केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
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क फाइल संख्या : File No : V2(ST)57/Ahd-South/2018-19 ,V2(ST)03/EA-2/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-0134&135-2018-19**
दिनाँक Date : **18-12-2018** जारी करने की तारीख Date of Issue 15/1/2019

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

ग Arising out of Order-in-Original No. **STC/82/N-Ram/AC/D-III/11-12** दिनाँक: **15.02.2012** issued by Assistant Commissioner, Div-III, STC, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
C.D. Integrated Service Pvt. Ltd.
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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त 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 प्रकिया 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।

केन्द्रीय वस्तु एवं सेवाकर (अपील-दक्षिण) आयुक्त का कार्यालय THE COMMISSIONER CENTRAL GST(APPEALS-SOUTH) AHMEDABAD

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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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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 हास्पिटल 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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

Hon'ble CESTAT vide its order no. A/11262/WZB/AHD/2013 dated 30.9.2013, in an appeal filed by M/s. C D Integrated Service Private Limited, B-802, Premium House, Nr. Gandhigram Railway Station, Navrangpura, Ahmedabad [for short 'appellant'], against OIA No. 93-94/2013(STC)/SKS/Commr.(A)/Ahd dated 8.5.2013, held as follows :

> *"4. The appellant filed an appeal before first appellate authority belatedly but within the time wherein the first appellate authority can condone the delay. This is evident from paragraph No. 7 of the first appellate authority's order. In our considered view, the first appellate authority has dismissed the appeal filed by the appellant only on the ground of non-acceptance of reasoning given by the appellant for belated filing of appeal, as mentioned in his order at Para 7. In our view, the reasoning recorded by the first appellate authority is incorrect. Since the appellant has already filed an appeal within the period wherein first appellate authority could condone the delay, and deposited entire amount of duty liability, interest thereof and some penalties imposed, we are of the view that first appellate authority should hear and dispose the appeal on merit. Accordingly, without recording findings/observations on the merits of the case, keeping all the issues open, we remand the matter back to first appellate authority, who will hear and dispose the appeal on merit, as the appellant has made out a case for condoning the delay. Needless to say the first appellate authority will follow the principles of natural justice before coming to conclusion. "*

The aforementioned OIA dated 8.5.2013, was decided in respect of appellant's appeal and a departmental appeal against OIO No. STC/82/N-Ram/AC/D-III/11-12 dated 15.2.2012 [*for short – 'impugned OIO'*], passed by the Assistant Commissioner, Division III, Service Tax Commissionerate, Ahmedabad. Accordingly, both the appeals were restored. However, since department had filed an appeal against the judgment of the Hon'ble Delhi High Court in the case of Intercontinental Consultants & Technocrats P Ltd[2012-TIOL-966-HC-Del-ST], before the Hon'ble Supreme Court, the appeals were therefore, kept in call book. Since the Apex Court has decided the departmental appeal, the appeal filed by the appellant was retrieved. Both the aforementioned appeals are being decided vide this common order.

2. Briefly, the facts are that during the course of audit by CERA, it was pointed that the appellant had recovered Rs 5,46,439/- for ODIN software charges from their clients for the period from 2004-05 to 2008-09 and had failed to pay service tax of Rs. 61,375/-; that the reconciliation of their accounts with the returns filed with the department revealed that the appellant had short paid service tax of Rs. 51,665/-; that the appellant had wrongly availed CENVAT credit of Rs. 19,158/- on the basis of document which was not a valid document. A show cause notice dated 21.9.2010 was therefore, issued to the appellant proposing recovery of service tax of Rs. 1,13,040/- along with interest and penalty and further proposing disallowing CENVAT credit wrongly availed of Rs. 19158/- along with interest and also proposing penalty under rule 15(3) of the CENVAT Credit Rules 2004.

3. This notice was adjudicated vide the impugned OIO dated 15.2.2012, wherein the adjudicating authority confirmed the service tax demand, along with interest and penalty and further disallowed the CENVAT credit wrongly availed and also ordered payment of interest and further imposed penalty in respect of the CENVAT credit wrongly availed.

4. Both the department and the appellant feeling aggrieved filed appeal against the impugned OIO. The grounds raised by the appellant in his appeals were:

- that the appellant had acquired the license of the ODIN software from M/s. FTIL; that the said license could be distributed to various other end users; that they had given this software on license basis to their sub broker and the client paid license fees for the usage of the software that M/s. FTIL raised a consolidated bill for the licenses and the appellant recovered only the license charges from their sub broker or clients; that no amount over and above the license fees for usage of ODIN software was recovered; that the appellant has paid the license amount to M/s. FTIL on behalf of their sub agent or client; that the appellant is not the owner of the software nor providing any services with regard to the said software;
- that in respect of the CENVAT credit wrongly availed, the appellant had availed credit did bear the classification of the service 'architectural planning and detail development charges', the date, service tax registration number service tax amount and education cess; that only the serial number was not there;
- that in respect of the service tax demanded on account of the reconciliation of their accounts with the returns filed with the department, they had excess CENVAT credit which was available; that when there is already a excess credit available with the appellant, there cannot be any intention not to pay any service tax;
- that extended period is not invocable;
- that penalty is not imposable.

4.1. The department, also filed an appeal on the grounds that while the adjudicating authority confirmed the demand of Rs. 19,158/- in respect of CENVAT credit wrongly availed, the adjudicating authority erred in imposing penalty of Rs. 2,000/- instead of minimum penalty of Rs. 19,158/- in terms of Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

5. Both the appeals were decided vide OIA No. 93-94/2013(STC)/SKS/Commr.(A)/Ahd dated 8.5.2013 by the then Commissioner(Appeals), wherein the departmental appeal was allowed and the appellant's appeal was rejected on the grounds of limitation. The appellant feeling aggrieved, filed an appeal before the Hon'ble Tribunal, who vide its order dated 30.9.2013, *supra*, remanded back the matter to the appellate authority.

6. Hence, a personal hearing was held on 24.10.2018 wherein Ms. Madhu Jain, Advocate, appeared on behalf of the appellant and reiterated the grounds of appeal. The learned advocate sought 7 days time for submitting additional submissions. Thereafter on 26.11.2018, additional written submissions were submitted wherein the appellant relied upon the case of Intercontinental Consultants and Technocrats P Ltd [2018-TIOL-76-SC-ST] and further stated that they were eligible for cum tax benefits; that they had availed the CENVAT credit on the basis of invoices and that they would like to rely on the cases of Kemwell Biopharma P Ltd [2017(47) STR 70], ITW India Ltd [2016(46)STR 419, Patel Air Freight [2016(45) STR 404] and Deolittle Haskins & Sells [2015(38) STR 1220].

7. I have carefully gone through the facts of the case of records, the grounds of appeal and the oral and additional submissions made by the appellant. The question to be decided is three fold

[a] whether the appellant is liable for service tax of Rs. Rs. 61,375 in respect of recovery of ODIN software charges;
[b] whether the appellant is liable for availment of CENVAT credit wrongly availed;
[c] whether the appellant is liable for service tax on account of the reconciliation between the accounts and the returns filed by them; and
[d] whether the adjudicating authority erred in imposing penalty a lesser penalty under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

8. Let me take up the first issue wherein the appellant had recovered Rs 5,46,439/- for ODIN software charges from their clients for the period from 2004-05 to 2008-09 and had failed to pay service tax of Rs. 61,375/-. The appellant has explained the whole transaction in the para A of his grounds of appeal. In the additional submissions they have relied upon the judgement of the Supreme Court of India in the case of Intercontinental Consultants and Technocrats P Ltd [2018-TIOL-76-SC-ST]. As I have already mentioned the appellant had given the license of the software owned by M/s. FTIL to their sub-broker and clients who pay license fee for the usage of the said software . The appellant recovered the license charges from their clients/sub brokers. The appellant has further stated that they had acted as a pure agent. The appellant as is already known is registered with the department for stock broker service. The issue of inclusion of reimbursable expenses in the gross amount charged for computation of service tax is no longer *res integra*. The Hon'ble Supreme Court of India, in the departmental appeal in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. [2018 (10) G.S.T.L. 401 (S.C.)], held as follows:

> **29.** In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. **Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax**. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, **therefore, has to be prospective in nature**. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of *Commissioner of Income Tax (Central)-I, New Delhi* v. *Vatika Township Private Limited* [(2015) 1 SCC 1] wherein it was observed as under :
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> > *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
> >
> > *28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
> >
> > *29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office*

Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

30. As a result, we do not find any merit in any of those appeals which are accordingly dismissed.

[emphasis added]

Hence, the ground of the appellant that no service tax is payable in respect of reimbursements is correct. The service tax confirmed in this regard of Rs. 61,375/- along with interest and imposition of penalty to this extent under section 76 and 78 is set aside.

9. Now moving on to the second issue i.e. whether the availment of CENVAT credit is correct or otherwise. The appellant, it was alleged in the notice had availed CENVAT credit of Rs. 19,158/- on the basis of a letter. The service tax was paid to Sarance Architects and Interior Design, Ahmedabad. The adjudicating authority, in his impugned OIO has held that the service provider had submitted copy of 2 sets of documents in lieu of invoices and both document do not contain Sr. No., classification of service and therefore these documents, cannot be called invoice/bill/challan as Sr. No. is the basic component of invoice/bills/challan. The appellant however claims that the documents bear the classification of the services 'architectural planning and detail development charges'; that it has the date, service tax registration number. The appellant, further relying on Rule 9(2) of the CENVAT Credit Rules, 2004, further states that if the document contains details of duty or service tax payable, description of the taxable services, assessable value, service tax registration number, name and address of the person issuing the invoice the CENVAT credit cannot be denied. Rule 9(2) of the CENVAT Credit Rules, 2004 states as follows:

(2) No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document :
***Provided** that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, [assessable value, Central Excise or Service tax registration number of the person issuing the invoice, as the case may be,] name and address of the factory or warehouse or premises of first or second stage dealers or [provider of output service], and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit.]*

9.1 The Adjudicating authority states that since the Sr. No. and the classification is not mentioned, CENVAT credit cannot be allowed. The appellant has contested it stating that only the Sr. No. is not mentioned. Since *Sr. no.* finds no mention in the proviso to Rule 9(2), I find that the omission of Sr. No. can be condoned. Hence, the order of the adjudicating authority in this regard disallowing the CENVAT credit, confirming the demand in this respect along with interest and imposition of penalty under Rule 15(3) of the CENVAT Credit Rules, 2004 is set aside.

9.2 In this regard I would like to also state that the **department had filed an appeal** seeking enhancement of the penalty imposed under Rule 15(3) in the departmental appeal, the details of which are mentioned supra. The same was earlier enhanced by my predecessor in the OIA dated 8.5.2013. However, as is already mentioned *supra* since the demand does not stand, the question of imposing penalty does not arise. **Further, the Commissioner, CGST, Ahmedabad South, vide his letter dated 3.12.2018, has informed that the departmental appeal filed against the impugned OIO dated 15.2.2012 is withdrawn**.

10. Now moving on to the last dispute i.e. the demand confirmed on account of the reconciliation of their accounts with the returns filed with the department which revealed that the appellant had short paid service tax of Rs. 51,665/-. The appellant in his argument has first requested for *cum duty* benefit and secondly stated that they had paid excess service tax amounting to Rs. 27,015/- in June 2008 and from August onwards they have extra credit which adjusted against the remaining demand. The adjudicating authority in his impugned OIO has stated that the appellant failed to submit any documentary evidence which shows that taxable income is including service tax and that they had not produced any reason for excess payment made by them and that they had failed to comply with the conditions mentioned in Rule 6 of the Service Tax Rules, 1994 for adjustment of said excess hence benefit of adjustment cannot be granted.

10.1 It is worth noting that no documents have been produced before me to substantiate their claims made supra. As far as cum duty benefit is concerned, I would like to reproduce the operative para of the majority judgement in the case of Sri Chakra Tyres [1999(108) ELT 361]

> *9.1 We have carefully considered the pleas advanced from both sides, assessable value is required to be determined in terms of Section 4 of the Act. Sub-section 4(d)(ii) envisages deduction of aggregate effective duty payable on the goods under the Act, and all other Acts, if the wholesale price at which goods are sold includes all such excise duties. Wholesale price is the total consideration received by an assessee against sale of excisable goods in wholesale trade. Wholesale price will include the element of duty payable on any goods because such duty forms part of the consideration for sale of the goods according to terms of sale of the goods. If any further demand of duty is created against an assessee and such further demand of duty cannot be passed on to a customer in view of the terms of sale of any goods between the assessee and a customer, the original consideration (including duty, if any) received by an assessee for sale of the goods in wholesale trade, has to be taken as cum-duty price for the purpose of demand of higher duty subsequently. Any hypothetical consideration that the sale price would have gone up had correct duty been paid in the first instance cannot, in our opinion, be made the basis for non-abatement of differential duty from the realised sale price. We have to take into account the facts as they are, not what they might have been. Total duty proposed to be demanded shall have to be abated from the cum-duty price actually received and liable to be received as a consideration for sale of goods. This is the mandate of sub-section 4(d)(ii). Contention of assessees, as given in examples in para 6.2 above is correct and in conformity with the provisions of Section 4(4)(d)(ii). We take support for our view from the Apex Court's judgment in Pravara Pulp (supra). Analysis made by the Tribunal in Express Rubber (supra), relevant portion of which has already been extracted above is apt in our view. We endorse the same.*

The dispute at hand, is a different matter altogether in so far as in this case, the demand has arisen out of reconciliation of accounts with the returns filed with the department. It was incumbent upon the appellant to identify the transactions which were underreported in the returns filed with the department and then come up with the plea of cum duty benefit. That not being the case, I find merit in the demand of the adjudicating authority for documents to come to a conclusive finding that the service amount involved service tax duty. Since the appellant has

not come up with any documents, I am constrained and uphold the finding of the adjudicating authority. Further, even the argument that they had paid excess service tax in June 2008 is not supported by documents. The argument therefore stands rejected. The order of the adjudicating authority confirming the demand of Rs. 51665/- along with interest and the penalty under section 76 and 78 in so far as this demand is concerned, is upheld. The penalty under section 77(2) is also upheld.

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

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

(उमा शंकर)
आयुक्त (अपील्स)

Date :18 .12.2018

Attested

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,
M/s. C D Integrated Service Private Limited,
B-802,
Premium House,
Nr. Gandhigram Railway Station,
Navrangpura,
Ahmedabad.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Assistant Commissioner, Central Tax Division- VI, Ahmedabad South Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.