


	<b>केंद्रीय कर आयुक्त (अपील)</b>	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर भवन सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015	7 <sup>th</sup> Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
☎ : 079-26305065		टेलिफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क. फाइल संख्या : File No : V2(ST)/59/Ahd-III/2017-18  
Stay Appl.No. NA/2017-18

*1548 to 1553*

ख. अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-336-2017-18  
दिनांक Date : 21-02-2018 जारी करने की तारीख Date of Issue

*16/3/2018*

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

ग. Arising out of Order-in-Original No. SD-06/18/AC/Mahalaxmi/16-17 दिनांक: 29/03/2017 issued  
by Asst. Commissioner, Central Tax, Ahmedabad-South

घ. अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**Mahalaxmi Infracontract pvt Ltd  
Ahmedabad**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती 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 अतत 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, 4<sup>th</sup> 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 :

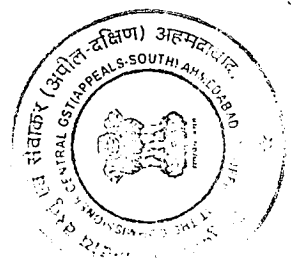
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(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।

... 2 ...



(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 है।

(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 हो।

(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.

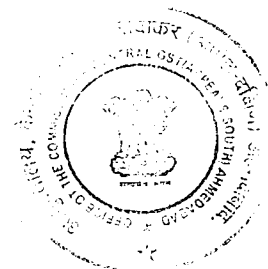
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मैन्टल हॉस्पिटल कम्पाउण्ड, मेघाणी 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 Appellate 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।

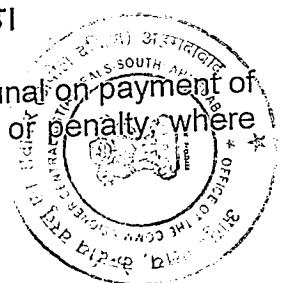
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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**

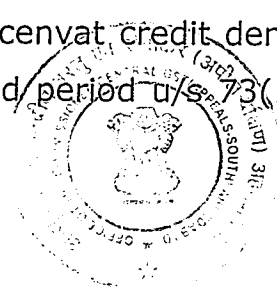
M/s. Mahalaxmi Infracontract Private Limited, B-2, Corporate House, Opp.- Pakwan-2, S.G. Highway road, Ahmedabad- 380 054 (centralized STR No. AAGC M4615E SD001) (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-06/18/AC /Mahalakshmi/ 16-17 dated 29.03.2017 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-VI, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief are that appellant reversed following cenvat credit during audit itself and before of SCN.

**Table-A**

Issue	Issue pointed out by audit team vide Audit report No. FAR 390/2014-15	Cenvat reversed	Interest paid
A	Capital goods (Excavator+ Garder) on which cenvat have been availed has been removed after being used. Cenvat credit reversal after giving certain percentage deduction u/r 3(5) of CCR, 2004	8,61,355 <b>Not Contested by appellant</b>	1,11,318
B	Reversal of Cenvat credit of insurance service tax availed on above Capital goods removed. Proportional reversal u/r 3(5) of CCR, 2004, of credit availed as capital goods did not remain with appellant	44,542	5,756
C	Reversal of credit of service taken on purchase of office building as office building is not input service	17,19,854 <b>Not Contested by appellant</b>	2,22,267
D	Reversal of cenvat availed on Ed. Cess & Sec. Higher Ed. Cess paid on CVD, though it was exempted vide NN 13/2012-Cus & 14/2012-Cus	4,57,184	59,081
	<b>TOTAL PAID</b>	<b>30,82,935</b>	<b>3,98,422</b>

3. Vide impugned OIO whole wrong availment of cenvat credit demand of Rs. 30,82,935/- was confirmed invoking extended period u/s 73(1) of



FA, 1994r/w rule 14 of CCR, 2004 and ordered to be recovered with interest u/s 75. Further imposed penalty of Rs. 15,41,468/- (50% of demand confirmed) u/s 78(1) and penalty of Rs. 10,000/- u/s 77(2) of FA, 1994. Cenvat credit Rs. 30,82,935/- already reversed along with interest of Rs. 3,98,422 paid, was appropriated in impugned OIO.

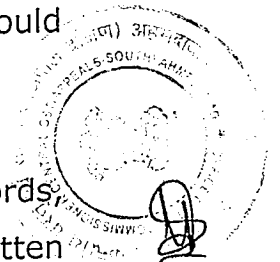
4. Being aggrieved with the impugned order, the appellants preferred an appeal on 11.05.2017 before the Commissioner (Appeals-II), against following issue-

ISSUE	Cenvat	Interest
Reversal of Cenvat credit of insurance service tax availed- Issue "B" above	44,542	5,756
Reversal of cenvat availed on Ed. Cess & Sec. Higher Ed. Cess paid on CVD, Issue "D" above	4,57,184	59,081
TOTAL	5,01,726	64,837
penalty u/s 78(1)	15,41,468	
penalty u/s 77(2)	10,000	

5. It is contended in appeal memo that there is no provision regarding reversal of cenvat availed on input service i.e insurance service u/r 3(5) of CCR,2005;that Ed. Cess & Sec. Higher Ed. Cess paid on CVD, appellant is eligible to take the credit; that there is no fraud or suppression or intend to evade the duty and they have accounted for all transaction pointed out so penalty u/s 78 can not be levied; that duty demanded by audit part has been paid with applicable interest before issue of SCN, therefore penalty can not be imposed and; that issuance of SCN itself is in contravention of section 73(3) as demand with interest paid as when point out by audit.

6. Personal hearing in the case was granted on 30.11.2017. Shree Pravin Doshi and Shri Hemal Doshi, both CA, appeared before me and reiterated the grounds of appeal and submitted additional submission. They further stated that duty/credit has been reversed on being pointed out. They submitted that they are paying duty of Rs. 54 crores and they had bonafied belief before taking credit. Further stated that SCN should not have been issued when they paid duty before SCN.

7. I have carefully gone through the facts of the case on records grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of



personal hearing. **Appellant has not contended the issue "A" and "C"** (except for penalty u/s 78) stated in Table-A above. Three question of law are involved in this appeal. I shall take up one by one.

8. **(Issue -B above) First question of law** is that whether Rule 3(5) of the Cenvat Credit Rules, 2004 ("the Credit Rules") for reversal of Cenvat credit on inputs or capital goods is also applicable to reversal of credit availed on input services- i.e. insurance service availed on capital goods?

9. I find that inputs, input services and capital goods have been separately defined in the Credit Rules and therefore are independent of each other. Rule 3(5) of the Credit Rules only talks about the Cenvat credit taken on inputs or capital goods. It does not refer to the Cenvat on Input services. In other words, there is no provision in Rule 3(5) of the Credit Rules to reverse credit of service tax availed in relation to inputs or capital goods when removed from the factory. My view supported by by judgement of Hon'ble Kolkata CESTAT in the case of M/s Seven Star Steels Ltd. Versus Commissioner of Central Excise, Customs & Service Tax, BBSR-II...[ 2013 (30) S.T.R. 532 (Tri. - Kolkata)]. Head notes of said decision is produced as below.

*"Cenvat credit of Service Tax - Input service - Reversal of credit availed on GTA service - Procurement of iron ores used in manufacture of sponge iron - No merit in allegation of iron ore used as such without being used in manufacture of final product - Input subjected to process of screening and screening process part of manufacturing process - **Rule 3(5) of Cenvat Credit Rules, 2004 directed for reversal of credit on inputs or capital goods and inapplicable to input services** - No merit in impugned order - Impugned order set aside - Rule 3(5) of Cenvat Credit Rules, 2004."*

In view of above I hold that appellant is not required to reverses cenvat credit of Rs. 44,542/- availed on insurance service and consequently interest of Rs. 5,756/- is not required to be paid. I set aside the penalty ( 50% of 44,542/-) imposed under u/s 78(1) in this regards.



10. **(Issue –D above)** Now **second question of law** is whether appellant is eligible for taking credit of Rs. 4,57,184/- of Ed. Cess & Sec. Higher Ed. Cess paid on CVD, which he was legally not required to pay as it being exempted vide Customs NN 13/2012-Cus & 14/2012-Cus. I am of considered view that as appellant was not legally required to pay above duty, and therefore it was not allowable as credit.

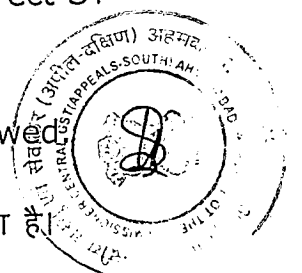
11. In view of above, I hold that, since said duty was not leviable in view of said customs exemption notifications, the appellant is not eligible to take credit of Rs. 4,57,184/- of Ed. Cess & Sec. Higher Ed. Cess paid on CVD, under rule 3 of CCR, 2004. I uphold the impugned OIO as far as it relates to said demand of wrongly availed credit of Rs. 4,57,184/- and interest on it and imposition of penalty u/s 78 (50% of Rs. 4,57,184/-).

12. Now remaining, **third question of law** is that whether SCN was not required to be issued in terms of section 73(3) of FA, 1994, considering the proceeding concluded, as appellant had paid duty and interest pointed out by departmental officer (before issuance of SCN).

13. Appellant's contention that since duty with interest is paid before issuance of notice there was no requirement to issue the notice as matter is deemed to be concluded as per section 73(3) is not acceptable as section 73(3) is applicable only where there is no fraud, no suppression or no mis-statement of facts. It was only during the course of audit proceedings that the entire event of non payment of tax had come to the knowledge of department. Had it not been the audit scrutiny of the financial statements of the appellant, the payment of Service tax would have gone unheeded. I hold that instant case is not covered under section 73(3) of Finance Act 1994. My view is supported by decision in the case of Machino Montel (I) Ltd.[2006 (202) ELT 398 (P&H)], wherein it was stated that mere deposition of the duty demand before issuance of SCN cannot give the benefit to the Assessee for non-imposition of penalty. Hence, I agree with the findings of the adjudicating authority and uphold impugned OIO as far as it relates to, imposition of penalty u/s 78 of FA, 1994, recovery of interest and recovery of credit/duty for above issue "A" , "C" and "D" in Table-A. I uphold the penalty imposed u/s 77(2) of 1994 as appellant has failed to file correct ST-3 returns and to show reversal of credit in return.

14. In view of above, appeal filed by the appellants is partially allowed.

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



15. The appeals filed by the appellant stand disposed off in above terms.

*U. Sh. Kar*

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

*R.R. Patel*

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

M/s. Mahalaxmi Infracontract Private Limited,

B-2, Corporate House, Opp.- Pakwan-2,

S.G. Highway road, Ahmedabad- 380 054

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad South .
- 2) The Commissioner Central Tax, CGST, Ahmedabad South.
- 3) The Additional Commissioner, Central Tax , Ahmedabad
- 4) The Asst. Commissioner, Central Tax, Div-VI, Ahmedabad South
- 5) The Asst. Commissioner(System), Hq, Ahmedabad South.

6) Guard File.

7) P.A. File.

