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

F. No.V/15-35/DEM/HQ/2011-12

Date of order: - 30.09.2012
Date of issue: - 10.10.2012

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 28/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/15-35/Dem-ST/HQ/2011-12 dated 28.02.2012.

Brief facts :

1.1 M/s Excel Crop Care Limited, 6/2, Ruvapari Road, Bhavnagar (hereinafter referred to as the "the Noticee") are a registered unit engaged in the manufacture of excisable goods i.e. insecticides and pesticides falling under Chapter 38 of the First Schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration No. AAACW3810DXM003 under Rule 9 of the Central excise Rules, 2002 (hereinafter referred to as "the CCR"). The Noticee is availing CENVAT credit as provided under CENVAT Credit Rules, 2004 (hereinafter referred to as "the CCR, 2004").

1.2 An intelligence was gathered by the officers of Anti-Evasion Section of Central Excise Commissionerate, Hqrs, Bhavnagar that the Noticee have taken CENVAT Credit on the basis of invalid document i.e. on supplementary invoice raised by the service provider viz. M/s R. K. Caterers, Bhavnagar against whom officers of Anti-Evasion Section of Central Excise Commissionserate, Hqrs, Bhavnagar had booked an offence case for non-payment of Service Tax for the period 2006-07 to 2009-10, therefore an inquiry was initiated against the Noticee.

1.3 During the course of investigation, a statement of Shri Satish Motiram Narvekar, General Manager (Excise), an authorised signatory of the Noticee was recorded under Section 14 of the Central Excise Act, 1944 (hereinafter referred to as "the Act") before the Superintendent (AE), Central Excise, Hqrs, Bhavnagar on 07.06.2011 wherein he, inter alia, stated that he was serving with the Noticee for the last twelve years as a Manager; that their company is engaged in the manufacturing of insecticides and their plant is situated at 6/2, Ruvapari Road, Bhavnagar and they had obtained Central Excise Registration No, AAACW3801DXM003; that they are having Service Tax Registration No. AAACW3801DST008 for GTA at their above mentioned plant address; that they are also having their corporate and registered office at Mumbai and depots at various places in India. On being asked about the CENVAT credit he stated that they are availing CENVAT credit on inputs used in the manufacture of their final products on the basis of

valid duty paying documents and also availing CENVAT credit of Service Tax i.e. GTA, Business Auxiliary services and other input services on the basis of invoices/bills raised by the input service providers; that they are availing Service Tax credit on the basis of invoices issued by their Head/Registered office and other branches being input services distributors. He produced the following documents :

(i) Copy of ER-1 return filed by their company for the month of March 2011;
(ii) Copy of Service Tax credit register (Part-I) for the month of March 2011;
(iii) Copy of Service Tax credit register (Part II) for the month of March 2011 ;
(iv) Original and copy of bill No. 1190 dated 29.03.2011 issued by M/s R.K.Caterers, Bhavnagar, challan and calculation of Service Tax for the period 2006-07 to 28.02.2011.

Shri Satish Motiram Narvekar, General Manager (Excise) also stated that they had taken CENVAT credit of Rs. 19,92,666/- including various cesses of Service Tax paid by M/s. R.K. Caterers on the basis of Bill No. 1190 dated 29.03.2011 issued by M/s. R.K. Caterers, Bhavnagar in the month of March 2011; that it is true that the said bill was meant only for payment of Service Tax for the services received by their factory from the service provider for the period from 01.10.2006 to 28.02.2011; that they were aware with the fact that an inquiry had been initiated by this office against M/s R.K.Caterers in the month of March 2011.

1.4 The Noticee vide their letter No. ECCL/BHA/ST2011-12 dated 27.06.2011 furnished account of Ms R.K. Caterers for the month of March 2011 and informed that following the decision of Bombay High Court in case of CCE Vs Ultratech Cement Ltd. Reported in 2010 (260) ELT 369 they had reversed proportionate credit to the extent embedded in the cost of food/tea/snacks recovered from the employees/workers amounting to Rs. 1,63,250/- (Rs.1,58,692/- S.T + Rs.3,174/- Ed Cess + RS.1,384/- SH Ed Cess) vide entry no. 50 dated 23.06.2011 in the service tax credit account and submitted self-certified copy of relevant extract from Service credit register.

1.5 It appeared that the Noticee had taken CENVAT credit of Rs. 19,92,666/- (Rs.19,36,560/- Service Tax + Rs.38,731/- Ed Cess + Rs. 17,375/- SH Cess) of the Service Tax paid by M/s R.K. Caterers for the period from 01.10.2006 to 28.02.2011 on the basis of supplementary Bill No. 1190 dated 29.03.2011 issued by M/s R.K. Caterers, Bhavnagar in the month of March 2011. The said bill was issued for additional amount of tax as such type of supplementary invoice is not a valid document as provided in provisions of Rule 9 of the CCR, 2004 and therefore it appeared that the Noticee had wrongly taken CENVAT credit and therefore, the said amount became recoverable on account of non-levy or non-payment by reason of suppression of facts.

1.6 Therefore, a show cause notice No. V/15-35/Dem/HQ/2011-12 dated 28.02.2012 was issued by Joint Commissioner, Central Excise Commissionerate, Bhavanagar to the Noticee proposing following actions :

(i) recovery of CENVAT credit of Service Tax Rs. 19,92,666/- (Rs. 19,36,560/- Service Tax + Rs.38,731/- Ed Cess + Rs.17,375/- SH Cess) wrongly taken and utilised under Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944. Confimation and adjustment of Rs.1,63,250/- (Rs.1,58,692/- Service Tax + Rs.3,174/- Ed Cess + Rs.1,384/- SH Cess) which was subsequently reversed towards CENVAT credit amount under Section 11A of the Act ;
(ii) recovery of interest under provisions of Rule 14 of the CCR, 2004 read with Section 11 AB of the Act ;
(iii) imposition of penalty under provisions of Rule 15(1) of the CCR, 2004.

1.7 The Noticee filed a detailed written reply No. ECCL/ST/BHA/2012-13 dated 11.04.2012 which is as under :

1 M/s R. K. Caterers (hereinafter referred to as 'service provider') are engaged in providing catering service in the canteen situated at our manufacturing plant by supplying food/tea/snacks to the workers/employees employed at our manufacturing plant. Pursuant to an inquiry initiated by the Headquarters Anti Evasion Cell, Bhavnagar Central Excise Commissionerate against the

service provider, an amount of Rs. 19,36,560- (rupees nineteen lacs, thirty six thousand, five hundred and sixty only) was paid as Service Tax along with an amount of Rs 38,731/- (Rupees thirty eight thousand, seven hundred and thirty one only) towards Education Cess and an amount of Rs.17,375/- (rupees seventeen thousand, three hundred and seventy five only) towards Secondary and Higher Education Cess totalling gross amount of Rs. 19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty six only) for the period from 01.10.2006 to 28.02.2011 to discharge their service tax liability for having provided a taxable service classifiable under the taxable service head of 'Outdoor Caterer's service' in terms of the relevant provisions of the Finance Act, 1994. The service provider issued a Bill bearing No 1190 dated 29.03.2011 to the Noticee. (Ann A).

2 On receipt of the said Bill No. 1190 dated 9.03.2011 from the service provider, we availed CENVAT credit of service tax paid therein amounting to Rs.19,36,560/-(rupees nineteen lacs, thirty six thousand, five hundred and sixty only) along with an amount of Rs. 38,731/- (rupees thirty eight thousand, seven hundred and thirty one only) towards Education Cess and an amount of Rs. 17,375/- (rupees seventeen thousand, three hundred and seventy five only) towards Secondary and Higher Education cess totalling a gross amount of Rs. 19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty six only) in the CENVAT A/c for the month of March 2011.

3 On 0706.2011, Superintendent of Central Excise, (Anti Evasion), Hqrs, Bhavnagar Central Excise Commissionerate recorded a statement from Shri S M Narvekar, General Manager (Excise) and an authorised signatory of the Noticee (hereinafter refered to as 'the authorised signatory') under section14 of the Central Excise Act, 1944. In the statement recorded from the authorised signatory, it was interalia, stated that the Noticee had taken CENVAT Credit of an amount of Rs. 19,92,666/- (amount inclusive of Service Tax and both the Cesses) paid as service tax by the service provider vide Bill No. 1190 dated 29.03.2011 for the taxable service rendered by the service provider to the Noticee for the period 01.10.2006 to 28.02.2011 and that they were aware of the fact that an inquiry was initiated by the Hqrs. Anti Evasion Cell of Bhavnagar Commissionerate against the service provider. The authorised signatory produced copies of ER-1 return filed by the Noticee for the month of March 2011 (Ann B), service tax credit register (part-I) for the month of March 2011 (Ann C), service tax credit register (part-II) for the month of March 2011 (Ann C), and the original as well as a copy of Bill No. 1190 dated 29.03.2011 issued by the service provider along with challan (Ann E) and calculation sheet for service tax for the period from 2006-07 to 28.02.2011 (Ann F).

4 The Noticee vide letter No. ECCL/BHA/ST/2011-12 dated 27.06.2011 (Ann G) furnished an account of the service provider for the month of March 2011 to the Hqrs Anti Evasion Cell of Bhavnagar Central Excise Commissionerate wherein it was submitted that an amount of Rs. 1,63,250/- (rupees one lac, sixty three thousand, two hundred and fifty only) towards service tax and both education cesses, the break up of which is Rs. 1,58,692/- (rupees one lace, fifty eight thousand, six hundred and ninety two only) towards service tax, Rs. 3,174/- (rupees three thousand, one hundred and seventy four only) towards Education cess and Rs. 1,384/- (rupees one thousand, three hundred and eighty four only) towards Secondary and Higher Education Cess, was reversed/paid vide Entry No. 50 dated 23.06.2011 in the service tax credit account of the Noticee complying with the guidelines of the Bombay High Court judgement in CCE vs. Ultratech Cement Ltd reported in (2010 (260) ELT 369 (Bom) = **(2010-TIOL-745-HC-MUM-ST)** which pertains to the proportionate amount of CENVAT Credit included in the cost of food/tea/snacks recovered from the workers/employees. Further, the Noticee vide their letter No. ECCL/BHA/ST/2011-12 dated 19.07.2012 addressed to the Superintendent of Central Excise (AE) informed the department of having paid interest of Rs. 6821.00 on the amount of said Cenvat credit totalling Rs.1,63,250/- reversed by them. (Ann H).

Allegations in the Show Cause Notice :

5 We were issued a Show Cause Notice F.No.V/15-35/Dem/HQ/2011-12 dated February 28, 2012 (hereinafter referred to as 'SCN') by the Joint Commissioner of Central Excise, Bhavnagar Central Excise Commissionerate, Siddhi Sadan, Plot No. 6776/B-2, Narayan Upadhyay Marg, Bhavnagar 364 001, inter alia, alleging that :

a) we had taken CENVAT credit of Rs. 19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty six only) (inclusive of service tax and both the cesses) which is the service tax paid by the service provider for the period from 01.10.2006 to 28.02.2011 vide Bill No. 1190 dated 29.03.2011 ;

b) the said Bill No. 1190 was issued by the service provider for additional amount of tax and therefore, the amount paid became recoverable from the service provider on account of non-levy or non-payment by reason of suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of the Rules made there under ;

c) such type of supplementary invoice is not a valid document prescribed or provided under Rule 9 of the CCR, 2004 ;

d) we had availed CENVAT credit on an invalid document ;

e) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 (hereinafter referred to as 'the STR, 1994') except the additional amount of tax became recoverable from him on account of non-levy or non-payment by reason of suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of the Rules made there under with the intent to evade payment of Service Tax is not a prescribed document as provided under Rule 9 of the CCR, 2004 ;

f) we had wrongly taken CENVAT credit of Rs.19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty only) (inclusive of service tax and both the cesses) which is the service tax paid by the service provider for the period from 01.10.2006 to 28.02.2011 on the basis of supplementary Bill No. 1190 dated 29.03.2011 issued by the service provider in the month of March 2011 ;

g) we had contravened the provisions of Rule 9 (1) of the CCR, 32004 in as much as we have taken CENVAT credit on the basis of documents which is not prescribed documents in the above said Rule ;

h) we appear to have committed an offence as described in Rule 15(1) of the CCR, 2004 ;

i) we had wilfully misstated the facts in our CENVAT Credit A/c and in the monthly return prescribed in Rule 9(5) of the CCR, 2004 for the month of March 2011 to the department regarding the CENVAT credit wrongly taken and utilised amounting to Rs.19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty six only) (inclusive of service tax and both the cesses) ;

j) we had also contravened the provisions of the Act or of the Rules made there under ;

k) the wrongly taken CENVAT credit is required to be recovered under Rule 14 of the CCR, 2004 read with section 11A of the Act ; and

l) we vide our letter dated 27.06.2011 submitted that an amount of Rs. 1,63,250/- (rupees one lac, sixty three thousand, two hundred and fifty only) (inclusive of service tax and both the cesses) was reversed vide entry No. 50 dated 23.06.2011 and which is required to be confirmed and adjusted towards recovery of wrongly taken CENVAT credit under Rule 14 of the CCR, 2004 read with section 11A of the Act.

Proceedings proposed to be initiated in SCN :

6 We were called upon to show cause to The Joint Commissioner of Central Excise , Central Excise Commissionerate, Bhavnagar as to why :

(i) the CENVAT credit of Service Tax Rs.19,36,560/- (rupees nineteen lacs, thirty six thousand, five hundred and sixty only) along with an amount of Rs. 38,731/- (rupees thirty eight thousand, seven hundred and thirty one only) towards education cess and an amount of Rs.17,375/- (rupees seventeen thousand, three hundred seventy five only) towards Secondary and

Higher education Cess totalling a gross amount of Rs. 19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred and sixty six only), wrongly taken and utilised by the Noticee, should not be recovered from the Noticee under Rule 14 of the CCR, 2004 read with Section 11A of the Act. Out of these wrongly taken and utilised CENVAT credit, CENVAT credit of Service Tax of Rs. 1,63,250/- (rupees one lac, sixty three thousand, two hundred and fifty only) towards service tax and both education cesses, the break up of which is Rs.1,58,692/- (rupees one lac, fifty eight thousand, six hundred and ninety two only) towards service tax Rs.3,174/- (rupees three thousand, one hundred seventy four only) towards Education Cess and Rs. 1,384/- (rupees one thousand, three hundred eighty four only) towards Secondary and Higher Education Cess which have been subsequently reversed should be **not** confirmed and adjusted towards the CENVAT credit amount under section 11A of the Act ;

(ii) interest should not be recovered from the Noticee under the provisions of Rule 14 of the CCR, 2004 read with Section 11 AB of the Act ;

(iii) penalty should not be imposed on the Noticee under the provisions of Rule 15(1) of the CCR, 2004.

Detailed submissions in response to allegations in SCN :

7 At the outset, we firmly deny all the allegations made in the SCN which are adversial to us and in support of our defence we humbly submit our detailed responses to all the allegations made in the SCN as follows :

a) We do not dispute the fact that we had availed CENVAT credit of Rs.19,92,966/- (rupees nineteen lacs, nine two thousand, nine hundred and sixty six only) (inclusive of service tax and both the cesses) which is the service tax paid by the service provider for the period from 01.10.2006 to 28.02.2011 vide Bill No.1190 dated 29.03.2011.

b) We also do not dispute the fact that we had reversed an amount of Rs.1,63,250/- (rupees one lac, sixty three thousand, two hundred and fifty only) (inclusive of service tax and both the cesses) was reversed vide Entry No.50 dated 23.06.2011 being the proportionate credit which is included in the cost of food/tea/snacks recovered from the workers/employees. We reversed the said amount in compliance with the guidelines prescribed in this regard by the Bombay High Court judgement in CCE vs. Ultratech Cement Ltd reported in 2010 (260) ELT 369 (Bom) (Ann I). We also paid interest of Rs. 6821.00 on the amount of Rs.1,63,250/- reversed as stated above.

c) It is humbly submitted that the said Bill No.1190 dated 29.03.2011 issued by the service provider is a valid document for the purpose of availing CENVAT Credit by a recipient of taxable service which in the instant case is the Noticee, in as much as the provisions of clause (f) of Rule 9 (1) of the CCR, 2004 stipulates that an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004 is a valid document for the purpose of availing CENVAT credit. The relevant provision of Rule 9(1)(f) of the CCR, 2004 is extracted below for ready reference :

> **"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 :-
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> ....
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> ....
>
> (f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004 ;"

d) It is further submitted that the SCN does not dispute the fact that the Bill No.1190 dated 29.03.2011 contains all the relevant information as prescribed in terms of Rule 9(2) of the CCR, 2004 read with relevant provisions of STR, 1994.

e) The SCN also does not dispute the fact that the service provider raised a Bill bearing No.1190 dated 27.03.2011 to discharge the service tax liability for the entire period

because the service provider discharged the service tax liability for the entire period from 01.10.2006 to 28.02.2011 on 29.03.2011 and raised a Bill to that effect, the said Bill does not attain the character of a 'supplementary invoice' as alleged in the SCN. It is submitted that the provisions of CCR, 2004 or Central Excise Rules, 2002 (hereinafter referred to as 'CER, 2002) or STR, 1994 does not define the words or phrases 'Invoice' or 'Bill' or 'Challan' or 'supplementary Invoice'. In such a scenario, the words or phrases have to be understood in the context in which they are used in the relevant statute or as are understood in the commercial parlance while interpreting the said words and phrases.

f) In Rule 9 of the CCR, 2004, the phrase 'supplementary invoice' is used in clause (b) of sub-rule (1) as well as clause (bb) of sub-rule (1) (clause (bb) inserted through an amendment of CCR, 2004 vide Notification 13/2011-CE(NT) dated 13.03.2011 which came into effect from 01.04.2011). In the context in which this said phrase is used in both clauses (b) and (bb) ibid, it refers to payment of an additional amount of duty or service tax and this additional amount of duty or tax should have been paid over and above the duty or service tax which was already paid by the manufacturer or service provider. In the instant case, it is submitted that the service provider had not paid any service tax liability prior to 29.03.2011 for the period from 01.10.2006 to 28.02.2011 but the entire service tax liability for the said period was voluntarily discharged at one go and raised a Bill bearing No. 1190 dated 29.03.2011 to reflect this payment of service tax on the Noticee. The service tax liability, thus discharged by the service provider for the entire period from 01.10.2006 to 28.02.2011 is not over and above an amount of service tax which was already paid by the service provider but the actual or entire liability that was required to be discharged by the service provider for the said period.

g) It is submitted that vide Notification No. 13/2011 CE (NT) dated 31.03.2011, the following sub-clause has been inserted after clause (b) in Rule 9 of the CENVAT Credit Rules, 2004 :

"(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made there under with the intent to evade payment of service tax."

If the existing provisions of Rule 9 prior to this above insertion bar utilisation of CENVAT credit on supplementary invoice issued by a provider of output service where the additional tax became payable on account of fraud etc, as alleged in the Show Cause Notice, then the above new sub-clause (bb) would be redundant and makes no difference to the position existing before this insertion. Thus, in a way the Show Cause Notice proposes to impose the restriction retrospectively even for the period before 1.4.2011 which is not sustainable. In this regard, the CBEC has vide Circular No 943/04/2011-CX, dated April 29, 2011 clarified that the restrictions imposed under the Notifications No. 3/2011-CE (NT) dated 1.3.2011 and No 13/2011-CE(NT) dated 31.03.2011 are only prospective (Sr. No 12 of the Table) and if the service is received before 1.4.2011, credit would be admissible under the earlier provisions.

Thus, even assuming the invoice issued by R.K. Caterers is supplementary invoice for additional tax payable on account of fraud etc, credit cannot be denied as the service is received prior to 1.4.2011.

h) We humbly further submit that the document in question being a Bill as prescribed in "rule 9(1) (f) of the CCR, 2004, we are eligible to take and utilised the credit of the service tax paid therein in terms of Rule 3(1)(ix), 3(1)(x), Rule 3(1)(xa) of the CCR, 2004 read with Rules 3(4) and 4 (7) of the CCR, 2004. The relevant provisions of the said Rules are extracted below for reference :

Rules 3(1)(ix), 3(1)(x) and 3(1)(xa) of the CCR, 2004 :

"Rule 3(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –

....
....

(ix) the service tax leviable under section 66 of the Finance Act ;

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable service leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007) ; and"

Sub-rule (4) of Rule 3 of the CCR, 2004 ;

"(4) The CENVAT credit may be utilised for payment of –
(a) any duty if excise on any final product ; or
(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed ; or
(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such ; or
(d) An amount under sub rule (2) of rule 16 of Central Excise Rules 2002 ; or
(e) Service tax on any output service ;..."

Sub-rule (7) of Rule 4 of the CCR, 2004 :

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

It is submitted that as per the provisions extracted above, a manufacturer shall be allowed to take credit of service tax leviable under s.66 of the Finance Act, 1994, the Education Cess leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 and the Secondary and Higher Education cess leviable under section 136 read with section 140 of the Finance Act, 2007 and said CENVAT credit may be utilised for payment as prescribed in sub-rule (4) of Rule 3 of the CCR, 2004. In terms of sub-rule (7) of Rule 4 of the CCR, 2004, CENVAT credit in r/o input service shall be allowed, or after the day on which the invoice, bill or challan referred to in Rule 9 is received by the manufacturer. In the instant case, it is humbly submitted that we received the Bill No.1190 dated 29.03.2011 from the service provider which reflected the service tax payment made by them on a taxable service in terms of section 66 of the Finance Act, 1994 read with section 68 of the Finance Act, 1994 and we took credit of the said amount of service tax and cesses paid/reflected therein in terms of Rules 3(1)(ix), 3(1)(x), Rule 3 (1)(xa) of the CCR, 2004 read with Rules 3(4) and 4(7) of the CCR, 2004 as the said Bill No.1190 dated 29.03.2011 fully conforms to the provisions of Rule 9(f) read with Rule 9(2) of the CCR, 2004 as required by Rule 4(7) of the CCR, 2004.

i) While assuming but not admitting the fact that the said Bill No. 1190 dated 29.03.2011 is a 'supplementary invoice' as alleged in the SCN, we humbly submit that there is no bar in availing CENVAT credit of service tax paid on supplementary invoices, in spite of lack of a specific mention of such a document in Rule 9(1) of the CCR, 2004 because the document impugned still carried all the relevant information required in terms of Rule 9(2) of the CCR, 2004 read with the relevant provisions of STR, 1994, the credit availed by us on such a Bill is legal and valid as was held by the Hon'ble CESTAT in Ultratech Cement Ltd. Vs CCE, Nagpur (2011-TIOL-154 CESTAT-MUM) (**Ann J**). In that case, the Hon'ble Mumbai Bench of the Tribunal while dealing with the lack of relevant provisions for availing credit on supplementary invoices reflecting payment of service tax held that "...procedural laws are not be understood in a manner which will deny the rights assured to the parties. Once the assessee is entitled to take credit in relation to the duty paid on the inputs or capital goods and this right being not in dispute, merely because there is some infirmity observed in the document on which the credit sought to be availed, that cannot be a justification for denying the credit...". Further, in Secure Meters Ltd vs. CCE, Jaipur-II (2010-TIOL-416-CESTAT-DEL) (Ann K), Hon'ble CESTAT Delhi Bench held "...it is not correct to deny the service tax credit on the basis of the above mentioned supplementary invoices, just because at the time of receipt of the input services, the input service providers were not registered and had

not mentioned service tax registration no. in the invoices. When the receipt of input services is not disputed and the fact that the input service had been used for providing the taxable output services is not disputed, the credit of service tax on the input services even if subsequently under supplementary invoices , cannot be denied."

j) From the rulings of the Hon'ble CESTAT as referred to above, it is humbly submitted that lack of relevant provisions of Rule 9 of the CCR, 2004 or that the service provider was not registered or had not mentioned service tax registration number in as much as benefit o CENVAT credit is a substantive benefit provided by statute to manufacturers and service providers and such substantive benefit cannot be curtailed by procedural infractions or lack of relevant procedural provisions which would have otherwise enabled availment of such credit. In this context, it may be noted that this procedural gap also curtailed by inserting clause (bb) in Rule 9(1) of the CCR, 2004 by an amendment to the CCR, 2004 vide Notification No.13/2011-CE (NT) dated 13.03.2011. The relevant clause (bb) is extracted below for reference :

"(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made there under with the intent to evade payment of service tax."

k) It was further alleged in the SCN that there was non-levy or non-payment of `service tax on the part of service provider for the period from 01.10.2006 to 28.02.2011 and the amount of service tax (including cesses) amounting to Rs. 19,92,666/- (rupees nineteen lacs, ninety two thousand, six hundred sixty six only) came to be recovered from the service provider on account of non-levy or non-payment by reason of suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of the Rules mad there under with the intent to evade payment os Service Tax. And in as much as allegations of suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of the Rules made thee under with intent to evade payment of service tax was made against the service provider, it is alleged in the SCN that the Bill No. 1190 dated 29.03.2011 raised by the service provider has become ineligible document for availing CENVAT credit of service tax paid therein by the Noticee. In this regard, it is humbly submitted that the service provider appears to have discharged his service tax liability voluntarily immediately after this lapse was pointed out to him by the department and in this connection, Hon'ble CESTAT, Chennai Bench in M/s L G Balkrishan Brother Ltd vs. CCE Trichy (2010-TIOL-949-CESTAT-MAD) (Ann L) held that "....Rule 9(1)(b) relates to supplementary invoices, issued by a manufacturer or the importer of inputs of capital goods and relates to that additional amount of excise duty or additional duty leviable under Section 3 of the Customs Act. In the said Rue, there is no mention of Additional amount of service tax. As such, there is no warrant in law to invoke such provisions of Rule 9(1)(b) in respect of the present case." An earlier ruling on a similar issue was held in favour of the assessee by Hon'ble CESTAT Chennai Bench in M/s JSW Ltd Salem Steel Works vs. CCE, Salem (2008-TIOL-2351-CESTAT-MAD) (Ann M), wherein the Hon'ble Tribunal held "....the invoices issued to the appellants by the input service provider did not attract clause (b) of sub-rule (1) of Rule 9. This clause, in fact, did not apply to service tax at all. The Explanation to this clause was also therefore not applicable to the above invoices issued by the input service provider. Documents for availment of credit of service tax paid on input services were those referred to under clauses (e), (f) and (g) of Rule 9. The Explanation ibid was not applicable to any of these provisions." From the aforesaid rulings of the CESTAT, it is humbly submitted that the provisions relating to 'supplementary invoice' as prescribed in Rule 9(1) do not find any application to service providers in the absence of a specific reference to such invoice, bill or challan raised by service providers while discharging their service tax liability after the lapses were pointed out to them by the department.

l) In view of the foregoing, it is humbly submitted that the allegation made in the SCN that we had availed CENVAT credit on a 'supplementary invoice' and the allegation that such a supplementary invoice is not a valid document in terms of Rule 9(1) of the CCR, 2004 is baseless and illegal because the Bill No.1190 dated 29.03.2011, the document which is the crux

of the issue, is a valid document and corresponds to the documents prescribed in clause (f) of sub-rule (1) OF Rule 9 of the CCR, 2004.

m) It was further alleged in the SCN that we have contravened the provisions Rule 9(1) of the CCR, 2004 in as much as we availed CENVAT credit on a document which was allegedly not prescribed therein and hence committed an offence liable for penalty under Rule 15(1) of the CCR, 2004. It was also alleged that we have wilfully misstated the fact in our CENVAT credit A/c and in monthly return prescribed in Rule 9(5) of the CCR, 2004 for the month of March 2011 to the Central Excise Department regarding CENVAT credit wrongly taken and utilising the same. It was also proposed in the SCN that the credit availed by us is recoverable with interest in terms of Rule 14 of the CCR, 2004 read with sections 73 and 75 of the Finance Act, 1994. In this regard, we humbly submit that in view of our aforesaid averments the impugned document viz., Bill No.1190 dated 29.03.2011 is a valid document in terms of Rule 9(1) (f) of the CCR, 2004 and as we have availed credit based on a valid document, we are not liable for any penalty as envisaged in the allegation made in the SCN under Rule 15(1) of the CCR, 2004. In this regard, Rule 15(1) of the CCR, 2004 as it existed at the relevant time is extracted below for reference :

> **"RULE 15. Confiscation and penalty**. - (1) If any person, takes or utilises CENVAT credit in respect of input or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty or service tax on such goods or services, as the case may be, or two thousand rupees, whichever is greater."

As is evident from the relevant provision, penalty is leviable under the said Rule only if any person, takes or utilises CENVAT credit in respect of input services, wrongly or in contravention of any of the provisions of the CCR, 2004. In the instant case, as humbly submitted by us in the aforesaid submissions, we have availed CENVAT credit on a document which fully conforms to the provisions of Rule 9(1) (f) of the CCR, 2004 and hence, we have not committed any offence to attract penalty under Rule 15(1) of the CCR, 2004. In this regard, Hon'ble CESTAT Banglore Bench in ABC Engineering Works vs. CCE, Guntur (2010-TIOL-1045-CESTAT-BANG) (Ann N), held that when issues involve interpretation of Rules, penalties are not leviable. Similar ruling was given by Hon'ble CESTAT Chennai Bench in an earlier case between India Japan Lighting Pvt Ltd vs. CE, Chennai (2007-TIOL-1755-CESTAT-MAD) (Ann O), wherein the Hon'ble Tribunal held that when issued involved between assessee and department is with regard to divergent construction of law, penalty is not imposable.

n) We further submit that the monthly ER-1 return for the month of March 2011, the fact that we have availed CENVAT credit on the impugned document viz., Bill No.1190 dated 29.03.2011is reflected in the column pertaining to the 'Amount of CENVAT credit availed on input services' and it is submitted that there is not specific requirement to furnish invoice wise details of credit availment along with the monthly ER-1 return as per Rule 9(7) of the CCR, 2004 (in the SCN the relevant provision was referred to as Rule 9(5) of the CCR, 2004). In view of the fact that we have submitted the CENVAT credit details including the amount pertaining to the impugned document in the statutory monthly return, the allegation that we have suppressed is not legally tenable. In this regard, we humbly submit that the Hon'ble Tribunal in CCE, Indore vs. Medicaps Ltd (2011 (24) S.T.R. 572 (Tri. - Del) (Ann P), while dealing with a case on similar set of facts held "....If there is no column in the monthly return to show the nature of service on which the credit was availed, the assessee cannot be blamed for not disclosing the said fact. For invoking the longer period of limitation, there has to be a suppression or mis-statement with an intent to evade payment of duty. When the respondents have reflected the amount of credit availed by them in their monthly returns, it cannot be said that there was any positive act of suppression on mis-statement on their part." In view of the aforesaid ruling of the CESTAT, it is submitted that we have not misstated any facts in the monthly return filed by us for the month of March 2011. It is further submitted that we have voluntarily reversed an amount of Rs.1,63,250/- (rupees one lac, sixty three thousand, two hundred and fifty only) towards service tax and both education cesses, being the amount of CENVAT credit ineligible for us in view of the guidelines prescribed in such instances by the Hon'ble Bombay High Court in Ultratech Cement Ltd case cited supra. In view of the foregoing, we humbly submit that the credit availed by us on the impugned document is legal and proper and not liable for recovery with interest as envisaged in the SCN.

Prayer :

8 In view of the aforesaid detailed submissions countering the allegations made in the SCN, we humbly reiterate once again that the CENVAT credit of service tax availed by us on the impugned document viz., Bill No.1190 dated 29.03.2011 is legal and proper and the said document conforms to the provisions of Rule 9(1)(f) of the CCR, 2004. We also humbly submit that there is no wilful misstatement or suppression of facts as alleged in the SCN as we have submitted the monthly return for the relevant month to the jurisdictional Central Excise Office for their scrutiny. In view of this, we therefore, humbly request the Hon'ble Joint Commissioner of Central Excise, Bhavnagar Central Excise Commissionerate to kindly drop all the proceedings which are proposed to e initiated against the Noticee in terms of paragraph 11.0 of the SCN and to pass a just and legal order as per law.

9 We also request the Hon'ble Joint Commissioner of Central Excise, Bhavnagar Central Excise Commissionerate to provide us an opportunity of being heard in person before concluding the proceedings initiated through the SCN.

10 In addition to above, the Noticee filed an additional written submission dated 10.05.2012 as under :

1 The fact that service tax paid on outdoor catering service is admissible in principle is not in dispute which is evident from the fact that Show Cause Notice under reference is silent on the issue of admissibility of Cenvat credit.

2 Rule 9(1) (b) relates to supplementary invoices, issued by a manufacturer or the importer of inputs or capital goods and relates to additional amount of excise duty or additional duty leviable under Section 3 of the Customs Act. In the said Rule, there is no mention of additional amount of Service tax. As such, there is no warrant in law to invoke such provisions of Rule 9(1) (b) in respect of the present case.
In this connection we refer to and rely upon the decision of CESTAT in the case of L.G. Balkrishanan & Bros Ltd vs. CCE, Trichy reported in 2010-TIOL-949-CESTAT-MAD. A similar view has been taken by the Tribunal in the case of JSW Steel Ltd vs. CCE, Salem –2009 (14) STR 310 (Tri-Chennai).
The aforesaid decisions are surely applicable to the facts of our case and accordingly, the demand in the present case is not sustainable.
This is also evident from the clause regarding supplementary invoices inserted vide Notification No.13/2011 CE (NT) dated 31.03.2011 which is effective from 1st April, 2012.

3 Without prejudice to above we further submit that there is no allegation in the Show Cause Notice that we have taken the Cenvat credit owing to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the Rules made there under with the intent to evade payment of service tax. The show cause Notice does no adduce any evidence to support the allegation of wilful mis-statement or contravention of provisions of the Finance Act or of the rules made there under with the intent to evade payment of service tax.
In fact there cannot be any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made there under with the intent to evade payment of service tax on our part as cenvat credit on the outdoor catering service was admissible and hence there was no reason for us to fraudulently avail the same.

4 We further refer to and rely upon the decision of CESTAT in the case of M/s Madras Cements Ltd vs. CCE, Trichy reported in 2010 (258) ELT 463 wherein it has been held that where additional amount of duty became recoverable from the supplier manufacturer only subsequent to taking of credit but the assessee on the strength of supplementary invoices, the restriction contained in Rule 9(1)(b) is not attracted. Finally, they requested to drop the proceedings initiated in the SCN.

1.8 A personal hearing was fixed on 30.08.2012 before the adjudicating authority wherein Shri S M Narvekar, General Manager (Excise) of the assesee appeared for hearing and submitted a written submission. He stated that he had nothing more to add.

2 Discussion and findings :

2.1 I have carefully 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 facts of the case, I find that the Noticee are engaged in manufacture of insecticides and pesticides falling under Chapter 38 of the First Schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration and the Noticee are also availing CENVAT credit as provided under CENVAT Credit Rules, 2004. It is alleged in the show cause notice that the Noticee have taken CENVAT credit on the basis of invalid document i.e. on supplementary invoices raised by the service provider namely M/s R.K. Caterers, Bhavnagar and against whom the Anti-Evasion Wing of Central Excise Commissionerate, Bhavanagar had booked an offence case for non-payment of Service Tax for the period 2006-07 to 2009-10. During the course of investigation, it was observed from ER-1 for the month of March 2011 that the Noticee had taken CENVAT credit of Rs.19,92,666/-including both cesses of service tax paid by the service provider M/s R. K. Caterers, Bhavnagar on the basis of a Bill No.1190 dated 29.03.2011 for the period from 01.10.2006 to 28.02.2011. The said bill was issued by the service provider for additional amount of service tax. It is the charge in the Show cause notice that the said supplementary invoice is not a valid document prescribed or provided under Rule 9 of the CCR, 2004 and that a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from him on account of non-levy or non-payment by reason suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of the Rules made there under with intent to evade payment of Service Tax is not a prescribed document as provided under Rule 9 of the CCR, 2004. It is also alleged in the show cause Notice that out of above wrong availment of CENVAT credit, an amount of CENVAT credit of service tax of Rs.1,63,250/- (Rs.1,58,692/- Service Tax + Rs.3,174/- Edu. Cess Rs.1,384/- SH Edu. Cess) which was subsequently reversed by the Noticee requires to be confirmed and adjusted under Section 11A of the Act. It is also proposed in the show cause notice the recovery of interest under Rule 14 of the CCR, 2004 read with Section 11AB of the Act on the above wrong availment of CENVAT credit along with imposition of penalty under the provisions of Rule 15 (1) of the CCR, 2004.

2.2 The Noticee in their written submission have argued mainly as under :

a) They have not disputed the fact that they had availed CENVAT credit of Rs. 19,92,966/- and they had reversed an amount of Rs. 1,63,250/- vide entry No.50 dated 23.06.2011 being the proportionate credit which included in the cost of food/tea/snacks recovered from their employees as per guidelines prescribed by Bombay High Court in their decision in case of CCE vs Ultratech Cement Ltd reported in 2010 (260) ELT 369 (Bom) along with interest of Rs.6821.00 on the above amount of reversal. The department has not disputed this fact in the show cause notice.

b) The Noticee have argued that the Bill No.1190 dated 29.03.2011 issued by a service provider is valid document for the purpose of availing CENVAT credit in terms of Rule 9 (1) (f) of the CCR, 2004 which stipulates that an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September 2004 is a valid document and the said Bill contained all the relevant information as prescribed in Rule 9(2) of the CCR, 2004. I find that the show cause notice does not dispute this aspect.

c) The Noticee have argued that the service provider has raised the said Bill for discharging their service tax liability for the period 01.10.2006 to 28.02.2011 and the said bill does not attain the character of 'supplementary invoice' as the CCR, 2004 or the STR, 1994 or Central Excise Rules, 2002 do not define the words or phrases 'Invoice' or 'Bill' or 'Challan' or 'Supplementary Invoice'. I agree with this argument that above words or phrase is not defined in any of the above said Rules. In such case words or phrases have to be understood in the context in which they are used in the relevant statute or as are understood in the commercial parlance.

d) The Noticee have argued that in Rule 9 of the CCR, 2004, the 'Supplementary invoice' is used in clause (b) of sub-rule (1) as well as clause (bb) of sub-rule (1), clause (bb) was inserted through an amendment of CCR, 2004 vide Notification No. 13/2011-CE (NT) dated 13.03.2011 effective from 01.04.2011 which refers to additional amount of duty or service tax and should have been paid over and above the duty or service tax which was already paid by the service provider. They have stated that the service provider had not paid any service tax liability prior to 29.03.2011 for the period from 01.10.2006 to 28.02.2011 but the entire service tax liability was paid at one go by raising Bill No.1190 dated 29.03.2011 for the above said period which not over and above an amount of service tax but actual and entire liability that was required to be discharged by the service provider. I find that this fact is not disputed in the show cause notice. The service provider had paid the service tax liability by issuing a Bill for payment of service tax for the period from 01.10.2006 to 28.02.2011 and thus it was a Bill / an Invoice as defined in Rule 9(1) (f) of the CCR, 2004. I also find and agree with the fact that if the existing provisions of Rule 9 prior to above insertion bar utilisation of CENVAT credit on supplementary invoice issued by a provider of service where the additional tax became payable on account of fraud then the above new sub-clause (bb) would be redundant. I find that the restrictions imposed by Notification No. 13/2011-CE (NT) dated 31.03.2011 are prospective and if the service is received before 1.4.2011, credit would be admissible under the earlier provisions.

e) The Noticee have argued that the Bill in question is a prescribed document as per Rule 9(1) (f) of the CCR, 2004 and they are eligible to take the credit and utilise credit in terms of Rule 3(1)(ix), Rule 3(1)(x) and Rule 3(1)(xa) of the CCR, 2004 and they have referred to Rule 3(4) and 4(7) of the CCR rules, 2004.
Rule(1)(ix) of the Cenvat Credit Rules, 2004 allows a manufacturer or a producer of final product or a provider of taxable service to take credit of service tax leviable under section66 of the Finance Act, 1994, Rule 3(1)(x) of the said Rules allows to take credit of Education Cess on taxable services leviable under Section 91 read with Section 95 of Finance Act, 1994 and Rule 3(1)(xa) of the Rule allows taking credit of Secondary and Higher Education Cess on taxable services leviable under Section 136 read with Section 140 of the Finance Act, 1994. Similarly, Rule 3(4) of the Cenvat Credit Rules, 2004 allows utilisation for payment as under :

"Rule 3(4) (a) any duty of excise on any final product ; or
(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed ; or
(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such ; or
(d) an amount under sub rule (2) of rule 16 of Central Excise Rules, 2002 ; or
(e) service tax on any output service .."

and Rule 4 (7) of the Cenvat Credit Rules, 2004 provides for time and manner for taking Cenvat credit as under :
"Rule 4(7) The Cenvat credit in respect of input service shall be allowed on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received..."
It is observed that the Noticee have taken Cenvat credit on the strength of Bill No.1190 dated 29.03.2011issued by the service provider in terms of Rule 3(1)(ix), 3(1)(x) and 3(1)(xa) of the said Rules as the Notice have received the services and I observe that the said Bill No. 1190 dated 29.03.2011 conformed to the provisions of Rule 9 (1)(f) read with Rule 9(2) and as required under Rule 4(7) of the Cenvat Credit Rules, 2004.

f) The Noticee have argued that even assuming that the said Bill No.1190 dated 29.03.2011 is a 'supplementary invoice' there is no bar in availing Cenvat credit of service tax paid in spite of lack of a specific mention of such document in Rule 9(1) of the Cenvat Credit Rules, 2004. I observe that the said Bill conformed to the provisions of Rule 9(f) read with Rule 9(2) and it was a valid document as it contained all the relevant information as

required in terms of Rule 9 (2) of the said Rules, 2004. For this I rely on the decision of Hon'ble CESTAT, Delhi Bench in case of Secure Meters Ltd vs. CCE, Jaipur-II (2010-TIOL-416-CESTAT-DEL) wherein it was held that it is not correct to deny the service tax credit on the basis of the supplementary invoices that the input service provider was not registered and had not mentioned the registration no. in the invoices and when the receipt of the input services is not disputed and the fact that the input service had been used for providing the taxable output services is not disputed, the credit of service tax on the input services even if the subsequently under supplementary invoices , cannot be denied.

g) Keeping in mind the provisions of Rule 9 of the Cenvat Credit Rules, 2004, the benefit of Cenvat credit is a substantive benefit provided by the statute to the manufactures and the service providers and I observe that it cannot be curtailed by procedural lapses or lack of relevant procedural provisions which would have otherwise enabled availment of such credit. I also observe that the procedural lapse / gap was curtailed by inserting clause (bb) in Rule 9 (1) of the Cenvat Credit Rules, 2004 by an amendment by Notification No. 13/2011-CE (NT) dated 13.03.2011.

h) It is alleged in the show cause notice that there is non-levy or non-payment of service tax amounting to Rs.19,92,666/- on the part of Noticee for the period from 01.10.2006 to 28.02.2011 by reason of suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or Rules framed there under with intent to evade payment of service tax. In this context, I observe that the service provider M/s R.K. Caterers, Bhavnagar has discharged his service tax liability immediately after being pointed out by the department and raised a bill No.1190 dated 29.03.2011 to the Noticee for the services provided to them for the period 01.10.2006 to 28.02.2011. The show cause notice in para 5 and 6 alleged that the said supplementary invoice is not a prescribed document as provided in Rule 9 of the Cenvat Credit Rules, 2004. The correct Rule for the documents for availment of credit of service tax paid on input services are those referred to in clause (e), (f) and (g) of Rule 9 of Cenvat Credit Rules, 2004 which is an invoice, a bill or challan issued by a provider of input service or input service distributor on or after the 10th day of September, 2004 and as prescribed under Rule 4A of the Service Tax Rules, 1994. The invoice/ bill No. 1190 dated 29.03.2011 is a prescribed document under Rule 9 (1)(f) of the Cenvat Credit Rules, 2004 read with Rule 4A of Service Tax Rules, 1994.

i) Since, the Bill No. 1190 dated 29.03.2011 is a prescribed and a valid document under Rule 9(1)(f) of Cenvat Credit Rules, 2004 as observed above, the Noticee have rightly availed the Cenvat credit of service tax paid on the basis of the said Bill dated 29.03.2011 and have utilised the same for payment of service on any output service within the provisions of Rule 3(4) of the Cenvat Credit Rules, 2004, I hold that the Noticee are not liable for penalty under Rule 15(1) of the Cenvat Credit Rules, 2004. For this I rely on the decision by Hon'ble CESTAT, Banglore Bench in ABC Engineering Works vs. CCE Guntur (2010-TIOL-1045-CESTAT-BANG) wherein it is held that when issues involve interpretation of Rules, the penalties are not leviable. Similar view is held by Hon'ble CESTAT Chennai Bench in case of India Japan lighting Pvt Ltd vs. CE, Chennai as reported in 2007-TIOL-1755-CESTAT-MAD that when issue involved between assessee and department is with regard to divergent construction of law, penalty is not imposable.

j) So far suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or of Rules made there under with intent to evade payment of service tax as alleged in show cause notice is concerned, I observe that the Noticee have filed ER-1 return for the month of March 2011 and have availed Cenvat credit on the basis of Bill No.1190 dated 29.03.2011 which is reflected in the column pertaining to 'amount of CENVAT credit availed on input services', there is no requirement to furnish invoice wise details of credit availment alongwith monthly ER-1 return, therefore, charge of suppression of facts and contravention of any of the provisions of Finance Act, 1994 or the Rules framed there under is not tenable. Further, when the Noticee have reflected the amount of credit availed by them in monthly return, it cannot be said that there was any positive act of suppression on their part. For this, I rely on the decision of Hon'ble Tribunal in case of CCE, Indore vs. Indore Medicaps Ltd reported in 2011 (24) STR 572 (Tri-Del).

k) I observe that the Noticee have voluntarily reversed an amount of Rs. 1,63,250/- towards service tax being the amount of CENVAT credit ineligible in view of the guidelines prescribed by Hon'ble Bombay High Court in case of CCE vs. Ultratech Cement Ltd reported in 2010 (260) ELT 369 (Bom). The Noticee have also paid an amount of Rs.6,821.00 towards interest on the said reversal of Cenvat credit. I find that the show cause notice does dispute the said reversal and the payment of interest thereon.

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/15-35/Dem-ST/2011-12 dated 28.02.2012 issued to the Noticee.

Sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

By Registered Post A.D.

To,
M/s Excel Crop Care Limited,
6/2, Ruvapari Road,
Bhavnagar-364 005.

Copy to :
1. Assistant Commissioner (AE), Central Excise, Hqrs, Bhavnagar.
2. Assistant Commissioner, Central Excise Division, Bhavnagar.
3. Superintendent of Central Excise, A.R.-I, Bhavnagar.
4. Guard File.

10/10/2012

ADDL. COMMISSIONER