


 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015	 7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)/100&101/Ahd-I/2017-18 / 896 to 900
 Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-279to280-2017-18
 दिनांक Date : 29-01-2018 जारी करने की तारीख Date of Issue 08/02/18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
 Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Assistant Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं AC/04/Div-II/2016-17
 दिनांक: 31/7/2017, से सृजित

Arising out of Order-in-Original No. AC/04/Div-II/2016-17 दिनांक: 31/7/2017 issued by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
 Harekrushna Technopride Engineering & Mahesh Trivedi
 Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतल नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

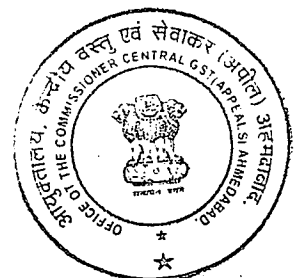
(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

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(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित हैं।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हों।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

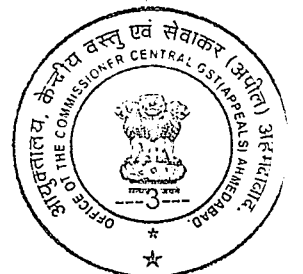
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

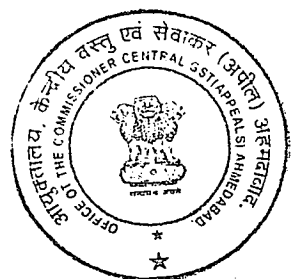
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, 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."



ORDER IN APPEAL

The below mentioned two appeals are filed against OIO No. AC/4/Div II/2016-17 dated 31.7.2017, passed by the Assistant Commissioner, Central GST, Division II, Ahmedabad South Commissionerate [for short –‘adjudicating authority’]:

Sr. No.	Name of the appellant	Appeal No.
1	Harekrushna Technopride Engineering, C 2/A-B, State Bank of India Road, Phase-I, GIDC Vatwa, Ahmedabad, Gujarat	100/Ahd-I/2017-18
2	Shri Mahesh Trivedi, 223, Vishalnagar, Opp. Parasprabhu Society, Isanpur, Ahmedabad.	101/Ahd-I/2017-18

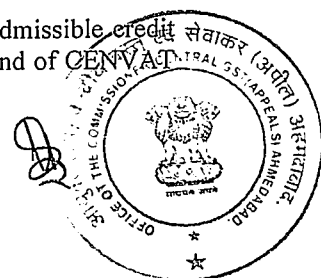
2. Briefly, the facts are that a show cause notice dated 15.12.2015 was issued to the appellant mentioned at Sr. No. 1, alleging that they had wrongly availed CENVAT credit on invoices issued by service providers who had actually not provided any service and had issued bogus bills, acting as an accommodation entry provider. The SCN therefore, demanded CENVAT credit of Rs. 25,94,313/- along with interest and further proposed penalty under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. Penalty was also proposed on the appellant mentioned at Sr. No. 2, *supra* under Rule 26 of the Central Excise Rules, 2002.

3. This notice was adjudicated vide the aforementioned OIO dated 31.7.2017, wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on both the appellants.

4. Feeling aggrieved, the appellants have filed this appeal raising the following contentions:

Harekrushna Technopride Engineering.

- that they are engaged in the manufacturing of pre filled syringe, filling closing, inspection and labeling machine, visual inspection machine, cartage nesting with inspection, DHS tunnel etc. falling under chapter heading 84 of CETA '85;
- that during the financial year 2011-12, they had received services of commission agents namely M/s. Sakshi Trade Link Private Limited and M/s. Vayu Tradelink Private Limited and on their invoices they had availed CENVAT credit on sales commission services;
- that the impugned order is in gross violation of the principles of natural justice, is ex facie illegal and unsustainable in law;
- that in the statement of Shri Abhishek Sharad controlling person of M/s. Sakshi Tradelinks P Limited, he had nowhere stated that they were providing accommodation entry to the appellant;
- that merely because they were providing accommodation entry i.e. issuing bogus invoice to other companies the same cannot be applied on the appellant without any substantial evidence; that the said commission agents have actually provided services to the appellant for which the appellant has paid consideration to the said commission agents and the amount of service tax charged in the bills was also paid by the appellant;
- that in the absence of cross examination, the adjudicating authority could not have relied upon statements of both the aforementioned persons as true facts and situation cannot be culled out from the statements recorded by the departmental authorities;
- that there being no substantial ground holding that the appellant had availed inadmissible credit based on some bogus invoice, the adjudicating authority has confirmed the demand of CENVAT credit and imposed penalty;



- that if such person would have remained present for cross examination the appellants would have successfully established that the facts alleged in the said statements were clearly untruthful and incorrect;
- that they would like to rely on the case of Arsh Casting P Ltd [1996(81) ELT 276], Asha Jyoti Spinning [1995(60) ECR 584], L Chandrashekhar [1990(49) ELT 289];
- that it has been their assertion that these firms viz M/s. Sakshi Trade Link Private Limited and M/s. Vayu Tradelink Private Limited, were their selling agents and nowhere have the appellant ever pleaded that service of promotion or marketing was also received by the appellant from such persons;
- the adjudicating authority committed an error by holding that the appellant has not received the commission agent services from the service provider M/s. Vayur Tradelink; that since the appellant had received the services in 2011-12 & the inquiry was conducted in 2014, the service provider could not be located at the time of investigation; that this does not tantamount to the fact that the said service provider never existed at all;
- the reliance on the statement of Shri P K Agarwal, Director of M/s. Rose Labs, recorded on 11.6.2015, is not correct since the appellant had appointed M/s. Sakshi Trade Link Private Limited and M/s. Vayu Tradelink Private Limited in relation to sales of machinery manufactured by them and the commission was paid by the appellant to these service providers;
- the invocation of extended period is illegal, arbitrary and without application of mind;
- the adjudicating authority failed to appreciate the fact that the appellant had received the services and paid the service tax amount mentioned in the invoices;
- that the appellant had taken all reasonable steps that an ordinary person would have taken in the circumstances;
- the appellant is not guilty of any suppression of facts or mis-declaration of facts with an intent to avail inadmissible CENVAT credit;
- that merely because the invoices issued by the service provider are alleged to be fake or bogus, it cannot be said that there was any malafide intention on the part of the appellant;
- that the appellant had not acted dishonestly or contumaciously and therefore not even a token penalty would be justified;

Shri Mahesh Trivedi

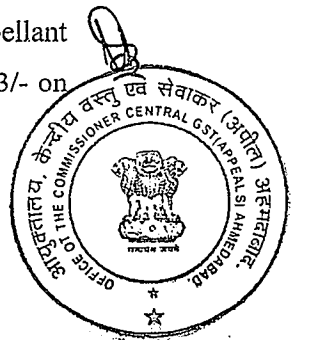
- that the penalty under rule 26 of the Central Excise Rules, 2002, is illegal in as much as it is not applicable in the instant case; that they would like to rely on the case of Standard Pencil [1996(86) ELT 245];
- that there is no proposal for confiscation of goods in the present case and therefore, in the absence of any findings that goods are liable to confiscation or actual confiscation, the penalty under rule 26 is not imposable.

5. Personal hearing in the matter was held on 22.1.2018 wherein Ms. Shilpa Dave, Advocate, appeared on behalf of both the appellants. The Learned Advocate reiterated the grounds of appeal. She further relied on the below mentioned judgements and also submitted the copies of the same:

- (i) Arsh Castings P Ltd [1996(81) ELT 276]
- (ii) Asha Jyoti Spinning Mills [1996(81) ELT 523]
- (iii) L Chandrasekat [1990 (48) ELT 289]
- (iv) Prayagraj Dyeing & Printing Mills P Limited [2013(290) ELT 61]
- (v) Premraj Dyg. & Printing Mills P Limited [2014(306) ELT 145]
- (vi) Minakshi Fashions P Limited [2015(322) ELT 174].

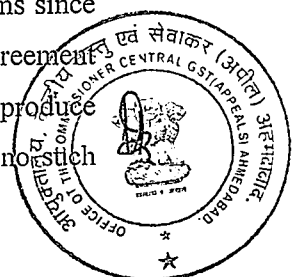
6. I have gone through the facts of the case, the grounds of appeal, the oral submissions made during the course of personal hearing. The issue to be decided is whether the appellant is eligible to avail CENVAT credit in respect of invoices issued by M/s. Sakshi Trade Link Private Limited and M/s. Vayu Tradelink Private Limited or otherwise.

7. Let me first examine the facts first. The allegation against the appellant mentioned at Sr. No. 1 is that they had wrongly availed CENVAT credit of Rs. 25,94,313/- on



the input service invoices issued by M/s. Sakshi Trade Link Private Limited and M/s. Vayu Tradelink Private Limited, in respect of sales commission. The genesis of the dispute is the letter dated 2.7.2014 from Kolkata Zone wherein it was informed that an investigation had revealed that M/s. Sakshi Trade Link Private Limited, Kolkata was acting as a 'accommodation entry provider' and issuing bogus invoices without actually providing any service. The fact that no service was provided to the appellant, has been accepted by Shri Sumit Sharma, Director of M/s. Sakshi Trade Link Private Limited and Shri Abhishek Sharad, its controlling person. Further investigations revealed that M/s. Vayu Tradelink Private Limited on whose invoices the appellant had availed CENVAT credit, was a bogus firm, which was non-existent at the registered address; that the Shri Vishal Solanki, Director of M/s. Vayu was also the director of M/s. Sakshi; that on physical verification of his residential address as per data mentioned in ROC, Kolkata & Income Tax department it was found that no such person was residing at the said address; that M/s. Vayu appeared to be a bogus company having directors of fake identity. Further the signature on the invoices of both the firms viz. M/s. Sakshi Trade Link Private Limited and Vayu Tradelink Private Limited were the same clearly pointing to the fact that Shri Abhishek Sharad was the common controlling person of both the firms. It is also on record that M/s. Vayu Tradelink Private Limited had not deposited the amount the service tax collected, in the government account. Further, investigations at the buyers end revealed that M/s. Rose Labs Bioscience Limited, who had purchased the machinery from the appellant and on said transaction the commission was paid to the aforementioned firm, was not even aware of the aforementioned two firms.

8. Despite the above facts not being refuted, the appellant has in his grounds, raised the averment that the service provided was in respect of commission agents; that they had received the services from these two service providers; that since Shri Abhishek Sharad controlling person had not taken their name, it was not correct to assume that they had only received only invoices and not the services. Surprisingly, the averments are made on the face of facts that both the Director and Shri Abhishek are on record admitting - that no service was provided; that they were only issuing bills; that the activity was done for monetary benefit; that on receipt of the payments, they used to pass the cash to the persons who had made payments. Further, even the authorized signatory of the appellant has admitted that they had not availed any sales promotion service from M/s. Sakshi. The most important fact being that none of the statements stand retracted. In addition to these facts, the appellant had provided cheques towards the wrong availment of CENVAT credit which bounced, resulting in the department filing a criminal case before the Hon'ble Additional Chief Metropolitan Court No. 32, at Ahmedabad. The statement of the buyer of the machine on which the so called service is said to be provided assumes significance since he was not knowing these two firms. Surely, if these firms were engaged as commission agents, in all probability the buyer would be aware of these firms since he would have engaged with them. Even otherwise, there would have been some agreement between the commission agent and the appellant. However, nothing of the sort has been produced to substantiate the claim that these firms were engaged as commission agents. Since no



engagement ever took place, which is corroborated by the buyer, the departmental finding that these two firms were fictitious and had only issued cenvatable invoices to fraudulently pass on credit as a accommodation entry provider substantiates based on the admission of the service provider and the authorized representative of the appellant appears to be concrete and correct.

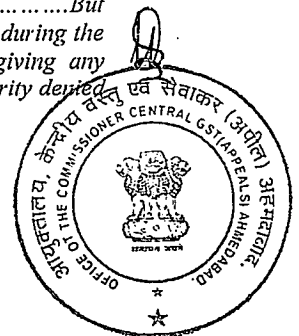
9. The appellant has also raised a contention that in the absence of cross examination, the department should not have relied upon the statements. On going through the impugned OIO, I find that in para 62 the adjudicating authority clearly lists that as per the request of the appellant, cross examination was granted four times, spanning two months. However, no one turned up once again bolstering the claim of the department that the firms were nothing but bogus, because had they anything to counter on the allegations made in the notice any prudent person would immediately avail the opportunity. The appellant's assertion now that since these persons did not turn up for the cross examination, their statement should not be relied upon appears to be untenable on account of the fact that sufficient opportunity was granted for the cross examination. The non appearance of these persons for the cross examination clearly reveals that the entire transactions were bogus; that no service was provided and the appellant was therefore not eligible to avail CENVAT credit in respect of the services which they had never received. The fact that that Income Tax assessment order clearly records that the appellant was providing accommodation entry in the year 2011-12, further bolsters the stand/finding of the adjudicating authority. Even otherwise, none of the persons have retracted their statements. Further, the statement of the service providers, were only corroborative in nature which even otherwise has not been retracted. When the appellant himself has confessed that he has not availed any sales promotion services, I find that the non attendance of the service providers for cross examination should not hamper the adjudicating authority's finding because it has already been held that what has been admitted, need not be proved. The appellant in this regard has relied upon the below mentioned cases, to substantiate the claim that they can avail the CENVAT credit viz

(i) Arsh Castings P Ltd [1996(81) ELT 276]. The Hon'ble Tribunal in this case held as follows [relevant extracts] :

4. *On remand, it appears that the Additional Collector of Central Excise, Chandigarh (Preventive) summoned the witnesses for cross-examination whose statements were relied upon in the Show Cause Notice. But none of them turned up for cross-examination and the Additional Collector without making any effort to propose their attendance for cross-examination by resummoning them etc. again decided the case on the evidence available on the record and confirmed the demand vide his impugned Order-in-Original dated 3-9-1993.*

8. *Considered. It is not in dispute that the entire case of the Department regarding the gate passes in question being fictitious hinges on the evidence of the Partner/Director of the concerned firm of Alang (Rajkot), who according to the gate passes resumed in the instant case were consignors. From the Final Order (as extracted above) No. A/245/92-NRB, dated 25-5-1992 passed by the Tribunal.*

12.....*Whereas the appellants have not merely denied the charge in their reply to the Show Cause Notice, but have brought on record both the documentary and circumstantial evidence to demolish the case of the Department. That is to say, the present case is not merely a case of statement against the statement, but is a case where the witnesses who have made the statement during the investigation/enquiry behind the back of the appellants are keeping themselves away and are not ready to stand the test of cross-examination against the statement (defence) of the appellants duly corroborated by the facts and circumstances of the case and the undisputed documentary evidence on the record.....But curiously enough both the authorities below relying upon the statements made by the witnesses during the investigation and the private enquiries held that the gate passes were fictitious without giving any opportunity of cross-examination. It may be noticed here that earlier also the adjudicating authority denied*



the opportunity of cross-examination of the witnesses whose statements were relied upon in the show cause notice and, therefore, the case was remanded by this Tribunal, as aforesaid, but on remand no opportunity to cross-examine was given.....But when such opportunity to cross-examine the witnesses is denied by the adjudicating authority, the order so passed by the adjudicating authority on the basis of such private enquiries and the statements made by the witnesses during investigation, stands vitiated.

(ii) Asha Jyoti Spinning Mills [1996(81) ELT 523]

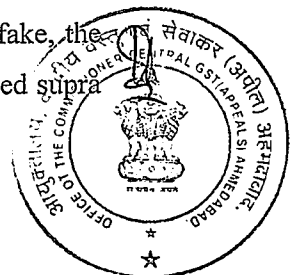
8. This judgment has been followed in the case of Vardhan Syntex (supra). The Chief Chemist has applied the test of uniformity of diameter of the yarn. It cannot be said that his report is clear and unambiguous. It was therefore, all the more necessary to have permitted cross-examination of the Chief Chemist. It has been held in a catena of decisions that denial of opportunity to cross-examine witnesses whose statements are relied upon by the department, tantamounts to violation of fundamental principles of natural justice. [See 1991 (56) E.L.T. 220 (Tri.) = 1991 (35) E.C.R. 186] and [1988 (38) E.L.T. 362 (Tri.) = 1988 (19) E.C.R. 231]. The necessity of cross-examination is further greater in a case like this where the Chief Chemist's report forms the sole plank of the department's case.

(iii) L Chandrasekar [1990 (48) ELT 289]

6. It is therefore, obvious from the finding of the Adjudicating authority that opportunity was not given to the appellant to cross-examine third parties on whose statements reliance was placed. It is an elementary principle of natural justice and fair play that person who is sought to be proceeded against and penalised in adjudication on the basis of third party statements should be afforded effective opportunity to challenge the correctness of the same as per law by cross-examination if he so desires. If witnesses do not turn up for cross-examination, it is open to the adjudicating authority to proceed with the adjudication without relying on those statements against the appellant given. Non-availability of witness will not be a ground to penalise the appellant in law when the appellant is entitled to an opportunity of cross-examination of third parties on whose statements reliance is placed

These case laws, stand distinguished based on facts in the present dispute. In the present case, the adjudicating authority *suo moto* granted cross examination not once but four times, spanning a period of two months. Further, in the present dispute, the case simply does not rest on the statements of these two persons. The authorized signatory of the appellant is on record that they had not availed such services; the service provider has mentioned that only invoices were received without providing any services; that the statements of the aforementioned two persons were only corroborative in nature; that the fact, that one of the firm was not traceable, the inquiry at the residential address revealing that no such person ever resided, the fact that the firm acted as a accommodation entry provider which has been confirmed by the Income Tax authorities leads to clear distinction of facts from the case laws relied upon. The effort made by the adjudicating authority in providing four opportunities for cross examination when corroborated with various facts on records, lead the adjudicating authority to proceed with the adjudication by relying on those statements. Further, it is also a fact that even the purchaser of the machinery was not aware of any such person acting as a commission agent/ or was involved in sales promotion. I therefore, find that the case laws relied upon stand distinguished and hence, are not applicable to the present dispute.

10. The advocate of the appellant during the course of personal hearing also relied upon the case laws of Prayagraj Dyeing & Printing Mills P Limited [2013(290) ELT 61], Premraj Dyg. & Printing Mills P Limited [2014(306) ELT 145] and Minakshi Fashions P Limited [2015(322) ELT 174] to contend that the CENVAT credit cannot be denied even if the supplier is not traceable/could not be found; that even if the supplier turned out to be fake, the credit could not be denied. However, I find a striking dissimilarity in the case laws relied upon



with the facts of the dispute at hand. In the dispute at hand, the appellant was aware of the non existence of the firm from whom invoices were received; that no service was received; that the firms [of service provider] were set up to perform this fraudulent work of only providing invoices, which is on record even before the Income Tax Authorities. Therefore, the case laws would not apply since CENVAT credit can be availed only if the services were received which is not the fact. Even otherwise, I find that this is a case of a forged document which is non existent before law. As has been held by the Hon'ble Supreme Court, "fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence". I therefore, do not find that the case laws, would be applicable in the case of the appellant.

11. As far as extended period and imposition of penalty goes, I am in total agreement with the adjudicating authority that the case has all the elements for invocation of extended period and for imposition of penalty on the appellant. The case clearly shows that the appellant fraudulently availed the CENVAT credit because it is not a case where the services on which credit was availed, was received. The appellant has not been able to provide any material fact to counter the allegation of the revenue. Therefore, the contentions in this regard stands rejected. The only counter is that the payments were made, which would not help them since the internet still has news reports that these firms were engaged in providing accommodation entry and to hoodwink the tax authorities they adopted the modus of making payments through banking channels.

12. Now coming to the contention of the appellant mentioned at Sr. No. 2, I find that the appellant has appealed against the imposition of penalty imposed under Rule 26. The appellant [at Sr. No. 2] was the authorized signatory, was in overall in charge of the appellant firm and therefore, was part of the conspiracy to avail fraudulent CENVAT credit based on documents that were fraudulently raised without any service being involved. The appellant's contention that since there was no confiscation, the question of penalty under Rule 26 does not arise, is not a tenable argument, more so since the penalty was proposed and imposed under Rule 26(2)(ii) of the Central Excise Rules, 2002. I agree with the findings recorded by the adjudicating authority imposing penalty on the appellant mentioned at Sr. No. (2). The contentions raised by the appellant mentioned at Sr. No. 2 supra therefore, in this regard is rejected.

13. In view of the foregoing, the OIO is upheld and the appeals filed by the appellants mentioned at Sr. No. 1 and 2, supra. are rejected.

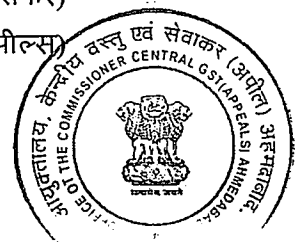
14. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

14. The appeal filed by the appellants stands disposed of in above terms.

उमाशंकर

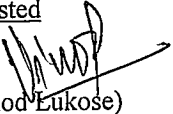
(उमा शंकर)

आयुक्त (अपील्स)



Date : 29.1.2018

Attested


(Vinod Eukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

By RPAD.

To,

Harekrushna Technopride Engineering, C 2/A-B, State Bank of India Road, Phase-I, GIDC Vatwa, Ahmedabad, Gujarat	Shri Mahesh Trivedi, 223, Vishalnagar, Opp. Parasprabhu Society, Isanpur, Ahmedabad.
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Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Excise Division-II, Ahmedabad South.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad South.
5. Guard File.
6. P.A.

