

::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 प.डी.द्वारा-

DIN-20220464SX0000999AE0

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/44/GDM/2021	41/DC/Anjar Bhachau/20-21	09-03-2021

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

KCH-EXCUS-000-APP-008-2022

आदेश का दिनांक / Date of Order:	जारी करने की तारीख / Date of issue:
27.04.2022	28.04.2022

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. Shiv Industries, Plot No. 146-A, Mahadev Nagar Anjar-Kutch-370110

इस आदेश (अपील) से व्यक्ति 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhanumali 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) नियमवली, 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 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 रजिस्टार 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। /
Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

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.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 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 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 रजिस्टार 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। /
Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

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 fee 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/-.



- (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, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपीलित देय राशि दस करोड़ रुपए 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
- बशर्त 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 को पुनरीक्षण 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-35E 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 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 इयूटी 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 नियत की गई तारीख अथवा समायाचिधि 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।
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 पढ़ी 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 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. Shiv Industries, Anjar-Kutch (hereinafter referred to as "Appellant") has filed Appeal No. V2/44/GDM/2021 against Order-in-Original No. 41/DC/Anjar-Bhachau/20-21 dated 09.03.2021 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Central GST, Anjar-Bhachau Division, Gandhidham (Kutch) (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in providing taxable services and was registered under the Finance Act, 1994 ("the Act"). Audit on the records of the appellant was conducted by the officers of Central GST Audit, Rajkot for the period from F.Y. 2014-15 to F.Y. 2017-18 (up to June, 2017). The observations of the audit officers was contained in Final Audit Report No. RJT/CIRCLE VII/AG 45/712/2019-20 dated 27 12.2019 (FAR). As per Revenue Para No. 01 of the FAR, the audit officers observed that the appellant had wrongly availed Cenvat credit amounting to Rs. 1,09,052/- on input service on the basis of two invoices, but could not provide other documentary evidences to prove the admissibility of the said credit. It was also observed that the Appellant had not maintained proper records as required under Rule 5(2) of the Service Tax Rules, 1994. Based on the audit observations, SCN dated 30.06.2020 was issued to the Appellant proposing to demand and recover Cenvat credit wrongly availed and utilized amounting to Rs. 1,09,052/- under Rule 14 of the Cenvat Credit Rule, 2004 ('CCR,2004') read with Section 73(1) of the Act along with interest under Rule 14 of CCR, 2004 read with Section 75 of the Act. The SCN also proposed imposition of penalty under Rule 15(3) of the CCR, 2004 read with Section 78 of the Act. Further, penalty of Rs. 10,000/- was also proposed under Rule 5(2) of the Service Tax Rules, 1994 for non-maintenance of prescribed records.

2.1. The aforesaid SCN was adjudicated vide the impugned order vide which the adjudicating authority has confirmed the demand of Rs. 1,09,052/- along with interest. The adjudicating authority has also imposed penalty under Rule 15(3) of CCR, 2004 read with Section 78 of the Act and a penalty of Rs. 10,000/- under Rule 5(2) of Service Tax Rules, 1994 for failure to maintain the records as prescribed.

3. Being aggrieved, the Appellant has preferred the present appeal contending, *inter-alia*, as under:

- (i) The demand has been confirmed without consideration of facts and its submissions and clarifications and documents given at the audit stage and in reply to the SCN;



- (ii) The invocation of the proviso to Section 73(1) of the said Finance Act is unjustified and illegal in the facts of this case because there has not been any suppression of facts or any willful mis-statement or any such ill-intention on its part for evading payment of service tax or for availing any Cenvat credit wrongly;
- (iii) The details of all such transactions were recorded in its statutory registers, records and books of accounts maintained in accordance with the general accounting practice; and therefore, the allegation of suppression of facts in this case is unsustainable and unjustified;
- (iv) The Appellant was registered for providing works contract services, erection, commissioning and installation services, and was also availing the input tax credit of CENVAT credit of the tax paid on Inputs services under the CCR, 2004;
- (v) The appellant has produced all the details like invoice issued, copy of service tax returns, copy of service tax payment challan, bank statement, Form No.26AS, confirmation from service receiver and service provider, bills/invoice on which cenvat credit taken, income tax return, complete ITR filed U/s.44AD, reconciliation of receipt and service tax liability with profit and loss accounts, with Form No.26AS, with Return of income (ITR);
- (vi) The above referred facts would show that the works has been executed in an open and a transparent manner, and all details of these works have been recorded in statutory records as well as books of accounts. There has not been any suppression of facts in this respect;
- (vii) The basis to disallow Cenvat credit of Rs.1,09,052/- is that dates of invoices of output service were earlier than input service invoices;
- (viii) There are two invoices which were disputed by the audit officers, on which the input tax credit is taken, as below.

Invoice No./ Date	Issued by Service Provider	Service Tax, KKC and SBC Charged (15%)	ITC availed of Service Tax and KKC (14.5%)
SNC_2016- 17/35 dated 28-2-2017	Shree Neelkanth	93,270/-	90,162/-
SNC_2017- 18/01 dated 5- 4-2017	Constructions, Anjar	19,542/-	18,890/-
Totals		1,12,812/-	1,09,052/-

- (ix) the input services of civil work were received by the appellants from the above-mentioned supplier as per above invoices, and the same was consumed for



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providing their output taxable services of erection and commissioning services, to M/s. Shri Nagendra Metals Pvt Ltd, Anjar;

- (x) Details of input service received and output service provided and payment made/received thereon are as under:-

(Amount in Rs.)							
Invoice No. & Date of Output Invoice	Issued to Service Provider	Invoice Value with Tax	Date of Payment Received	Invoice No. & Date of Input Invoice	Issue by Service Provider	Taxable Value	Date of Payment Made
2016-17/059, Dated 22/02/2017	Shri Nagendra Metals Pvt Ltd, Anjar	8,76,510	03/3/17	SNC_2016-17/35, Dated 28/02/2017	Shree Neeikanth Construction	7,15,070	04/3/17
							16/3/17
2017-18/001, Dated 01/04/2017	Shri Nagendra Metals Pvt Ltd, Anjar	1,78,111	06/4/17	SNC_2017-18/01, Dated 05/04/2017	Shree Neelkanth Construction	1,49,822	07/4/17

- (xi) While providing the erection and commissioning work, various civil works are also required to be undertaken to keep the erected structure in proper place, for keeping it affixed to the ground. The objection of the audit officers was mainly that the appellant did not have any contract for providing such service. In this regard, it is submitted that making a separate contract for such a small work was not required, as the same was received as an ongoing work and for limited purpose. The invoice itself was sufficient for the work done, and payments made to the service suppliers. There is no condition in the Cenvat credit rules that credit can be denied for not having a contract.
- (xii) The appellant submits that since the input service is received and utilized for the purpose of providing taxable output service, the Cenvat credit has been correctly taken in terms of Rule 3 of the Cenvat Credit Rules, 2004.
- (xiii) The Rule 3 of the Cenvat Credit Rules, clearly authorize the appellant to avail credit on the input service and utilize the same for providing taxable output service. It is nowhere mentioned that one to one correlation is required to be proved and also there is no such condition that input service bill is required to be issued first and thereafter invoice of output service can be issued.
- (xiv) The reliance is placed on the judgement in the case of (a) Indus Towers Ltd vs CCE & ST cited in 2020-TIOL-886-CESTAT-CHD (b) Marudhara Motors vs CCE cited in 2017 (48) STR 260 (Tri-Del)
- (xv) In view of the above submissions, it is clarified that the appellant has correctly availed input tax credit on the civil work, utilized for providing output taxable services i.e. erection and commissioning services, and therefore, the said credit cannot be denied to the appellant.



- (xvi) The details of the service tax paid and Cenvat credit of input service availed during February, 2017 to April, 2017 have been taken by the Revenue from books of accounts and registers, which signifies that there was no suppression of facts on its part in this case. Therefore, larger period of limitation cannot be invoked.
- (xvii) The reliance is placed upon the following cases (a) *India Tin Industries V/s. Commissioner of Central Excise, Bangalore - 1994 (70) ELT 731 (Trib.)*, (b) *Bony Rubber Co. Pvt. Ltd. V/s. Collector of Central Excise, New Delhi - 1996 (84) ELT 58* and (c) *D.J. Vora, Batliboi & Co. Ltd. V/s Collector of Central Excise, Surat - 1999 (30) RLT 223* (d) *Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC)* and *1989 (40) ELT 276 (SC)* (e) *Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in 2007 (216) ELT 177 (SC)*, (f) *Messrs Jaiprakash Industries Ltd. reported in 2002 (146) ELT 481 (SC)*
- (xviii) The present one is not a case where it had committed contravention of any of the Rules with an intent to evade payment of duty. There is no violation of any nature committed nor breached any Rules with an intent to evade payment of duty. In this view of the matter, no penalty or interest could be justifiably imposed on us in law.
- (xix) Further, penalty under Rule 5(2) of the Service Tax Rules-1994, would be unjustified because according to said rule records includes computerised data/records and means the records as maintained by an assessee in accordance with various law in force from time to time. The appellant had provided all the details and documents and clarification and records in relation to service tax, to calculate value of taxable service provided, service tax liability and to verify payment of service tax, the cenvat credit availed and utilized by for payment of service tax.
- (xx) The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the land mark case of *Messrs Hindustan Steel Limited reported in 1978 ELT (J159)* wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed. It is held by the Hon'ble Supreme Court that in other cases where there were only irregularities or contravention flowing from a bonafide belief, even a token penalty would not be justified;
- (xxi) The submissions and explanations tendered by the appellant vide reply dated 16.07.2020 and also at the time of hearing are on record of this case and therefore, the appellant does not repeat the same submissions and explanations once over again herein. As the reply and the submissions on the record of this



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case are a part and parcel of the present appeal, the appellant craves leave to refer to and rely upon the replies and written submissions at the time of hearing of this appeal. The Assistant Commissioner has failed to appreciate these submissions and explanations while passing the impugned order and therefore, the impugned order which is against the weight of evidence is perverse in nature, and hence the same is liable to be dropped.

(xxii) In the instant case, there is no short levy or short payment or non-levy or non-payment of any excise duty. Therefore, the proposal to charge interest under Section 75 of the Act is also not maintainable in the present case.

4. Personal hearing in the matter was scheduled on 10.03.2022, 24.03.2022 and 05.04.2022 in virtual mode. No one attended the hearing. However, the Appellant vide letter dated 25.04.2022 has waived the requirement of personal hearing and has requested to decide the case on the basis of merits considering the written submission made and documents furnished by them.

5. I have carefully gone through the facts of the case, the impugned order, and the Appeal Memorandum filed by the Appellant. The issue to be decided in the case is whether the impugned order confirming demand of cenvat credit amounting to Rs. 1,09,052/- along with interest and imposing penalty under Section 77 and 78 is correct, proper and legal or otherwise.

6. I find that the adjudicating authority, vide impugned order, has disallowed the cenvat credit of Service Tax (including KKC), in respect of Invoice No. SNC_2016-17/35 dated 28-2-2017 and No. SNC_2017-18/01 dated 5-4-2017 involving credit amount of Rs. 90,162/- and Rs. 18,890/- respectively to the Appellant. The credit was disallowed on the ground that the output service bills had been issued earlier than the input service bills. The adjudicating authority also observed that cenvat credit was availed before the date of invoice and hence was not eligible as per Rule 4(7) of CCR, 2004. The adjudicating authority further observed that the Appellant could not prove that input services were used for further output services.

6.1. Countering the findings of the adjudicating authority, the Appellant argued that the input services of civil work mentioned in the two invoices pertaining to Shree Neelkanth Construction, Anjar were used in providing output services of erection and commissioning to M/s. Shri Nagendra Metal Pvt. Limited, Anjar. The Appellant has also furnished details of payment made to input service provider (Shree Neelkanth Construction, Anjar) and payment received from the output service receiver (M/s. Shri Nagendra Metal Pvt. Limited, Anjar). The Appellant has contended that due to ongoing nature of work, no



separate contract was required. The Appellant has also argued that there is no provision in the Cenvat credit Rules to deny the credit on the ground that invoices for the input services were issued on later date than the output service invoices.

6.2 I find that the Appellant in its above submission has already stated as to how the disputed input services were used in providing output services. It is also observed that the Appellant had made identical submission in reply to the SCN also and provided relevant documents also to the adjudicating authority. However, it appears that the adjudicating authority without considering/discussing the above submission had come to the conclusion that the Appellant could not prove the use of input services for further output services. Thus, the impugned order is a non-speaking one on this aspect. In my considered view, the adjudicating authority has failed to bring on record any concrete evidences against the Appellant's submission wherein it has shown the nexus between the input services and the output services. Accordingly, the Appellant's contention that the above said input services were consumed for providing its output services is required to be accepted.

6.3 I find that ratio of judgment of Hon'ble Tribunal in the case of Marudhara Motors Vs. CCE(2017(48)STR 260(Tri.Del.) relied upon by the Appellant is also squarely applicable in the present case. The relevant observations of the Hon'ble Tribunal are reproduced below:-

"7. I find that both the authorities below have not addressed the issue regarding the activities of the appellant in providing the business auxiliary service, for which the advertisement expenses have been incurred. Since the issue regarding taking of service tax on the disputed service for providing taxable output service i.e., business auxiliary service have not been properly addressed by the authorities below, I have no option but to accept the submission made by the appellant that those services have in fact been utilized for providing the business auxiliary service."

6.4 I also find that the adjudicating authority has not cited any legal provision for denying the cenvat credit on the ground that the invoices for the input services were issued on later date than the output service invoices and hence, such grounds are legally unsustainable. Further the adjudicating authority has observed that the Appellant had availed the credit on earlier date i.e., before the date of invoice and hence was not eligible for cenvat credit as per Rule 4(7) of CCR, 2004.

6.5 In this regard, the relevant provisions of Rule 4(7) of CCR, 2004 are reproduced below:-



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

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

Provided further that in case the payment of the value of input service and the service tax paid or payable as indicated in the invoice, bill or, as the case may be, challan referred to in rule 9 is not made within three months of the date of the invoice, bill or, as the case may be, challan, the manufacturer or the service provider who has taken credit on such input service, shall pay an amount equal to the CENVAT credit availed on such input service, except an amount equal to the CENVAT credit of the tax that is paid by the manufacturer or the service provider as recipient of service, and in case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules :

From the above provisions it is clear that the cenvat credit in respect of input service is required to be taken on or after the date on which invoices/bills have been received and payment towards the same is required to be made within three months of the date of invoice. It is observed from the copy of cenvat credit register that the Appellant has shown availment of the impugned cenvat credit on the date of invoices itself and not before that. It is also observed from the submission made by the Appellant that it has made payment to the input service provider well within the time limit of 3 months stipulated in second proviso to Rule 4(7) supra and hence, there was no irregularity on this aspect also. Accordingly, the findings of the adjudicating authority that cenvat credit was availed in contravention of Rule 4(7) of CCR, 2004, is legally not maintainable.

6.6 Accordingly, I find that demand of cenvat credit of Rs. 1,09,052/- is not sustainable on merits. Since the demand itself is not sustainable, the question of recovery of interest under Section 75 of the Act and imposition of penalty under Section 78 of the Act also does not arise.

7. I further find that the adjudicating authority has imposed a penalty of Rs. 10,000/- under section 77(1) (b)/(c) of the Act for non-observation of provision of Rule 5(2) and Rule 5A(2) of Service Tax Rules, 1994.

7.1 It is observed that the Appellant had given details of records maintained by it and also provided copies of correspondences showing the list of records/ documents furnished to the authorities concerned. However, while imposing penalty, the adjudicating authority has not discussed as to why these records maintained by the Appellant is not sufficient for compliance of Rule 5(2) and Rule 5A(2) of the Service Tax Rules, 1994. Accordingly, I



find the impugned order non-speaking one on this aspect, and the penalty imposed under Section 77(1)(b)(c) of the Act is also unjustified.

7.2 I also find that the ratio of judgment of Hon'ble Supreme Court in the case of M/s. Hindustan Steel Limited (1978(2)ELT (J159) relied upon by the Appellant is also applicable in the facts and circumstances of the present case.

8. In view of above findings, I set aside the impugned order and allow 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.

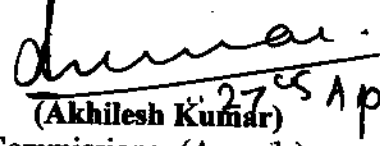
सत्यापित / Attested



Ketan Dave

अधीक्षक (अपील)

Superintendent (Appeal)



(Akhilesh Kumar)

Commissioner (Appeals)

27th April, 2022.

By RPAD

To M/s. Shiv Industries, Plot No. 146-A, Mahadev Nagar, Anjar-Kutch-370110.	मैसर्स शिव इंडस्ट्रीज, प्लॉट नं। 146-A, महादेव नगर, अंजार-कच्छ-370110
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प्रति:-

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, मंडल अंजार-भचाउ, को आवश्यक कार्यवाही हेतु।

4) गार्ड फ़ाइल।

