



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



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan
रेस कोर्स रिंग रोड / Race Course Ring Road
राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए.डी.द्वारा :-

DIN-20210664SX0000777F1C

क	अपील / फाइल नं./ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/63/GDM/2020	10/GST/AC/2020-21	30-09-2020

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

KCH-EXCUS-000-APP-174-2021

आदेश का दिनांक /

Date of Order:

08.06.2021

जारी करने की तारीख /

Date of issue:

09.06.2021

श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Akhilesh Kumar, Commissioner (Appeals), Rajkot.

- ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवं 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/ST / GST, Rajkot / Jamnagar / Gandhidham :
घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-

M/s. Vihar Logistics, 207, Rishi Corner, Second Floor, Opp. Maritime House,, Plot No. 20, Sector-12 / A,, Gandhidham-Kutch,

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:-
- (ii) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद 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.
- (iii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा जहमदाबाद- 380016 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) नियमवाली, 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा /।
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs.5000/-, Rs.10,000/- where amount of duty demanded/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 अंतर्गत 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा /।
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied 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/-.



- (ii) 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 सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रेषित 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेलेंट) के प्राप्ति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विनियम 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 दम करोड़ रुपये में अधिक न हो।

- केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
 - सेलेंट जमा की ली गई गलत राशि
 - सेलेंट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इन धारा के प्रावधान विनियम (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे। /

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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 या चिका निम्नलिखित मामलों में, केन्द्रीय 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 में 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 छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी क्रेडिट 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 निश्चित की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 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 संश्लेषण 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। जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग में किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढी कार्य में वचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 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-1 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 बर्णित एवं अन्य संबन्धित मामलों को सम्भलित 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 में 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. Vihar Logistics, Gandhidham (hereinafter referred to as "appellant") has filed Appeal No. V2/63/GDM/2020 against Order-in-Original No. 10/GST/AC/2020-21 dated 30.9.2020 (hereinafter referred to as "impugned order") passed by the Asst. Commissioner, Central GST, Gandhidham (Urban) Division (hereinafter referred to as "adjudicating authority").

2. The facts of the case, in brief, are that the appellant was engaged in providing 'Cargo Handling Service', 'Clearing and Forwarding Service', GTA Service etc. and was holding Service Tax Registration No. AAIFV4053CSD002. Inquiry initiated against the Appellant revealed that they had availed Cenvat credit on Capital goods in the year 2012, which was subsequently sold by them in the year 2014, without reversing /paying applicable Cenvat credit. It appeared to the investigating officers that the Appellant was liable to reverse Cenvat credit on the said Capital goods, in terms of Rule 5(A) of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004'). The Appellant vide letter dated 23.8.2016 informed that they had paid Cenvat credit totally amounting to Rs. 9,16,990/- along with interest of Rs. 4,30,960/-.

2.1 On culmination of inquiry, Show Cause Notice No. SCN/33/CEP/Kutch/ 18-19 dated 13.2.2019 was issued to the Appellant calling them to show cause as to why an amount of Rs. 9,16,990/- should not be demanded and recovered from them under Rule 14 of the CCR, 2004 read with Section 73 of the Finance Act, 1994 (hereinafter referred to as 'Act') and why the amount of Rs. 9,16,990/- paid by them should not be appropriated against the said demand; interest should not be demanded from them under Rule 14 ibid and an amount of Rs. 4,30,960/- should not be appropriated against said liability. The notice also proposed imposition of penalty under Rule 15 of CCR, 2014 read with Section 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who disallowed Cenvat credit of Rs. 9,16,990/- under Rule 14 of CCR, 2004 read with Section 73 of the Act and appropriated Rs. 9,16,990/- against confirmed demand. The adjudicating authority ordered for recovery of interest under Rule 14 ibid and appropriated Rs. 4,30,960/- against their interest liability and imposed penalty of 1,37,549/- under proviso to Section 78 of the Act.

3. Being aggrieved, the appellant preferred the present appeal on the following grounds, *inter alia*, contending that,



(i) There was no allegation of suppression in the show cause notice. In the entire show cause notice there is no use of the words, suppression, fraud, collusion, misstatement etc. and it is a fact that there was no suppression. Despite this fact penalty has been imposed under proviso to Section 78 of the Finance Act, 1994.

(ii) Appellant further submits that in its reply it had submitted that clearance of the capital goods i.e. loaders were already mentioned in the statutory record i.e. Balance Sheet and it had immediately paid the amount just after initiation of inquiry; that it was not the case that it had hidden or suppressed any material fact or intentionally evaded the tax liability; that it had shown sale of loader in its books of accounts which suffice that there was no fraud, willful misstatement, collusion from its side and also cited the relevant instructions issued from F. No. 137/46/2015-S.T., dated 18-8-2015.

(iii) That the extended period of limitation can be invoked only in a case where the service tax has not been paid on account of fraud, collusion, willful misstatement and suppression of facts with an intention to evade tax. It is very evident that the said circumstances are not established in the instant case. The extended period has been invoked in the notice and the consequential order-in-original on the grounds that the appellant was a registered assessee and duty bound to know the procedure, Act and Rules made thereunder. However, no efforts are visible in the order elaborating the ground on the basis of which such a serious allegation is being inferred. The provisions are controversial and in absence of any finality in law, the bona fide view of the appellant cannot be termed as fraud, collusion, willful misstatement, and suppression of facts with an intention to evade tax for the purposes of invoking proviso to section 73(1) of the Finance Act, 1994. Though there was no omission reversing the Cenvat Credit but it was just due to ignorance and not deliberate. Further, had there been any such malafide intention, they would not have shown in their books of accounts. Relied upon following case laws:

- (a) Kanagalakshmi -2010 (19) STR 746
- (b) Tamilnadu Housing Board - 1994 (74) ELT 9
- (c) Hindalco Industries Ltd- 2003 (161) ELT 346

(iii) Since there was no suppression at all and as such no penalty is imposable under Section 78 of the Finance Act, 1994, if the entire amount of Service Tax along with interest thereon has been paid before issue of

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show cause notice as stipulated under Section 73(3) of the Finance Act, 1994 and relied upon case law of YCH Logistics India Ltd - 2020-TIOL-605-CESTAT-Bang and Adecco Flexione Workforce Solution Ltd- 2012 (26) STR 3 (Kar.).

4. Personal hearing in the matter was conducted in virtual mode through video conferencing on 25.5.2021. Shri R.C. Prasad, Consultant, appeared on behalf of the Appellant and reiterated submission of appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, and grounds of appeal memorandum. The issue to be decided in the present appeal is whether the Appellant is liable to penalty under Rule 15 of CCR, 2004 read with Section 78 of the Act or otherwise.

6. On perusal of the records, I find that the Appellant had availed Cenvat credit on Capital goods in the year 2012 which was subsequently sold by them in the year 2014 but had not reversed applicable Cenvat credit in terms of Rule 5(A) of CCR, 2004. This fact came to light during inquiry initiated against them. The Appellant paid applicable Cenvat credit along with interest. The adjudicating authority confirmed demand of Rs. 9,16,990/- (including Cess) along with interest under Rule 14 of CCR,2004 and imposed penalty of Rs. 1,37,549/- under Section 78 of the Act.

6.1 I find that the Appellant has not disputed about confirmation of demand or recovery of interest but contested imposition of penalty under Section 78 of the Act on the grounds that there was no suppression of any facts and imposition of penalty on the allegation of suppression is bad in law and liable to be set aside.

7. I find that the Appellant has not challenged confirmation of demand or recovery of interest. I, therefore, uphold the impugned order to that extent as not challenged. Now coming to imposition of penalty under Section 78 of the Act, I find that adjudicating authority has imposed penalty of Rs. 1,37,549/- under proviso (i) of Section 78(1) of the Act, which is reproduced as under:

“SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. — (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

Provided that ...



Provided further that where service tax and interest is paid within a period of thirty days of —

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

...”

7.1 As per above, provisions of Section 78 can be invoked for reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or rules made thereunder with the intent to evade payment of service tax. On going through the impugned order, I find that the adjudicating authority has given findings for imposing penalty under Section 78 which is reproduced below:

“16. With regard to imposition of penalty under Section 78 of the Finance Act, 1994, the Noticee has contested and refers Board instruction F.No. 137/46/2015-S.T., dated 18.08.2015 and as per para 3.2 if the amount along with interest is paid prior to issuance of the SCN where no suppression is involved there is no requirement to issue SCN and penalty is not imposable. However, I find that the Noticee had been a registered Service Tax assessee and duty bound to know the procedure, Act and Rules made there under and they had also undertaken to comply with all the conditions prescribed in the said Act/ Rules at the time of obtaining Service Tax Registration. Further, under self-assessment regime Noticee is duly bound to be honest and prompt while discharging their liability. The Noticee has availed and utilized the CENVAT credit of duty paid on capital goods but did not paid/ reversed the applicable cenvat credit when they sold the said capital goods after their use. This fact was unearthed only during the course of inquiry when the documents of the Noticee were scrutinized and statement of the partner of the Noticee was recorded. In view thereof, the Noticee rendered themselves liable for penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 and Board instruction F.No. 137/46/2015-S.T., dated 18.08.2015 is not applicable in this case as refer by Noticee.”

(Emphasis supplied)

7.2 It is not under dispute that non reversal of Cenvat credit on capital goods sold by the Appellant was unearthed during inquiry initiated against them. Had there been no inquiry initiated against the Appellant, such non reversal of Cenvat credit would have gone unnoticed. So, there existed element of suppression of facts with intent to evade payment of tax. Though the adjudicating authority has not specifically mentioned suppression of facts for



imposing penalty under Section 78 but it is reflected in the findings reproduced *supra*. I, therefore, hold that penalty under Section 78 was correctly imposed by the adjudicating authority.

8. In view of above, I uphold the impugned order and reject the appeal filed by the appellant.

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

9. The appeal filed by the Appellant is disposed off as above.

सत्यापित,
D/S
निपुण शर्मा
असिस्टेंट (एन-1/एच-8)

Arun Kumar
(Arun Kumar)
Commissioner (Appeals)

By RPAD

To, M/s Vihar Logistics, 207, Rishi Corner, NH-8, Gandhidham.	सेवा में, मेसर्स विहार लॉजिस्टिक्स, 207, ऋषि कोर्नर, एनएच-8, गांधीधाम।
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प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम (अर्बन) मण्डल, को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।



