::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/305 /RAJ/2017	**56/ADC/RKC/2016-17**	**31.03.2017**

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

RAJ-EXCUS-000-APP-080-2018-19

आदेश का दिनांक / Date of Order:	**11.05.2018**	जारी करने की तारीख / Date of issue:	**14.05.2018**

Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएँ, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

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

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

1. M/s Kunal Structure (India) P. Ltd., Shop No. 7, Near Bhaktidham Temple, Opp : Atithi Apartment, Panchwati Main Road, Rajkot,

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

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त 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 असावा अहमदाबाद- ३८००१६ को की जानी 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) 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 duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अतगत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो 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, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" 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 को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर 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 outside India 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 (न॰ 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is 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 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) 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

M/s. Kunal Structure (India) Pvt. Ltd., Shop No.7, Near Bhaktidham Temple, Opposite Atithi Apartment, Panchvati Main Road, Rajkot (hereinafter referred to as "the appellant") had filed the present appeal against OIO No.56/ADC/RKC/2016-17 dated 31.03.2017 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the adjudicating authorities").

2.1 Briefly stated, the facts are that on the basis of an intelligence gathered by the DGCEI, Regional Unit, Vadodara, an inquiry was initiated against the appellant under summon proceedings on 12.06.2012. During the inquiry, it revealed that the appellant was engaged in manufacturing of Ready Mix Concrete (RMC) from their Concrete Batching Plants. Said product is classifiable under 3824.5010 of the first schedule to the Central Excise Tariff Act (CETA), 1985. It also revealed that by the Finance Act, 2011, RMC was chargeable to concessional rate of duty at 1% with no CENVAT Credit under Notification No. 01/2011 dated 01.03.2011, and w.e.f. 17.03.2012, said duty was increased to 2% with no CENVAT Credit vide Notification No. 16/2012-CE dated 17.03.2012. However, RMC has again been specifically exempted from levy of excise duty vide Notification No.12/2016-CE dated 01.03.2016. It also revealed that during the period March, 2011 to February, 2016, the appellant has manufactured & cleared RMC without obtaining Central Excise Registration, without preparing Central Excise Invoices, and without payment of Central Excise duty, leviable thereon.

2.2 Accordingly, a SCN dated 28.03.2016 was issued to the appellant proposing for demand of Central Excise Duty along with interest and proposing for imposition of penalties under Section 11AC of Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002.

2.3 It is alleged in the SCN that:-

- RMC is concrete, mixed in a stationary mixer in a central batching and mixing plant or in a truck mixer and supplied in fresh condition to the purchaser either at the site or into the purchaser's vehicle, whereas Concrete Mix is a mixture of cement, sand, gitti, and water prepared spontaneously either manually or by using machines at site;
- RMC has a longer shelf life compared to Concrete Mix and can be loaded on a truck mixer mounted on truck chassis and transported to the site of use, whereas Concrete Mix cannot be transported;
- The batching plant comprises of big, heavy, sophisticated and automated high value machineries required for manufacture of RMC, whereas Concrete Mix required low value mixing machines;
- From the examination of purchase bills and photographs of batching plants of the Appellant, it appears that the goods manufactured by the appellant are RMC and not Concrete Mix. Further, the appellant have never disputed or claimed during the investigation that their product is not RMC but is Concrete Mix;
- In view of the above, RMC and Concrete Mix are two different or dissimilar products and therefore, the benefit of exemption available to "Concrete Mix" under Sr.No.144 of the Notification No.12/2012-CE dated 17.03.2012 is not admissible to the appellant for the RMC manufactured by them. The essential ingredients for availing the benefit of Sr.No. 144 of Notification No. 12/2012-CE dated 17.03.2012 are as under:-
  a) The goods in question must be Concrete Mix falling under Chapter 38 of the first schedule to the CETA, 1985;
  b) The Concrete Mix must be manufactured at the site of construction; and
  c) The Concrete Mix must be used in construction work at the site of construction.

- In this regard, the Hon'ble Supreme Court, vide judgement dated 06.10.2015 in the case of M/s. Larsen & Toubro Ltd., held that the term "Concrete Mix" in the exemption notifications will not cover "RMC".

2.4 Statements dated 03.06.2013 & 24.09.2013 of Shri Kamlesh Domadia, General Manager of the appellant was also recorded wherein he inter alia stated that the appellant had purchased 8 Concrete Batching Plants which were used for manufacturing RMC; that in most cases, the batching plants were located at the place of construction and only in case of 4 projects, due to non-availability of land at the project site, the batching plants were located a few kilometres away; that in cases where the batching plant is located away from the project, the RMC is transported using transit mixers and the appellants prepare challans for such RMC supply.

3. The adjudicating authority confirmed the demand made in the aforesaid SCN along with interest and imposed equal penalty upon the appellant under Section 11AC of Central Excise Act, 1944, but dropped the penalty upon the appellant under Rule 25 of Central Excise Rules, 2002.

4. Feeling aggrieved, the appellant has filed the present appeal on the following grounds:-

- Concrete Mix and RMC are similar products. RMC is a type of Concrete Mix. In other words, Concrete Mix includes RMC. RMC and Concrete Mix are used interchangeably.
- Both RMC & Concrete Mix are a mixture of Cement, Sand, Stone Aggregates, and Water. Both the products are used in construction work.
- The only possible difference between Concrete Mix and RMC is the method adopted for manufacturing of both the said products. There is no difference between Concrete Mix and RMC in respect of its constituents, function and usage.
- The difference in the manufacturing process will not render the resultant products as different products. There are a number of other goods, where more than one manufacturing process is employed by the manufacturer. However, the product remains the same irrespective of the method adopted. Similarly, both the goods are charged to separate rate of duty cannot be a ground that RMC and Concrete Mix are different goods.
- RMC has again been specifically exempted from levy of excise duty vide Notification No.12/2016-CE dated 01.03.2016. The amendment dated 01.03.2016 is clarificatory in nature. The purpose of the said amendment is to clarify that the scope of the exemption under Entry No.144 of the Notification No.12/2012-CE dated 17.03.2012 covers RMC since Concrete Mix includes RMC. The said amendment clearly shows the intention of the legislature for not levying excise duty on RMC. This submission is further supported by the fact that the amended notification uses the terms "Concrete Mix or Ready-mix Concrete (RMC)" and not "Concrete Mix and Ready-mix Concrete (RMC)". The use of the word "or" and not "and" in the amended entry shows that both the words can be used interchangeably and are not mutually exclusive. Thus, any benefit available to Concrete Mix would naturally be available to RMC also. In this regard, the appellant relied upon the following judgements of higher appellate forum:-
    - Hon'ble High Court of Punjab & Hariyana in the case of CCE, Jalandhar Vs. Chief Engineer, Ranjit Sagar Dam, as reported in 2007 (217) ELT 345 (P&H);
    - M/s. Simplex Infrastructures Ltd. and others Vs. CCE, Belapur, as reported in 2007-TIOL-16-CESTAT-Mum;
    - CCE, Delhi-II Vs. M/s. Consolidated Construction Consortium Ltd., as reported in 2017 (347) ELT 295 (Tri.Del.);

- Order-in-Appeal No. PUN/EXCUS-002-APP-165-13-14 dated 15.01.2014 issued by the Commissioner (Appeals), Central Excise, Pune-II in the case of M/s. Modern Road Makers Pvt. Ltd., Kolhapur;
- Order-in-Appeal No. RPS/33/NSK/2013 dated 06.02.2013 issued by the Commissioner (Appeals), Central Excise & Customs, Nashik in the case of M/s. Ultratech Cement Ltd., Nashik;
- Order-in-Original No. 13/2012/KA/KKD-2/CEx. Dated 09.08.2012 issued by the Assistant Commissioner, Central Excise, Kakinada-II Division, Kakinada Commissionerate in the case of M/s. IVRCL Ltd., Mallavaram, Tallareva Mandal;

- It is settled law that benevolent amendments and provisions which confer benefits on taxpayers should be read retrospectively. Accordingly, the exemption benefit now give to RMC vide Notification No. 12/2016-CE dated 01.03.2016 will be available for RMC for the prior period also.
- The appellant manufactured RMC in batching plants installed at the construction site and the same is utilised in the respective construction project. Only in some construction projects, the batching plants were located a few kilometres away due to non-availability of land at the place of construction. It is not practically feasible for the appellant to set up a batching plant inside each and every premise where construction work is going on. The appellant cannot be denied the benefit of Notifications, supra, on the ground that the RMC is not manufactured at the site of construction.
- The term 'site of construction'' is to be liberally interpreted. CBEC, vide Circular No. 456/22/99-CX dated 18.05.1999 the term 'site' must be liberally interpreted and it shall include the premises where the appellate have set up the RMC plant for manufacture of RMC for use in road construction work. In this regard, the appellant relied upon some judicial pronouncements of higher appellate forum.
- Though the Hon'ble Supreme Court vide judgement dated 06.10.2015 in the case of M/s. Larsen & Toubro Ltd. held that the term "Concrete Mix" in the exemption Notifications will not cover RMC, yet the exemption notification was subsequently amended vide Notification No. 12/2016-CE dated 01.03.2016 to specifically include RMC within its ambit.
- Demand beyond normal period of limitation is not maintainable. There is nothing to show that the appellant have suppressed the fact with intention to evade payment of duty. Extended period can be invoked only if both (i) Suppression, fraud, collusion etc., and (2) intent to evade payment of duty, is proved. The burden is on the department to prove both the fact situations. The department has not discharged its burden in proving either of the fact situations. In this regard, they relied upon some judicial pronouncements of higher appellate forum.
- No mens rea can be alleged on the part of the appellant and thereby the imposition of penalty is not justifiable. The issue in the present case involved an interpretation of the provisions of law. It is settled law that the penalty cannot be imposed in such situations. In this regard, they relied upon some judicial pronouncements of higher appellate forum.

5. Personal hearing was also granted to the appellant for appearing on 23.04.2018, wherein Shri Kunal Domadia, Managing Director of the appellant and Shri Jigar Shah, Advocate appeared on behalf of the appellant and reiterated the same as mentioned in their aforesaid appeal memorandum. They also submitted that even if the case was decided against them on merits, they had a strong case on limitation; that the revenue authorities made out a case of classification of the product as RMC only after the issue was decided by Hon'ble Supreme Court

in the case of M/s. Larsen & Toubro Ltd. They also relied upon the following cases for their arguments on merit as well as limitation:-

- M/s. Anand Nishikawa Co.Ltd., as reported in 2005 (188) ELT 149 (SC);
- M/s Pushpam Pharmaceuticals Co., as reported in 1995 (78) ELT 401 (SC);
- M/s Star Entertainment Pvt. Ltd., as reported in 2015 (329) ELT 50 (Bom.);
- M/s. Lyka Labs Ltd., as reported in 2002 (148) ELT 284 (Tri. Mum.);
- M/s. Padmini Products, as reported in 1989 (43) ELT 195 (SC);
- M/s. Sujana Metal Products Ltd., as reported in 2011 (273) ELT 112 (Tri.Bang.)
- M/s. Jammu & Kashmir Cements Ltd., as reported in 2014 (314) ELT 334 (Tri.Del.);
- M/s. Tata Iron & Steel Co. Ltd., as reported in 1988 (35) ELT 605 (SC).

6. The appeal was filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017 and Board's Order No. 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Department of Revenue, CBEC, Service Tax Wing.

7. I have carefully gone through the facts of case, the grounds mentioned in the appeal and the submissions made by the appellant. The question, to be decided in the appeal, is as to whether:-

(i) The impugned product manufactured by the appellant i.e. RMC is exempted vide Notification No.12/2012-CE dated 17.03.2012 (Sr.No.144), provided to "Concrete Mix", or otherwise;

(ii) Extended period can be invoked in the present case, or otherwise;

(iii) Penalty can be imposed upon the appellant under Section 11AC of Central Excise Act, 1944, or otherwise.

8. I find that the most of the arguments put forth by the appellant including the one that "RMC is akin to Concrete Mix and exemption available to "Concrete Mix" should also be available to "RMC", has already been dealt in detail & decided by the Hon'ble Supreme Court in the case of M/s. Larsen & Toubro Ltd. Vs. CCE, Hyderabad, as reported in 2015 (324) ELT 646 by holding that "RMC" and "Concrete Mix" are two different products. I rely upon the said judgement, and once the Hon'ble Supreme Court has pronounced its judgment on this issue, all the contentions of the appellant, including reliance upon various judgments pronounced by the higher appellate forum, fall flat. Further it is also an undisputed & admitted fact that the appellant is manufacturing "RMC". Therefore, the appellants' endeavour to equate RMC with Concrete Mix is not of much avail in light of the above judgment of the Hon'ble Supreme Court.

9.1 Regarding retrospective effect, I find that it is a settled legal position that unless it is categorically mentioned in the notification, the benefit of the exemption notification cannot be accorded retrospectively. Further, if the intention of the legislature to grant retrospective exemption to RMC also, the same would have been categorically mentioned in the Notification. In absence of such provision in the notification, ibid, the benefit of exemption under said notification cannot be given to the appellant retrospectively. In this regard, I rely upon the latest judgement of Hon'ble CESTAT, Delhi in the case of CCE, Bhopal Vs. M/s. My Car (Bhopal) Pvt. Ltd., as reported in 2018-TIOL-814-CESTAT-DEL, wherein the Hon'ble CESTAT held that *"the activity of trading has come under the category of exempted service vide Notfn. 03/2011-CX(NT) dated 01.03.2011, only w.e.f. 01/04/2011 and the said amendment carried out to Cenvat Credit Rules cannot be considered as having any retrospective effect"*.

9.2 In this regard, the appellant relied upon the judgment of Hon'ble Supreme Court in the case of M/s. WPIL Ltd Vs. CCE., Meerut, as reported in 2005 (181) ELT 359 (SC), wherein in Para 3 of said Order, it is stated that:-

"With a view to reducing special exemption notifications and consolidating various exemption notifications, in 1994, the Government rescinded 389 notifications with effect from March 1, 1994 and re-issued a consolidated notification incorporating earlier notifications vide Notification No.46/94 dated March 1, 1994. In the said notification, power driven pumps were shown as an exempted item. Due to inadvertence, however, parts of power driven pumps used in manufacture of pumps within the factory which were all along exempted from 1978 were omitted. But there was no change in the Government policy in 1994 which was in vogue since 1978. The omission was, therefore, brought to the notice of the Government by the industries. The Government was also satisfied and amended the notification No.46/94 dated March 1, 1994 by issuing another notification No.95/94 on April 25, 1994 correcting the mistake and clarifying the position that parts of power driven pumps which were used in manufacture of power driven pumps would also be exempted. According to the appellant, the notification No.95/94 dated April 25, 1994 was thus merely clarificatory in nature and an obvious error or omission which remained while issuing notification No.46/94 on March 1, 1994 was rectified by the subsequent notification No.95/94 on April 25, 1994 and hence it .was retrospective in operation. The resultant effect, according to the appellant, was that parts of power driven pumps which were to be utilized for manufacturing power driven pumps within the factory would continue to be exempted from payment of excise duty."

9.3 On comparing the brief facts of said case with that in present appeal, I find that in said case, the parts of power driven pumps were remained exempted since 1978 to 01.03.1994. However, due to consolidation of various exemption notifications in 1994, it was inadvertently omitted, and as soon as said fact came into the knowledge of the government, the government immediately amended the notification by issuing another notification on 25.04.1994 and corrected the mistake. Whereas, in the present case RMC was leviable to Central Excise Duty for a long period of five years i.e. during the period from 01.03.2011 to 01.03.2016, and it cannot be considered as inadvertently omitted by the government. Hence, the facts of the judgment of Hon'ble Supreme Court are different than that of the present appeal.

9.4 In this regard, I rely upon the judgment pronounced by the Hon'ble Apex Court, in the case of CIT, New Delhi Vs. M/s. Vatika Township Pvt. Ltd., as reported in 2014-TIOL-78-SC-IT-CB, wherein the Hon'ble Court held that the proviso to Section 113 of the Income Tax Act, 1961 (the Act) levying a surcharge on undisclosed income had a prospective effect as Parliament specifically chose to make the proviso effective from June 1, 2002. In this ruling, the SC has also elaborated general principles concerning interpretation of amendments with retrospective effect, relying on a host of Indian and foreign judgments. The Hon'ble Supreme Court, in Para 29 to 37 of said order, held that:-

"29. Notwithstanding the aforesaid position clarified with us, we are of the opinion that dehors this discussion, in any case on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.

General Principles concerning retrospectivity

30. A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-à-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that ***unless a contrary intention appears, a legislation is presumed***

not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force *and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that* ***every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset****. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre (1870) LR 6 QB 1,* ***a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.***

32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd (1994) 1 AC 486. Thus, ***legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect****; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.*

33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association (2005) 7 SCC 396 = ***2005-TIOL-109-SC-CUS****, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors. (2006) 6 SCC 286. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.*

34. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that ***no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act****, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.*

35. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labeled as "declaratory statutes". The circumstances under which a provision can be termed as "declaratory statutes" is explained by Justice G.P. Singh Principles of Statutory Interpretation, 13th Edition 2012 published by LexisNexis Butterworths Wadhwa, Nagpur in the following manner:

"Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions.

A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr. (1968) 3 SCR 623, while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows:

"The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from s.115, Code of Civil Procedure, and the legislature has by the amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

36. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment ***unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective.*** *(See Controller of Estate Duty Gujarat-I v. M.A. Merchant 1989 Supp (1) SCC 499. We would also like to reproduce hereunder the following observations made by this Court in the case of Govinddas v. Income-tax Officer (1976) 1 SCC 906, while holding Section 171 (6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Income Tax Act came into force:*

"11. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, ***unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure.*** *The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospectively and retrospective operation should not be given to a statute so as to affect, alter or*

destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be constued as prospective only."

*37. In the case of C.I.T., Bombay v. Scindia Steam Navigation Co. Ltd. 1962 (1) SCR 788 = **2002-TIOL-616-SC-IT-CB**, this Court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, **any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year."***

9.5 In view of the aforesaid judgment of the Hon'ble Apex Court, I find that in determining whether a provision is applicable prospectively or retrospectively, attention would be required to be paid to the language of the amending statute, the legislature's intent, and the memorandum to the relevant Finance Act. In this regard, as stated above, I find that Central Excise Duty was leviable on RMC for a long period of five years i.e. during the period from 01.03.2011 to 01.03.2016, and it cannot be considered as inadvertently omitted by the government. Further, the Sr.No.46 of Notification No.01/2011-CE dated 01.03.2011 envisages as under:-

46	3824 50 10	Ready-mix Concrete (RMC)

9.6 I have also carefully gone through the explanatory notes given by the government with the Union Budget 2011-12, wherein it is clearly stated that *"A tariff rate of 5% excise duty is being prescribed on Ready-mix concrete (RMC). However these goods would attract the concessional 1% duty without CENVAT credit facility. (S. No.46 of notification No.1 /2011-Central Excise, dated 1st March, 2011 refers)."*

9.7 In addition, I have also carefully gone through the D.O. Letter dated 29.02.2016, issued by Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India, from F.No.334/8/2016-TRU, wherein it is clearly stated that:-

"Chapter 38:

1) Ready Mix Concrete [3824 50 10] manufactured at the site of construction for use in construction work at such site is being fully exempted from excise duty. Also, the expression "site" is being defined in the exemption notification. S. No. 144 of notification No. 12/2012- Central Excise, dated 17th March, 2012 as amended by notification No. 12/2016-Central Excise dated 1st March, 2016 refers."

9.8 In view of the above all, I find that the language of the amending Notification No. No.01 /2011-CE dated 01.03.2011 backed by above mentioned explanatory notes, is very much clear and understandable. Accordingly, there is no ambiguity in prescribing concessional rate of duty of 1% on RMC in the Notification No.01 /2011-Central Excise, dated 1st March, 2011 which needs clarification. Further, on going through both the said Notifications i.e. Notification No.01 /2011-Central Excise, dated 1st March, 2011 & Notification No. 12/2016-CE dated 01.03.2016 as well as the above mentioned explanatory note and D.O. Letter dated 29.02.2016 issued by the TRU, the intention of the legislature is clearly established.

10.1 Regarding limitation issue, I find that prior to the decision of the Hon'ble Supreme Court in the case of M/s. Larsen & Toubro Ltd., supra, which came on 06.10.2015, the legal position on the issue, in question, was not clear. Further, there were certain decisions of various Hon'ble Tribunals/Commissioner (Appeals)/Adjudicating Authorities, as discussed in foregoing para, wherein the decisions were against the revenue. Accordingly, the appellant was under the bonafide impression that in view of various judgements, pronounced by various higher appellate forums, RMC was not liable to Central Excise Duty. In view of the above, I find it difficult to hold that there has been conscious or deliberate withholding of information by the appellant. There has been no willful misstatement much less any deliberate and willful

suppression of facts. It is settled law that in order to invoke the proviso to Section 11A(1), a mere misstatement or suppression of facts could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful. I also find that onus to prove fraud, misstatement lies on revenue and the burden is shifted to assessee only when discharged by revenue. In the present case, the department had failed to establish the malafide intention of the appellant with intent to evade payment of Central Excise Duty, leviable on RMC. Therefore I find merit in the contention of the appellant that the allegation of suppression with intent to evade payment of duty is not sustainable. In this regard, I rely upon the decisions pronounced by the Hon'ble Supreme Court in the case of Commr. of Customs, (CSI Airport) Vs. M/s. Star Entertainment Pvt. Ltd., as reported in 2015(329) ELT 50 (Bom.), the facts of which are very much identical with the facts of the present case, wherein the Hon'ble Court held that:-

"12) When the matter was referred to third Member for his opinion, he heard both sides and we are concerned only with his finding on the point of time bar and limitation. Paras 22 and 23 of his decision read as under :-

> *"22. On the issue of time bar, the contention of the appellant is that the demand is confirmed by invoking extended period of limitation on the ground of suppression of facts with intent to evade payment of duty. In this regard I find that prior to the decision of the Hon'ble Supreme Court in the case of Living Media India Ltd., there were decisions of the Tribunal in the case of Sony Music Entertainment Pvt. Ltd. vs. CC, Mumbai reported in 2005 (189) ELT 227 = 2005-TIOL -1018- CESTAT -MUM , CC, Mumbai vs. Sony BMG Music Entertainment (I) Pvt. Ltd. reported in 2007 (218) ELT 699 and in the case of Living Media Ltd. vs. CC reported in 2002 (148) ELT 441.*
>
> *23. In the case of Sony BMG Music Entertainment (I) Pvt. Ltd. (supra), the Tribunal, after taking into consideration the Hon'ble Supreme Court decision in the case of Associated Cement Companies Ltd. reported in 2001 (128) ELT 21 (SC) = **2002-TIOL-08-SC-CUS-LB**, held against the Revenue. The Hon'ble Supreme Court in the case of Living Media India Ltd. (supra), reversed the view taken by the Tribunal in the year 2011. In these circumstances, **as during the period when the goods in question were imported into India, there were certain decisions which are against the Revenue, therefore I find merit in the contention of the appellant that the allegation of suppression with intent to evade payment of duty is not sustainable.** On the issue of time bar I agree with the view taken by the learned Member (Judicial) hence the order confirming the demand, confiscation of the goods and imposition of penalties is not sustainable hence set aside. The Appeals are allowed after setting aside the impugned order on the ground of limitation."*

*13) Having perused these paragraphs and finding that the majority view is that on merits there being no dispute but difference was with regard to invocation of the extended period that there is no perversity in the views which have been taken. It is well settled that finding on the point of limitation can raise mixed question of fact and law. **In the present case, the facts being undisputed, the Tribunal found that prior to the decision of the Hon'ble Supreme Court, which came on 17th August, 2011, there were certain decisions of the Tribunal. It may be that the Tribunal has not referred to all the decisions, but nonetheless in the order passed by the third Member, there is a reference to the Judgment of the Hon'ble Supreme Court in the case of Associated Cement Companies Ltd. (supra). These were the views against the Revenue. The legal position, therefore, was not clear, but somewhat in doubt. It is in these circumstances that the Tribunal concurrently held that the demand in the present case is time barred. The demand was, therefore, set aside.***

*14) We do not see how a decision of this nature can be faulted. In the case of Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh-I reported in 2007 (216) ELT 177 = **2007-TIOL-152-SC-CX**, the Hon'ble Supreme Court had an occasion to consider this aspect in somewhat similar wording and phraseology. There, M/s. Nathpa Jhakri Power Corporation (NJPC) was a joint venture between the*

Government of India and the Government of Himachal Pradesh set up for the purpose of construction of a power project. The civil work relating to project was alloted to 3 companies, one of which was the Continental Foundation Jt. Venture. The agreement was executed and to provide inter alia mix concrete for execution of various items of work under the contract. A show cause notice was issued by the Commissioner of Central Excise to the joint venture companies alleging that the construction companies employed by Nathpa Jhakri Power Corporation were manufacturing Ready Mix Concrete (RMC) on which no central excise duty is being paid. Since the said RMC falls under Chapter Heading No. 3824.20 of the Schedule to the Central Excise Tariff Act, 1985 and is subject to Central Excise duty under Central Excise Act, 1944, duty is payable. The allegations in the show cause notice and the reply of the Assessee have been then referred extensively by the Hon'ble Supreme Court . Then, in para 5, the Hon'ble Supreme Court noted the plea relating to non applicability of the extended period of limitation. Then, the Hon'ble Supreme Court in para 9 held that it is not necessary to go in other issues, because the Appeals are bound to succeed on the point of the challenge to the extended period of limitation.

15) *In paras 10 and 11, this is what the Hon'ble Supreme Court has held: -*

> *"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly.* ***Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty.*** *When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression.* ***When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact****. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.*
>
> *11. Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act."*

16) *In the light of the above principles and which we can safely apply to the present case, we do not term the Tribunal's view as perverse. The Tribunal may not have referred to all the decisions, the Assessee also has been faulted in this case for not abiding by the provisions of law in the teeth of some clear judicial pronouncements, however, the question was, when the consignment or goods were imported, was the Assessee guilty of not complying with the provisions of law and willfully.* ***That there were certain orders and the decisions of the Tribunal against the Revenue being an undisputed fact, the Tribunal concluded that the extended period could not have been invoked. If the Assessee cannot be faulted for taking advantage of the unclear or doubtful legal position, then, the demand rightly fails. The Tribunal has, by majority, held that during the period when the goods were imported in India, there were certain decisions against the Revenue. The allegation of suppression with intent to evade payment of duty, therefore, is not established and proved.*** *In the circumstances, the third Member agreed with the Member Judicial that the order confirming the demand, confiscation of the goods and imposition of penalty is not sustainable and must be set aside. While we can appreciate the anxiety of the Revenue, when the Assessee succeeded on technical ground, but, the doubtful legal position and which is required to be cleared by the higher Courts is something for which we cannot hold either the Assessee or the Revenue*

responsible. In the circumstances, we do not think that the Appeal raises any substantial question of law. It is accordingly dismissed."

10.2 In this regard, I also rely upon the following decisions pronounced by the higher appellate forum:-

- **M/s. Padmini Products, as reported in 1989 (43) ELT 195 (SC)** – wherein the Hon'ble Supreme Court held that *"extended period of 5 years inapplicable for mere failure or negligence of the manufacturer to take out licence or pay duty when there was scope for doubt that goods were not dutiable."*

- **M/s. Pahwa Chemicals P.Ltd. Vs. CCE, Delhi, as reported in 2005 (189) ELT 257 (SC)**, wherein the Hon'ble Supreme Court held that *"merely because they were affixing the label of a foreign party, they did not lose the benefit of Notification No. 175/86-CE, as amended by Notification No. 01/93-CE. The view taken by the appellants had, in some cases, been approved by the Tribunal which had held that mere use of the name of a foreign party did not disentitle a party from getting benefit of the Notifications.* ***It is only after larger Bench held in Namtech Systems Ltd Vs. Commissioner of Central Excise, New Delhi reported 2000 (115) ELT 238 (Tribunal) that the position has become clear. It is settled law that mere failure to declare does not amount to wilful mis-declaration or wilful suppression. There must be come positive act on the part of the party to establish either wilful mis-declaration or wilful suppression****. When all facts are before the Department and a party in the belief that affixing of a label makes no difference does not make a declaration, then there would be no wilful mis-declaration or wilful suppression. If the Department felt that the party was not entitled to the benefit of the Notification, it was for the Department to immediately take up the contention that the benefit of the Notification was lost."*

- **M/s. Cosmic Dye Chemicals Vs. CCE, Bombay, as reported in 1995 (75) ELT 721 (SC)**, wherein the Hon'ble Supreme Court held that *"the requisite intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful- preceding the words 'mis-statement or suppression of facts- which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules- are again qualified by the immediately following words 'with intent to evade payment of duty-. It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful."*

- **CCE, Mumbai-IV Vs. M/s. Damnet Chemicals Pvt. Ltd., as reported in 2007 (216) ELT 3 (SC)**, wherein the Hon'ble Supreme Court held that *"in order to invoke the proviso to Section 11A(1), a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful."*

- **M/s. Anand Nishikawa Co. Ltd. Vs. CCE, as reported in 2005 (188) ELT 149 (SC)**, wherein this Court held *""suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression."*

- **CCE Vs. M/s. Chemphar Drugs and Liniments, as reported in 1989 (40) E.L.T. 276 (S.C.)**, wherein the Hon'ble Supreme Court has observed that *"to invoke the extended period of time, something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when manufacturer knew otherwise, is required to be established."*

- **M/s. Uniworth Textiles Ltd. Vs. CCE, Raipur, as reported in 2013-TIOL-13-SC-CUS,** wherein the Hon'ble Apex Court held that *"mere non-payment of duties is not equivalent to collusion or willful misstatement or suppression of facts and burden of proof of proving mala fide conduct lies with the Revenue and assessee cannot be asked to substantiate his bona fide conduct."*

- **M/s. Shapoorji Pallonji and Co. Ltd. and others Vs. CCE, Mumbai, as reported in 2016-TIOL-2126-CESTAT-AHM,** wherein the Hon'ble CESTAT, Ahmedabad held that *"the mix manufactured by the appellant is specially made for Mahindra & Mahindra and is manufactured with precision of a high standard and is delivered to the customer at his site. Thus prima facie it fulfills the criteria identified by the Hon'ble Supreme Court in its decision. In the instant case the appellants are also adding plasticizers to improve the quality of the concrete. In view of above it is held that the product manufactured by the appellants is RMC and the appellants are not entitled under Notification No. 4/97 dated 01.03.1997. In so far as the issue of limitation is concerned the decision of the* ***Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture*** *(supra) is squarely on this issue. In the said decision the Hon'ble Apex Court has observed as follows:-*

> *11. Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.*
>
> *12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful.*
>
> *4.5 In fact, the period as well as the issue involved is roughly the same. Relying upon the above said decision of the Hon'ble Supreme Court we hold that extended period of limitation cannot be invoked in this case."*

10.3 In view of the above, I find that extended period cannot be invoked in the present case. However, since the case stands on merits, the appellant is liable to pay Central Excise Duty leviable on the excisable goods cleared during the normal period of limitation along with interest at the appropriate rate on the delayed payment.

11. Regarding penalty, I find that even after the judgement passed by the Supreme Court in the case of M/s. Larsen & Toubro Ltd., clarifying the issue, in question, the appellant had failed to follow the procedures, as laid down under Central Excise Act, 1944 and rules, framed thereunder, and failed to pay Central Excise Duty leviable on said excisable goods i.e. RMC. When the crystal clear legal provision was available to deal with a situation, the appellant should have followed the same. I also find that the excisable goods, in question, i.e. RMC was chargeable to Central Excise Duty since March, 2012, and the Hon'ble Supreme Court has just clarified the issue. Accordingly, the appellant should have suo moto started following the requisite procedures and paying applicable Central Excise duty on said excisable goods, which the appellant had failed. The appellant, therefore, liable to penalty equal to 50% (fifty per cent)

of the amount of Central Excise Duty determined, as discussed herein above, under the provisions of Section 11AC(1)(b) of the Central Excise Act, 1944.

12. The appeals filed by the appellant stand disposed of in above terms.

(DR. BALBIR SINGH)
ADDITIONAL DIRECTOR GENERAL (DGTS),
AZU, AHMEDABAD

F.No. V2/305/RAJ/2017 Date : .04.2018

BY RPAD.

To,

M/s. Kunal Structure (India) Pvt. Ltd.,
Shop No.7, Near Bhaktidham Temple,
Opposite Atithi Apartment, Panchvati Main Road,
Rajkot, Gujarat

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST & Central Excise, Rajkot.
3. The Commissioner (Appeals), CGST, Rajkot.
4. The Jurisdictional Deputy / Assistant Commissioner, CGST & Central Excise, Rajkot Commissionerate;
5. The Additional / Joint Commissioner , Systems, CGST, Rajkot;
6. Guard File.