



::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



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी.द्वारा

DIN-20221064SX000000BBE5

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/16/RAJ/2021	DC/JAM-I/ST/14/2020-21	16-10-2020

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

RAJ-EXCUS-000-APP-065-2021-2.2

आदेश का दिनांक / Date of Order:	07.01.2022	जारी करने की तारीख / Date of issue:	12.01.2022
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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. Gurukrupa infrastructure (Main Market, Village Padana), Taluka- Lalpar, Jamnagar, Gujarat.

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) सामान्य शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थी न्यायाधिकरण के प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 का 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 मुद्दाओं में सम्बन्धित सभी मामलों 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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्टेट) 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) 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 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 अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है 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 or less, Rs.5000/- 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 प्रतियां 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेन्टेट) के प्रति अपील 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 जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में 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 अर्जी एवं अपील को लागू नहीं होगा। / 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 कोपनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 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 an 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 अट्टी केबीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं- 2), 1998 की धारा 109 के द्वारा नियत की गई तरीक 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 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 साध्य 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 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 से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने 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 Appellate 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-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.



:: ORDER-IN-APPEAL ::

M/s Gurukrupa Infrastructure, District: Jamnagar (*hereinafter referred to as "Appellant"*) has filed Appeal No. V2/16/RAJ/2021 against Order-in-Original No. DC/JAM-I/ST/14/2020-21 dated 16.10.2020 (*hereinafter referred to as 'impugned order'*) passed by the Deputy Commissioner, CGST Division-I, Jamnagar, Rajkot Commissionerate (*hereinafter referred to as "adjudicating authority"*).

2. The facts of the case, in brief, are that the Appellant was engaged in providing 'Supply of Tangible Goods Service' and was registered with Service Tax Department having Registration No. AUGPJ5693QSD001. Investigation carried out by the officers of Headquarters Preventive Branch, erstwhile Central Excise, Rajkot revealed that the Appellant had charged and collected service tax to the tune of Rs. 96,08,840/- during the period from February, 2014 to December, 2016 but short paid / not paid the same in Government exchequer and also failed to file prescribed ST-3 Returns for the said period.

2.1 On culmination of investigation, Show Cause Notice No. V.ST/JMN/10/Demand/2017-18 dated 5.10.2017 was issued to the Appellant calling them to show cause as to why service tax amounting to Rs. 46,70,229/- should not be demanded and recovered from them under proviso to sub-Section (1) of Section 73 of the Act and an amount of Rs.16,00,000/- deposited during investigation should not be appropriated against above demand. The Notice also proposed recovery of interest under Section 75 of the Act and imposition of penalty under Sections 70, 76, 77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated vide Order-in-Original No. 19/DC/JAM-I/2017-18 dated 27.3.2018 where in the adjudicating authority has confirmed demand of service tax amounting to Rs. 46,70,229/- under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and imposed penalty of Rs. 46,70,229/- under Section 78 of the Act, Rs. 70,000/- under Section 77(2) of the Act and late fee of Rs. 1,40,000/- under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994.

2.3 Being aggrieved, the Appellant filed appeal before the then Commissioner (Appeals), Rajkot who vide his Order-in-Appeal No. RAJ-EXCUS-000-APP-135-2019 dated 28.6.2019 remanded the matter to the adjudicating authority for *de novo* proceedings with a direction to allow Cenvat credit to the Appellant in accordance



with law considering all relevant documents relating to Cenvat credit.

3. In *de novo* proceedings, the adjudicating authority denied the request of the Appellant to allow them Cenvat credit of Rs. 30,21,312/- vide the impugned order, on the grounds that the Appellant had not filed ST-3 Returns for the disputed period and also failed to avail Cenvat credit within specified period of one year. The adjudicating authority confirmed service tax demand of Rs. 46,70,229/- under proviso to Section 73(2) of the Act and appropriated amount of Rs. 16,00,000/- against confirmed demand. He also ordered for recovery of interest under Section 75 of the Act and imposed penalty of Rs. 46,70,229/- under Section 78 of the Act, penalty of Rs. 70,000/- under Section 77(2) of the Act and late fee of Rs. 1,40,000/- under Section 70 of the Act read with rule 7C of the Service Tax Rules, 1994.

4. Being aggrieved, the Appellant has preferred the present appeal on various grounds, *inter alia*, as under:-

(i) They had maintained all the necessary records like original invoices for Cenvat credit availed and also maintained separate records for service tax collected, service tax paid and Cenvat credit availed. However, without considering the same in true spirit of law the adjudicating authority did not allow credit for Cenvat credit while calculating short payment of service tax. It is alleged at Para 2 of show cause notice that ST-3 returns have not been filed and therefore, payment of service tax could not have been paid utilising Cenvat credit. However, there is no any provision in Cenvat Credit Rules, 2004 which prevent the service provider to avail Cenvat credit. There are catena of decisions wherein it has been held that Cenvat credit was available even prior to registration and relied upon following case laws:

- (a) J R Herbal Care - (2010) 253 ELT 321
- (b) Sew Construction Ltd -(2011) 32 STT 120
- (c) Progressive Systems - (2012) 36 STT 30

(ii) That main purpose of allowing Cenvat credit is to avoid cascading effect of taxes. They have already paid huge amount of tax by way of Cenvat, which should be allowed as payment of service tax and accordingly amount of short, service tax paid should be restricted to Rs. 48,916/- only.

(iii) The adjudicating authority erred in determining short payment of service tax of Rs. 46,70,229/-. Actual short payment is only Rs. 48,916/-. While calculating the short payment credit for payment of service tax of



Rs, 16,00,000/- through PLA and Rs. 30,21,312/- through CENVAT was not considered.

(iv) The intention of the legislature for imposing the penalty under Section 78 is to discourage the defaulters who are liable to pay the service tax and intentionally not paying the same. However, there was no deliberate intention on their part to not pay the tax. The appellant had availed the Cenvat credit which is not allowed by the department. Therefore, it can not be concluded that there is short payment of service tax, Thus, maximum penalty under Section 78 that can be levied is Rs. 48,916/- and not Rs 46,70,229/-.

(v) The Appellant have lack of knowledge about service tax law. They were under bona fide belief that since tax liability was discharged, no further action was required. Hence, they could not comply with the requirement of law and the Appellant should not be penalised under Section 77(2) and Section 70 of the Act.

5. Personal hearing in the matter was scheduled in virtual mode on 22.9.2021, 30.9.2021, and 8.10.2021 and communicated to the Appellant through email and Speed Post. However, no consent was received from the Appellant to remain present in hearing nor any request for adjournment was received. I find that sufficient opportunities have been offered to the Appellant. Since; the Appeal cannot be kept pending indefinitely, I proceed to decide the appeal on the basis of grounds raised in appeal memorandum.

6. I have carefully gone through the facts of the case, the impugned order and ground of appeal submitted by the appellant in the memorandum of appeal. The issue to be decided in the present case is whether the impugned order, in the facts of the present case, is correct, legal and proper or not.

7. On perusal of the records, I find that the impugned order was passed pursuant to remand directions of the then Commissioner (Appeals), Rajkot vide Order-in-Appeal No. RAJ-EXCUS-000-APP-135-2019 dated 28.6.2019. The relevant portion of the said Order is reproduced as under:

“6. I find that appellant has not disputed their service tax liability of Rs. 46,70,229/-, however, has contended that they are eligible to avail Cenvat Credit of Rs. 30,21,312/- on the input services received from M/s. J.J. Enterprise, Jamnagar and since they also paid Rs.16,00,000/- in cash during investigation,



penalty is required to be reduced to Rs.48,916/- under Section 78 of the Act. I find that the appellant did not participate in adjudication process before the lower adjudicating authority as is revealed from Para 16 of the impugned order as under:

.....

7. I find that the impugned order was issued in absence of sufficient documents on record. The lower adjudicating authority has not recorded findings with regard to admissibility of Cenvat Credit claimed by the appellant during inquiry to decide the quantum of demand, which appears available to them as per challans, ledgers and ST-3 returns of M/s. J.J. Enterprises, Jamnagar. Since, the appellant has now come up with relevant documents, the basis on which they are claiming Cenvat Credit of input services availed by them and they have now submitted to have paid interest on delayed payment of service tax and also late fee. They have also stated that they could not file ST-3 returns as ACES platform is not operational to file ST-3 returns. Thus, I find that the impugned order has decided the show cause notice without looking into records and not on merits. I hold that the Cenvat Credit is required to be allowed to the appellant in accordance with law considering all relevant documents (relating to Cenvat Credit) submitted by the appellant in this appeal proceedings. Hence, the matter needs to be remanded back to the lower adjudicating authority to determine the service tax liability on merit, if any.

7.1

8. In view of above, I hold that this is a fit case to remand the matter back to the jurisdictional adjudicating authority for de novo adjudication. The appellant is directed to submit all relevant records and documents in support of their contentions within 30 days from the date of receipt of this order to the lower adjudicating authority, who shall decide the quantum of demand of service tax and pass reasoned and speaking order within 3 months from receipt of this order after fair and reasonable opportunities to the Appellant to explain their case.”

8. I find that the Appellant had not contested confirmation of service tax demand before the then Commissioner (Appeals), Rajkot but sought adjustment of Cenvat credit of Rs. 30,21,312/- available with them towards their service tax liability and also requested for reduction of penalty imposed under Section 78 of the Act. In *de novo* proceedings, the adjudicating authority denied the benefit of Cenvat credit to the Appellant on the grounds that the Appellant had not filed ST-3 Returns for the disputed period and also failed to avail Cenvat credit within specified period of one year. The Appellant has contended that they had



maintained all the necessary records like original invoices for Cenvat credit availed and also maintained separate records for service tax collected, service tax paid and Cenvat credit availed. However, the adjudicating authority did not allow credit for Cenvat credit while calculating short payment of service tax.

8.1 I find that Rule 9(1) of CCR, 2004 prescribed documents on the basis of which Cenvat credit can be availed. Further, Rule 9(5) and Rule 9(6) of CCR, 2004 mandated that every manufacturer and output service provider to maintain proper records of receipt and consumption of inputs and input services, respectively. If the Appellant had availed Cenvat credit of input services in their books of accounts within limitation prescribed under Rule 4(1) of CCR, 2004 and complied with the provisions contained in Rule 9 of CCR, 2004, then they are well within their right to claim/utilize the same against discharge of their service tax liability on output service. Mere non filing of ST-3 Returns cannot be a ground for denial of Cenvat credit. It is not forthcoming from the impugned order whether the adjudicating authority had examined relevant invoices, books of accounts etc. to verify whether they had availed Cenvat credit in their books of accounts in terms of CCR, 2004 or not. The Appellant has not produced any documents before me and, therefore, it is not possible to arrive at any conclusion on this issue. I, therefore, consider it appropriate to remand this issue to the adjudicating authority to verify and grant benefit of Cenvat credit, if Cenvat credit was availed within prescribed time limit and by fulfilling conditions prescribed under Rule 9 of CCR, 2004. The Appellant is also directed to produce relevant documents before the adjudicating authority in support of their claim. Needless to mention that principles of natural justice be adhered to in remand proceedings.

9. As regards penalty imposed under Section 78 of the Act, the Appellant has pleaded that the intention of the legislature for imposing penalty under Section 78 is to discourage the defaulters who are liable to pay the service tax and intentionally not paying the same. However, there was no deliberate intention on their part to not pay the tax and hence, penalty is not imposable upon them. I find that the Appellant was registered with Service Tax Department. They had during the relevant period charged and collected service tax from their clients but did not deposit the same in Government exchequer, which was unearthed during investigation carried out against them by the officers of Headquarters Preventive Branch, erstwhile Central Excise, Rajkot. It is on record that they had also failed to file ST-3 Returns for the disputed period. Further, Service Tax payment of Rs. 16,00,000/- was also made after initiation of investigation against them. The



Appellant has also not disputed about their liability to pay service tax. Hence, this is a fit case for invocation of extended period of limitation under Section 73 of the Act on the grounds of suppression of facts. It is a settled position of law that when extended period of limitation is invoked, penalty under Section 78 of the Act is mandatory, as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty of Rs. 46,70,229/- imposed under Section 78 of the Act.

10. Regarding penalty of Rs. 70,000/- imposed under Section 77(2) of the Act, I find that the adjudicating authority has imposed penalty on the grounds that the Appellant had failed to assess correct service tax and also failed to file prescribed ST-3 returns within due date. I concur with the findings of the adjudicating authority. However, maximum penalty of Rs. 10,000/- can be imposed under Section 77(2) of the Act. I, therefore, uphold penalty of Rs. 10,000/- under Section 77(2) of the Act and set aside the remaining penalty of Rs. 60,000/-.

11. Regarding penalty of Rs. 1,60,000/- imposed under Section 70(1) of the Act read with Rule 7 of the Service Tax Rules, 1994, I find that the adjudicating authority has imposed penalty for non-filing of ST-3 Returns for the period from February, 2014 to December, 2016. I concur with the findings of the adjudicating authority and uphold imposition of penalty of Rs. 1,60,000/- under Section 70(1) of the Act.

12. In view of the discussion made above, I set aside the impugned order so far as it relates to admissibility of Cenvat credit and remand this issue to the adjudicating authority to decide it afresh as per directions contained in Para 8.1 above. I also set aside penalty of Rs. 60,000/- imposed under Section 77(2) of the Act. The remaining portion of the impugned order is upheld.

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

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

सत्यापित / Attested



Jahn
जतिन कुडलिया
अधिदक्षक

Akhil
(AKHILESH KUMAR)
Commissioner (Appeals)
7th January, 2022.

By R.P.A.D.

To, M/s Gurukrupa Infrastructure Main Market, Village Padana, Taluka : Lalpur, District : Jamnagar.	सेवा में, मेसर्स गुरुकृपा इंफ्रास्ट्रक्चर मुख्य बाज़ार, ग्राम पडाना, तालुका : लालपुर, जिला : जामनगर।
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प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
- 3) ऊप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, जामनगर -I मण्डल, जामनगर को आवश्यक कार्यवाही हेतु।
- ✓ 4) गार्ड फ़ाइल।



