in Cenvat Credit Account, they were not eligible to avail Cenvat credit of such debits as per my findings in para *supra*. Thus, contention of the Appellants is devoid of merit and not sustainable.

12. Since the amount debited through cenvat credit account against payment of service tax where the appellant is liable to pay the service tax as service recipient and also the availment of cenvat credit, are in gross violation of the provisions contained in Cenvat Credit Rules, 2004, the appellant is required to pay the amount so confirmed by the adjudicating authority alongwith interest.

13. Regarding penalty imposed under Section 76 of the Act, I find that failure to pay service tax would attract the provisions of Section 76 of the Act and it is on record that the Appellant did not discharge their liability to pay service tax as recipient of service, as held by me in paras supra. I, therefore, uphold the penalty imposed under Section 76 of the Act.

14. Similarly, as regard to penalty imposed upon them under Rule 15(1) of Cenvat Credit Rules, 2004 for wrongly availed cenvat credit, I find that they have availed the cenvat credit which is in gross violation of Rule 4(7) read with Rule 9(1)(e) of Cenvat Credit Rules, 2004 and therefore penalty under Rule 15(1) is also imposable. The citations relied upon by the appellant as regards to penalty under Section 76 of the Finance Act, 1994 or under Rule 15 of Cenvat Credit Rules, 2004, are on different footings and cannot be applicable in the present case.

15. In view of above discussion, I uphold the impugned orders and reject the appeals.

१५.१ अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

15.1 The appeals filed by the Appellants stand disposed off in above terms.

सत्यापित

जे. एस. नाग्रेचा
अधीक्षक (अपील्स)

(Gopi Nath)
Commissioner (Appeals)

29/4/2020

By RPAD

To

M/s Gujarat NRE Coke Ltd, Village: Dharampur, Jam-Khambhalia- 361 306, Dist. Dev-Bhumi Dwarka.	मैसर्स गुजरात NRE कोक लिमिटेड, धरमपुर, जाम-खंभालिया, 361 306 , जिल्ला: देव भूमि द्वारका

Copy to:

1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
2) The Commissioner, GST & Central Excise, Rajkot for information and necessary action.
3) The Additional Commissioner, CGST Sub-Commissionerate Jamnagar for information and necessary action.
4) Guard File.
5) F. No. V2/110/RAJ/2019.