OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1,"SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR - 364 001.

F. No. V/15-57/DEM/2011-12

Date of order: - 30.08.2012
Date of issue: - 03.09.2012

Passed by Shri Harcharan Singh, Additional Commissioner

Order-in-Original No. 26/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner Central Excise (Appeals), Rajkot, Central Excise Bhavan, Race Course, Ring Road, Rajkot-360 001 within 60 days from the date of its communication. The appeal should bear a Court Fee stamp of Rs. 2.50 paise only.

The appeal should be filed in Form EA-1 in duplicate as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the Appellants in accordance with the provisions sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

- It should be accompanied with the following :
- Copy of appeal in duplicate.
- Copies of the order, one of which shall be certified copy of the order must bear a Court Fee stamp of Rs. 2.50 paise as per Schedule I to Article of the Court Fee Stamp Act, 1870.

Sub: - Show Cause Notice No. V/15-57/HQ/DEM/2011-12 dated 27.03.2012.

Brief facts:

1.1 M/s Rushil Decor Ltd, Surendranagar-Dhangadhra Road, Navalgadh, Dhangadhra (hereinafter referred to as "the said Noticee") are engaged in the manufacturing of wood based Particle Boards and Cotton Stalk Particle Boards falling under Chapter Heading 4410 of the First Schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration No. AABCR3005NXM004. The Noticee is availing the benefits of Cenvat Credit Scheme as provided in Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR") and are maintaining records to this effect.

1.2 During the course of audit of the records maintained by the Noticee, the Audit officers of the Department noticed that the Noticee is taking CENVAT credit on the strength of various challans issued by their Head Office as Input Service Distributors who are distributing the amount of credit of Service Tax to their manufacturing units viz the Noticee. It was further observed that none of challans/invoices issued by Head Office contain essential requirements of mentioning of Invoice No. Address and Registration No. of service provider, category of service received as required under Rule 4A of Service Tax Rules, 1994 and therefore, such invoices cannot be considered as a valid and reliable document for taking the CENVAT credit and thus CENVAT is not admissible to the Noticee as per the provisions of Rule 9(2) of Cenvat Credit Rules, 2004. As per Rule 9 (1) (a) (g) of Cenvat Credit Rules, 2004, credit can be taken on a Bill / Challan/Invoice issued by an Input Service Distributor under Rule 4A of Service Tax Rules, 1994. Rule 9 (2) of Cenvat Credit Rules, 2004 provides that "No CENVAT credit under sub-rule (1) shall be taken unless all the particulars prescribed under the Central Excise Rules, 2004 or the Service Tax Rules, 1994 as the case may be are contained in the said document....".

1.3 Whereas Rule 4A (2) of Service Tax Rules, 1994 reads as under:

> Rule 4A (2)-Every input Service Distributor distributing credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorised by him, for each of the recipient of the credit distributed, ad such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following namely:-

(i) The name, address and registration number of the person providing input services and the serial number and date of invoice, bill, or as the case may be, challan issued under sub-rule (1) ;

(ii) The name and address of the input service distributor ;

(iii)The name and address of the recipient of the credit distributed ;

(iv) The amount of the credit distributed.

1.4 Therefore, it appeared that the Noticee had wrongly taken Cenvat credit of Rs. 25,70,070/- in contravention of Cenvat Credit Rules, 2004. It was also observed that the Noticee has never informed the Department about availment of such Cenvat credit and this fact was found out the Department only during the course of Audit of records maintained by the said Noticee. It also appeared that the Noticee had availed the said Cenvat credit and has suppressed this fact from the Department with an intention to evade payment of Central Excise Duty.

1.5 Therefore Show Cause Notice No. V./15-57/HQ/DEM/2011-12 dated 27.03.2012 was issued to the Noticee by Joint Commissioner, Central Excise Commissionerate, Bhavnagar proposing the following actions. The Show Cause Notice dated 27.03.2012 was made answerable to Additional Commissioner, Central Excise Commissionerate, Bhavnagar as per Corrigendum dated 24.07.2012.

I Recovery of Cenvat credit amounting to Rs. 25,70,070/- alongwith interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A and 11AB (Now 11AA) respectively of Central Excise Act, 1944.

II Imposition of penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

1.6 Defence reply and personal hearing:

Noticee filed a written submission dated 05.06.2012 mainly contending as under:

I Noticee vehemently objected the proposal of demand of Service Tax and interest as proposed in Show Cause Notice and stated that no such Cenvat duty was required to be reversed or interest was payable by them and the penalty cannot be imposed on them as they have not violated any of the provisions of the Act or the rules made there under. The SCN is based on presumptions and assumptions and is in sheer disregard of facts on record, legal provisions, decided case laws and Departmental instructions.

II They submitted that the SCN is issued in sheer disregard of facts on record which clearly shows that the demand of duty of Cenvat credit availed on the basis of ISD issued by the Head Office on the basis of some procedural lacuna without going to the basis definition, circular and clarification of the Board only by any stretch of imagination and accordingly the demand under SCN is not sustainable on merit. Further they submitted that there is no fraud, or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made there under with intent to evade payment of Service tax on their part and hence the demand is not sustainable on the ground of limitation also as the SCN is issued after a limitation period of one year from the relevant date. The SCN is issued to them on 13.03.2012 covering the period from 01.04.2006 to 30.06.2010 which clearly shows that the same is issued beyond a period of one year from the relevant date.

III They stated that the SCN is vague in its contents as it straight away alleges and states in para 5 that "whereas it is observed that the said Noticee has never informed the Department about availment of such Cenvat credit and these facts were found by the Department only during the course of Audit of records maintained by the Noticee". They submitted that these facts being clearly in knowledge of Department since 2006 and onwards saddling with the SCN issued in the year 2012 alleging suppression of facts is itself a ground on which the SCN is illegal, unfair and uncalled for. Confirmation of having knowledge about the practice of assessee since 2006 and onwards and issuing SCN on the same issued in 2012 alleging suppression proves clear contradiction of the stand taken in the SCN and thus the SCN is capricious, therefore, they requested to drop the proceedings under SCN.

IV For silent issues namely minor lapse, minor procedural lapse, extended period and penalty they submitted as under:

Minor lapse on the mentioning details in the ISD challan amount to be rejection of Cenvat credit or not:

It was observed that the assessee is taking Cenvat credit on the strength of various challans issued by their Head Office as Input Service Distributors who are distributing the amount of credit of Service Tax to their manufacturing units viz. the Noticee. The Audit party has observed that on the challans/invoices issued by Head Office that details of input service provider i.e. Registration No. of Service Provider, category of service received are not stated as required under Rule 4A of Service Tax Rules, 1994 and therefore, such invoices cannot be accepted a valid and reliable document for taking Cenvat Credit and is not admissible to the Noticee.

For this objection, they drew attention towards the fact that it was typographical mistake in the challan Annexure while actual bill of input service provider contains all the details required by Rule 9(1) of Cenvat Credit Rules, 2004 which was offered to produce but audit team had denied verification with the invoices. For this, they relied on the following citations for their claim.

I CCE Vapi Vs DNH Spinners, CESTAT Ahmedabad Final Order No. A/1476/2009/ WZB/AHD dated 10.07.2009, 2009(244) ELT 65 (Tri. Ahd). The Tribunal has held that credit on technical ground that documents not in name of assessee's factory but issued in name of Head Office situated elsewhere-No dispute about input service received by assessee- Substantive benefit not deniable on procedural grounds and rejected Revenue's appeal.

II Modern Petrofils Vs CCE Vadodara, CESTAT, Ahmedabad Final Order No. A/1085-086/2010/WZB/AHD dated 30.07.2010, 2010 (20) STR 627 (Tri. Ahd). Credit availed based on invoices not containing name of factory – No dispute on receipt of services by factory to whom credit was passed on – Tribunal decision in DNH Spinners case (2009 (16) STR 418 (Trib) relied on by Commissioner (Appeals) correct though multiple divisions of appellant involved in present case – Invoice in the name of Head Office – No allegation that input service not relatable to factory and hence omission curable and condonable – Impugned order holding suppression cannot be alleged and extended period not invokable merely for non-disclosure of credit availed on said document, sustainable- Penalty set aside- Rule 9, 14 and 15 of Cenvat Credit Rules, 2004.

III Parekh Plast (India) Pvt. Ltd. Vs CCE Vapi. CESTAT, Ahmedabad Final Order No. A/1011/2011/WZB/AHD dated 15.06.2011. 2012 (25) STR 46 (Tri. Ahd). Cenvat credit of Service Tax- Invoices raised in the name of head office, not in the name of input service provider-defect in invoices can be omissions totally curable and condonable-Denial on sole ground of invoices in the name of head office not justified–Rule 3 and 9 of Cenvat Credit Rules, 2004.

Demand-Limitation-Suppression or mis-statement–ER-1 Return not disclosing the fact that credit of Service Tax availed on the invoices in the name of head office–Absence of any column or provision in ER-1 Return to show whether invoices raised in the name of assessee or head office–Failure to disclose a fact which was not required by assessee cannot be equated to suppression or misstatement–Demand barred by limitation- Section 11A of Central Excise Act, 1944. Appeal allowed.

IV Idea Mobile Communication Ltd. Vs CCE Meerut-I, CESTAT, New Delhi Final Order No. 652/2010-EX(PB) dated 30.07.2010. 2010 (20) STR 775 (Tri. Del).

Order-Adjudication order- Non application of mind- Rule 9(2) of Cenvat Credit Rules, 2004 provides discretion to adjudication authority to give necessary concession to assessee in relation to procedural irregularity regarding maintenance of documents on basis of which Cenvat credit can be availed–Before ascertaining liability, adjudicating authority expected to apply its mind and to arrive at final conclusion about assessee's liability-Impugned order not reveal such exercise having been undertaken by adjudicating authority-Impugned order set aside-remanded to adjudicating authority for fresh decision–Rule 9 ibid.

Cenvat credit of Service Tax–Verification of invoices–Appellants contend that all original invoices were produced before the authority for verification–No reply was issued to letter addressed to superintendent for same–Adjudicating authority ought to consider these documents –Impugned order set aside–Mater remanded for fresh adjudication–Rule 9 of Cenvat Credit Rules, 2004.

Natural justice–Documents relied upon, non-supply of–Authorities verified reports to ascertain liability of assessee–Records not disclosed that assessee were furnished with copies of said reports–Rules of principles of natural justice require that before any document is relied upon, copy thereof be made available to assessee except for specified cases–Natural justice denied to assessee. Case remanded.

V Plastic Products Engg. Co. Vs CCE Ahmedabad, CESTAT, Ahmedabad Final Order No. A/788/2009/WZB/AHD ated 17.04.2009.

Cenvat/Modvat–Documents for availing credit–Denial of credit on the ground that invoices were in the name of appellant's other units – Submission that two units located very near to each other and one more in the nearby village–Name and address of unit indicated correctly but ECC code was wrongly mentioned by supplier of inputs as supplying to all the three units such mistake rectifiable–Moreover, no dispute that inputs not received by appellant and not utilised in manufacture of final product – Denial of credit on such procedural ground not sustainable- Impugned order set aside–Rule 9 of Cenvat Credit Rules, 2004. Appeal allowed.

Therefore, from the above it is clear that no Cenvat credit is required to be reversed only on the ground of typographical mistake i Annexure attached to the ISD Challan when all the details required were in the Invoices of service provider available with the Head Office .They requested to drop the proceedings and demand for reversal of Cenvat credit in the interest of justice.

Minor procedural lapse can be condonable or not:

The Noticee drew attention towards relevant provision of Cenvat Credit Rules, 2004 as under.

Rule 9. Documents and accounts –(1) The Cenvat credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(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 al 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 of taxable warehouse or premises of first or second stage dealers or provider of taxable 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.

They requested to take a lenient view on typographical mistake on above basis and drop the proceeding in the interest of justice.

Demand is time barred.

The Noticee submitted that the show cause notice covers the period of 2006 to 2010. The Show Cause Notice is issued on 13.03.2012 thus; the extended period of limitation is invoked. The Show Cause Notice has badly alleged that the Noticee have suppressed the information from the Department.

The Noticee submitted that the extended period of limitation cannot be invoked in the present case since there is not suppression, wilful misstatement on the part of the Noticee. Supreme Court in case of Pushpam Pharmaceutical Company Vs CCE, Bombay -1995 Supp (3) SCC 462 – while dealing with the meaning of expression of "suppression of facts "in proviso to section 11A of the Act has held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The supreme Court has further held that " In taxation (Suppression of facts) can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty where facts are known by both the parties the omission by one to do what he might have done and that he must have done, does not render it suppression ".

Noticee, in view of above requested that there was no deliberate intention on their part for not to disclose the correct information or to evade payment of duty.

Penalty proceedings

Noticee, regarding penalty proceeding under Rule 15(3) of Cenvat Credit Rules, 2004 reiterated that it was a typographical mistake which was unintentional, therefore, penalty proceedings may be dropped in the interest of justice. Noticee submitted that it can be seen that it was not a deliberate act to de-finance and not complying the provisions of the Act. The Noticee had taken the immediate steps to fulfil the compliance of rule, therefore, they requested to take a lenient view and drop the demand and penalty proceedings on above basis.

The Noticee also submitted that the proceeding for imposing penalty is a proceeding which is quasi-criminal in nature. The question of imposition of penalty in ordinary course came for scrutiny before Hon'ble Supreme Court in the case of Hindustan Steel Vs State of Orissa reported in IR 1970 SC 253. The Hon'ble Court had observed that penalty should not be imposed in ordinary course unless the party acted deliberately in defiance of law. Penalty will not also be imposed merely because it is lawful to do so. Applying above ratio in the present case, it would be seen that there is no allegation of deliberate defiance on them as such no penalty be imposed the proceeding initiated under the subject Notice may be dropped.

1.7 Personal hearing:

Shri Vipul Khandhar, Chartered Accountant appeared on behalf of the Noticee on 6.8.2012. He reiterated the submissions already made in written reply submitted by him. He also provided paper book containing 1-51 pages in support of his contentions.

2 Discussion and findings:

2.1 I have gone through the facts of the case, defence reply filed by the Noticee and all the relevant documents placed in the file. On going through the fact of the case, I find that the Noticee is holding Central Excise Registration No. AABCR3005NXM004 and is availing Cenvat credit of duty paid on inputs and input services received by them to be used in or in relation to manufacture of their final products in terms of provisions of Cenvat Credit Rules, 2004. During the course of Audit of records of Noticee by Departmental Audit team, it was observed that the Noticee was taking Cenvat credit on the strength of various challans issued by their Head Office as Input Service Distributors who were distributing the amount of credit of Service Tax to their manufacturing units and it was observed that none of challan/invoices issued by Head Office contained essential requirements of mentioning of Invoice No. address and Registration No. of Service provider, Category of service received as required under Rule 4A of Service Tax Rules, 1994 and therefore such invoices cannot be considered as valid and reliable document for taking Cenvat credit and the Cenvat availed is inadmissible as per provisions of the Rule 9 (2) of Cenvat Credit Rules, 2004.

Further, as per Rule 9 (1) (a) (g) of the Cenvat Credit Rules, 2004, credit can be taken on a bill/challan/invoice issued by an input service distributor under Rule 4A of Service Tax Rules, 1994 and Rule 9 (2) of the said Rules provides that "No Cenvat credit under sub-rule (1) shall be taken unless all the particulars prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994 are contained the said documents...".

2.2 For better appreciation, Rule 4A of Service Tax Rules, 1994 is reproduced under:

Rule 4A. Taxable service to be provided or credit to be distributed on invoice, bill or challan—

(1) Every person providing taxable service shall, not later than fourteen days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service whichever is earlier issue an invoice, a bill or, as the case may be, a challan singed by such person or a person authorised by him in respect of such taxable service provided or to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely :-

(i) the name, address and the registration number of such person ;
(ii) the name and address of the person receiving taxable service ;
(iii)description, classification and value of taxable service provided or to be provided ; and
(iv) the service tax pay able thereon :

(2) Every input service distributor distributing credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorised by him, for each of the recipient of the credit distributed, and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely:-

(i) the name, address and registration number if the person providing input service and the serial number and date o f invoice, bill, or as the case may be, challan issued under sub-rule (1) ;
(ii) the name, and address of the said input services distributor ;
(iii) the name and address of the recipient of the credit distributed ;
(v) the amount of the credit distributed :

2.3 The Noticee has submitted that it was a typographical mistake in the Challan Annexure while the actual bill of input service provider contained all the details required under Rule 9 (1) of Cenvat Credit Rules, 2004 and in support of their claim they have relied upon the following decisions:

a) CCE, Vapi Vs DNH Spinners CESTAT, Ahemdabad, Final order No. A/1476/2009/WZB/AHD dated 10.7.2009 reported in 2009(244) ELT 65 (Tri. Ahd) ;

b) Modern Petrofils Vs CCE Vadodara, CESTAT, Ahmedabad, Final Order No. A/1085-1086/2010/WZB/AHD dated 30.7.2010 reported in 2010 (20) STR 627 (Tri.Ahd) ;

c) Parekh Plast (India) Pvt. Ltd. Vs CCE Vapi, CESTAT Final Order No. A/1011/2011/WZB/AHD dated 15.6.2011 reported in 2012 (25) STR 46 (Tri .Ahd) ;

d) Idea Mobile Communication Ltd. Vs CCE Meerut-I. CESTAT, New Delhi reported in 2010 (20) STR 775 (Tri. Del) ;

e) Plastics Products Engg Co. Vs CCE Ahmedabad. CESTAT, Ahmedabad Final Order No. A/788/2009/WZB/AHD dated 17.4.2009 reported in 2009 (248) ELT 859 (Tri.Ahd).

2.4 I have perused copy of challans for distribution of credit received on input services issued under Rule 4A (2) of Service Tax Credit Rules, 1994 along with its Annexure. The Challan contains the name and address of input service distributer, the name, address and Registration No. of the recipient / transferee unit, Challan No. While column No. 4 is for details of the input service providers where an Annexure is attached which contains the following details:

Invoice No. and date, name and address of the service provider, Service Tax Registration, Category of Service, Credit Reference, basic amount of Service Tax, Education Cess, Secondary and Higher Education Cess, payment date and period.

2.5 These details are sufficient as incorporated in invoices for availing Cenvat credit within the framework of provisions of Rule 9 (1) of Cenvat credit Rules, 2004. It is nowhere disputed that the input services were not received by the recipient unit/manufacturer i.e. Navalgadh Unit nor it is alleged that the input services were not relatable to the factory. Relying on the decisions of Tribunal, I hold that procedural lapses can be condoned and omissions are condonable and substantive benefit cannot be denied. I also hold that the Invoices were raised in the name of Head Office and not in the name of the input service provider which being a procedural lapse and such defect in invoices can is curable and condonable and in the result, Cenvat credit cannot be denied.

2.6 I also find that the Show Cause Notice covers period of 2006 to 2010 while it is issued on 13.3.2012 invoking extended period of limitation. On this count, I find that the Noticee is a holder of Central Excise Registration and has been availing the benefits of Cenvat credit facility under Cenvat Credit Rules, 2004 and has been filing periodical returns with the Department for payment of Central Excise duty. I find that the credit of Service Tax availed on the invoices in the name of Head Office

and the Head Office is subsequently issuing Challans for distribution of credit on input services in the capacity of Input Service Distributor (ISD) cannot be equated with suppression or mis-statement of facts leading to invocation of extended period of limitation, for this I rely on the decision of CESTAT, Ahmedabad in case of Parekh Plast (India) Pvt. Ltd. reported in 2009 (244) ELT 65 (Tri. Ahd).

2.7 Coming to the charge of imposition of penalty under Rule 15(3) of the Cenvat Credit Rules, 2004, I find that since the recovery of Cenvat credit is not justified in view of the foregoing discussion and as submitted and argued by the Noticee that the mistake was typographical mistake and it was unintentional, I accept the Noticee's submission and hold that the imposition of penalty under Rule 15(3) is not justified.

In view of the facts, evidences, discussion and findings I pass the following orders.

ORDER

I drop the proceedings initiated under Show Cause Notice No. V/15-57/HQ/DEM/2011-12 dated 27.03.2012 to the Noticee.

(HARCHARAN SINGH)
ADDL. COMMISSIONER

To,
M/s. Rusil Decore Ltd,
Survey No 270,
Navalgadh,
Dhangdhra,
District Surendranagar.

Copy to: -

1. Commissioner, Central Excise, Bhavnagar.
2. Assistant Commissioner, Central Excise Division, Surendranagar.
3. Superintendent, Central Excise, AR-Dharangdhra.
4. Guard File.

3/8/2012
ADDL. COMMISSIONER