भारत सरकार
आयुक्त कार्यालय, केंद्रीय उत्पाद शुल्क
सिद्धी सदन, नारायणभाई उपाध्य रोड़, प्लाट नो. ६७-७६, बी-१, भावनगर-३६४००१
Phone No. : 0278-2523627 E-mail- adjbhavnagar@gmail.com
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F. No. V/15-68/Dem/HQ/2010-11 Date of Order: 19/02/2015
Date of Issue: 19/02/2015

Passed by: Shri H. S. Narang, Commissioner, Central Excise & Service Tax, Bhavnagar.

ORDER IN ORIGINAL NO. : BHV-EXCUS-000-COM-006 to 011-14-15 DT. 19-02-2015

1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. The Appeal should be filed in form EA-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.

4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).

5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

(a) Where the amount of duty and interest demanded and penalty is levied is more than ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);
(b) Where the amount of duty and interest demanded and penalty levied is more than ₹ 5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/-(Rupees Five Thousand);
(c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/-(Rupees One Thousand);

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. (a) Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.
(b) An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,
M/s. Saurashtra Cement Limited,Near
Railway Station, Ranavav,
Distt: Porbandar - 360 560.

Sub: Adjudication of following six SCNs:-

(1) F. No. V/15-68/Dem/HQ/2010-11 dated 05.07.2011 (2) SCN F. No. V/15-08/Dem/HQ/2011-12 dated 06.09.2011 (3) SCN F. No. V/15-56/Dem/HQ/2011-12 dated 22.06.2012 (4) SCN F. No. V/15-82/Dem/HQ/2012-13 dated 22.03.2013 (5) SCN F. No. V/15-39/Dem/HQ/2013-14 dated 01.10.2013 (6) SCN F. No. V/15-102/Dem/HQ/2013-14 dated 27.03.2014 issued to M/s Saurashtra Cement Limited, Near Railway Station, Ranavav, Distt: Junagadh - 362150.

BRIEF FACTS :-

1.1 M/s Saurashtra Cement Ltd., Ranavav (hereinafter referred to as "the Noticee") are holding Central Excise Registration No. AAHFS5211JXM001 for manufacture of Cement and Cement Clinker falling under Chapter 25 of the First Schedule to the Central Excise Tariff Act, 1985 and are availing CENVAT Credit of Central Excise duty / Service Tax paid on Inputs, Capital Goods and Input Services under Rule 3 of CENVAT Credit Rules, 2004 (hereinafter referred to as CCR, 2004). The Noticee also avails the Cenvat Credit in respect of Input Services viz. Goods Transport by Road (GTA) and utilized the same for the payment of Central Excise duty on clearance of its final product.

1.2 The facts leading to issuance of the subject show cause notice are that during the course of scrutiny of ER-1 returns for the period shown in the table, it was found that the Noticee has availed Cenvat Credit of Service Tax paid on outward transportation of finished goods, which was not in consonance with CCR, 2004. Accordingly, following six show cause notices have been issued to the Noticee on the ground that they have wrongly availed Cenvat credit of Service Tax paid on outward transportation of their final product, which appeared to be inadmissible:

Table

Sr. No.	SCN No.& Date	Period of SCN	Amount in Rs.
1	V/15-68/Dem/HQ/2010-11 dated 05.07.2011	June 2010 to July 2010	Rs. 1,11,58,470/-
2	V/15-08/Dem/HQ/2011-12 dated 06.09.2011	August 2010 to May 2011	Rs. 28,69,930/-
3	V/15-56/Dem/HQ/2011-12 dated 22.06.2012	June 2011 to February 2012	Rs. 9,38,318/-
4	F. No. V/15-82/Dem/HQ/2012-13 dated 22.03.2013	March 2012 to November 2012	Rs. 23,31,012/-
5	F. No. V/15-39/Dem/HQ/2013-14 dated 01.10.2013	December 2012 to June 2013	Rs. 38,31,982/-
6	F. No. V/15-102/Dem/HQ/2013-14 dated 27.03.2014	July 2013 to December 2013	Rs. 20,44,567/-

1.3. The issue involved in these show cause notices is that during the period under consideration, it was noticed that the Noticee had availed and utilised Cenvat credit in respect of Service Tax paid on outward transportation services which is not allowable in terms of definition of input service as provided under Rule 2 (l) of CCR as it covers the services eligible for credit up to place of removal, which is defined under Section 4(3)(c) of the Central Excise Act, 1944 (hereinafter referred to as the "Act").

1.4 It appeared that the Noticee had availed and utilised credit of Service Tax paid on transportation services, i.e., outward transportation of goods, after removal from the factory gate and upto the place of delivery of goods of their finished goods, at buyer's place, which are not their input services. The Central Board of Excise & Customs vide circular No. 97/8/2007 dated 23.08.2007 has clarified that after final products are cleared from the place of removal, there would be no scope for subsequent use of service to be treated as input. The said observations and views explain the scope of the relevant provisions clearly,

correctly and in accordance with legal provisions. A manufacturer/consignor can take credit on the Service Tax paid on outward transport of goods upto the place of removal only and not beyond that.

1.5 It, therefore, appeared that no credit can be availed and utilized in respect of Service Tax paid for the outward transportation of goods beyond the place of removal and hence, the credit availed and utilized by the Noticee on this account appeared to be incorrect and inadmissible to them and thus, recoverable from them alongwith interest under Rule 14 of the CCR read with Section 11A and 11AB (w.e.f 08.04.2011 Section 11AA) of the Act.

1.6 Therefore, these show cause notices were issued to the Noticee requiring them to show cause as to why wrongly availed credit should not be recovered from them alongwith interest under Rule 14 of the CCR read with Section 11A and 11AB (w.e.f 08.04.2011 Section 11AA) of the Act. The Noticee was also required to show case as to why penalty should not be imposed upon them under Rule 15 of the CCR read with Section 11AC of the Act.

1.7 Now, I have taken up all the above Show Cause Notice(s) for adjudication.

Personal Hearing:

2.1 Personal hearing in the matter was held on 08.12.2014. Shri Saurabh Dixit, Consultant of the Noticee and Shri D. K. Suri, G.M. appeared in the personal hearing and filed their written submission dated 06.12.2014 before the then Commissioner and requested to decide the matter on the basis of their written submission. They have also enclosed the copy of defence reply – (1) dated 02.08.2011 in r/o SCN F. No. V/15-68/Dem/HQ/2010-11, (2) dated 14.10.2011 in r/o SCN F. No. V/15-08/Dem/HQ/2011-12 & (3) dated 20.07.2012 in r/o SCN F. No. V/15-56/Dem/HQ/2011-12 vide their letter dated 08.12.2014. (4) dated 22.04.2013 in r/o SCN F. No. V/15-82/Dem/HQ/2012-13 (5) dated 02.11.2013 in r/o SCN F. No. V/15-39/Dem/HQ/2013-14, (6)dated 05.05.2014 in r/o SCN F. No. V/15-102/Dem/HQ/2013-14. Further, the noticee vide their letter dated 28.01.2015 informed that they would not like to have any further hearing in the matter and requested to decide the matter on the basis of their earlier defense reply and oral submission made at the time of personal hearing. As the noticee has waive their right of personal hearing by tendering a letter dated 28.01.2015, I take up all six SCNs for adjudication.

Defence:

3.1 The Noticee submitted their various defense rely as shown in above para, wherein they *inter alia* submitted that the issue involved in all the above SCNs whether Cevnat Credit of Service Tax paid on outward GTA is admissible to them or not; that another ancillary issue involved herein, in the given set of facts and circumstances, is also whether factory premises should be treated as "place of removal" for the purpose of Cenvat Credit Rules, 2004 during relevant period or otherwise; that the subject SCNs clearly bring out the relevant legal position vis-à-vis outward GTA, including CBEC Circular dt.23.8.07 and states that w.e.f. 1.4.08, owing to amendment to the definition of the term "input service", while transportation "from" place of removal was admissible input service upto 31.3.08, however thereafter, transportation "upto" place of removal alone was admissible to credit as valid input service; that as regards SCN dt.5.7.11, inasmuch as period covered therein was from April'07 to June'10 during which outward GTA service was availed by them in light of the Hon'ble Gujarat High Court's judgments in the case of Parth Poly Woven P. Ltd. 2012(25) STR 4 (Guj) as re-confirmed in the case of CCE V/s. Ellora Time Ltd. 2014(34) STR 801(Guj), in so far as credit pertaining to period up to 31.3.08 is

concerned, there is no question of denying the same by any count; that it is also pertinent to note that the decision in the case of Ellora Time Ltd. (supra) was pertaining to Rajkot Commissionerate itself and hence, following the judicial discipline, credit upto 31.3.08 must be allowed to them; that it is not in dispute that admissibility to credit on basis of definition of input service is to be examined vis-à-vis the date on which input service was availed and not the date on which credit was actually taken in books; that this is also evident from Board Circular dt.29.4.11 (Para 11; that as such, since the input service was availed prior to 31.3.08, credit was admissible on the same irrespective of the fact whether or not the same was availed upto or beyond place of removal; that this is however without prejudice to the fact that whole of outward GTA under all the three SCNs mentioned hereinabove, was upto place of removal only and in all cases, **invariably, the place of removal was the buyer's doorsteps, since the terms of sale were on FOR basis;** that in so far as credit pertaining to services availed on and after 1.4.08, it is submitted that for reasons stated and justified in the respective replies filed to the SCNs, the credit was always admissible since the place of removal was buyer's door steps only; that it has been a consistent stand on our part that our sales were on FOR basis and the freight constituted intergral part of the assessable value of the goods; that the risk in goods was also borne by us till delivery thereof to the buyer's premises in acceptable condition; that as such, we had satisfied all conditions of Board Circular dt.23.8.07; that notwithstanding the same, in terms of the following decisions, the outward GTA service was upto place of removal only and hence valid input service and for the same reasons, the credit must be allowed to us in the facts and circumstances of the case:

a. Lafarge India Ltd. 2014(307) ELT 7 (Chhattisgarh)
b. Ultratech Cement Ltd. 2014 (307) ELT 3(Chhattisgarh)
c. CCE, Panchula V/s. Jamuna Auto Industries Ltd. 2013(31) STR 587 (Tri-Del)
d. New Allenberry Works 2014-TIOL-724-CESTAT-DEL
e. Allied Auto Parts P. Ltd. V/s. CCE, Rajkot 2013-TIOL-1333-CESTAT-AHM

3.2 The notice submitted sample copy of purchase order and corresponding invoices raised by them to substantiate their above contention; that since clearance was on FOR basis, the place of removal being customer's door steps, the outward GTA always constitutes valid input service for them and the credit in this regard therefore cannot be denied to them; that produced CA certificates forming part of our earlier replies further buttress this contention.It is submitted that the so called restriction on "transportation upto the place of removal" appearing in the second limb of the definition is restricted to removal of "inputs" and "capital goods" only and not to finished goods. That it is a principle of statutory interpretation that the latter words take colour from the preceding words and in the present case, the wordings appearing in the definition "inward transportation of inputs or capital goods and outward transportation upto the place of removal" can be interpreted to mean that outward transportation of inputs and capital goods upto the place of removal alone are eligible for CENVAT Credit purposes as input services. A reading in this manner also makes sense inasmuch as since CENVAT Credit on inputs and capital goods can be availed so long as inputs and capital goods are available in the factory and upon its removal, such credit is required to be reversed, for the same reason, the CENVAT Credit of Service Tax paid on transportation of such inputs and/or capital goods is also restricted upto the place of removal only. Thus, the said embargo shall not apply to finished goods cleared from the place of removal.

3.3 That availment of CENVAT Credit is a vested right. It is not the allegation that transportation of goods in the present case was not in the course of our business. That the department cannot and should not give a restricted reading and meaning to the term "input service", which otherwise carries a vast

meaning. Even the statute has sufficiently treated services availed for clearance to be input services. That fiscal statute is to be strictly construed and always read as a whole. That notwithstanding the above, in any case, the "place of removal" does not necessarily mean "factory gate" or "depot", as understood for the purpose of the levy of Central Excise duty. Neither the Finance Act, 1994 nor the Rules framed thereunder define "place of removal". Section 4 of the Central Excise Act, 1944 defines "place of removal", however it is made clear that such definition is limited only for the purpose of the said Section 4(i.e. for valuation of Central Excise duty). Thus, there is no need to consider place of removal as factory gate only. In fact, the Hon'ble Karnataka High Court in the case of ABB Ltd. had specifically held to this effect that Place of removal under Section 4 of Central Excise Act, 1944 does not have any bearing on the term "input service" under CCR, 04.That the in order to plug such anomaly, the Cenvat Credit Rules, 2004 were amended, prospectively, vide Notification No.21/14-CE(NT) dt.11.7.14, wherein for the first time the term "place of removal" was defined for the purpose of Cenvat Credit Rules, 2004. As such, strictly speaking, such meaning cannot be ascribed to the term "place of removal" prior to such insertion in the statute. Be that as it may, notwithstanding and without prejudice to the above, while legal position in this regard is already clear, we wish to draw Your Honour's kind attention to the Board Circular No.988/12/2014-CX(bearing F. No.267/49/2013-CX 8) dt.20.10.14, wherein the concept of "place of removal" has been discussed in great detail pursuant to amendment made vide Notification No.21/14-CE(NT), following the earlier decisions of the Hon'ble Apex Court in the case of Escort JCB Ltd. 2002(146) ELT 31(SC) as well as Hon'ble CESTAT in the case of Associated Strips Ltd. 2002(143) ELT 131(Tri-Del). That even going by such meaning so given, and assuming but not accepting that such definition applies retrospectively even to cases prior to 11.7.14, including the period covered vide the subject SCNs, even then, since the entire clearances in dispute were made on FOR basis only and since buyer's door steps was the place of removal, the outward GTA service was valid input service for us at all times, and there is no question of denying any credit in this regard, contrary to what is proposed in the subject SCN.It is further submitted that once the freight amount is loaded in the assessable value of the goods and is not separately charged and on which composite value the Central Excise duty stands discharged, Cenvat Credit of Service Tax paid on such freight outward becomes available to the assessee. When term of delivery of goods is buyer's door steps, the ownership in goods passes on to the buyer only at the latter's doorstep and Cenvat Credit of Service Tax paid on outward freight would therefore be available. The freight would be included in assessable value only when the place of removal is the buyer's doorsteps, as held by the Hon'ble Apex Court in the case of Escort JCB Ltd. 2002(146) ELT 31(SC). We crave leave to refer to and rely upon the following decisions in support of our above contention:

Priya Industrial Packaging (P) Ltd. V/s. CCE, Daman 2010(20) STR 31(Tri-Ahmd)
Vardhman Special Steels V/s. CCE, Ludhiana 2008(223) ELT 220(Tri-Del)

3.4 That it may be appreciated that we pay Central Excise duty on the price, which is inclusive of transportation charges. That thus, as such, Central Excise is paid even on transportation charges, which happens only when the place of removal is buyer's premises. That under the circumstances, assuming the place of removal is factory gate, the fact that we pay duty (through PLA or utilization of Cenvat Credit), to the extent the same pertains to transportation charges (which ought not to have been paid since factory gate is place of removal as per subject SCN), the same ought to be considered as reversal of Cenvat Credit availed of Service Tax paid on such transportation charges itself. That the issue is thus as such revenue neutral and accordingly, the subject SCN deserves to be dropped/vacated. That for the above reasons, even otherwise CENVAT Credit cannot be denied to us in the present case inasmuch

as the transportation was upto the place of removal only. That accordingly, the impugned order deserves to be quashed and set aside.

3.5 Be that as it may, the Hon'ble High Court of Gujarat in the case of Parth Poly Wooven Sacks Ltd. 2012(25) STR 4(Guj) as reconfirmed vide CCE V/s. Ellora Time Ltd. 2014(34) STR 801(Guj) has already concluded that Cenvat Credit of Service Tax paid on outward GTA upto place of removal is admissible. Any other decision contrary to such view is per incurium. This being the case, the decisions of the Hon'ble Gujarat High Court are as such binding on the Central Excise authorities governing our unit. In case of any conflict between the decision in the case of Gujarat High Court as compared to any other Court, the former shall be binding on Your Honour and the decision in the case of Hon'ble Gujarat High Court will have to be followed.
That in support of the above legal proposition, we crave leave to refer to and rely upon the following decisions:

a. CCE V/s. Kashmir Conductors 1997(96) ELT 257(Tri-LB)
b. Ambika Industries 2007(213) 323(SC)
c. Astik Dyestuff P. Ltd. 2014 (34) STR 814 (Guj)

3.6 That in the facts and circumstances of the case, where there are contrary judicial decisions on the subject, fraud, suppression, intention to evade etc. cannot be assumed by the department on our part since our stand regarding eligibility to Cenvat credit does stand vindicated by the order and views of the Hon'ble Tribunal and Hon'ble High Courts. Moreover, since the issue involved is that of interpretation of statutory provisions, neither extended period of limitation can be invoked nor any penalty deserves to be imposed on us.

3.7 Apart from the fact that the issue involved in the matter is that of substantial interpretation of statutory provisions, the bona fide views on our part in this regard are well supported vide the catena of orders and decisions cited supra. That thus, it is not correct to assume that we had entertained any malafide intent to evade payment of duty and had suppressed any material fact from the department with such malafide intent. Further, merely because it is not possible for the department to ascertain the quantum of disputed service Cenvat Credit from the monthly returns is hardly a reason to invoke extended period of limitation in the facts and circumstances of the case. For the same reasons, neither extended period of limitation can be invoked nor penalty can be imposed on us.

3.8 That notwithstanding and without prejudice to the above, in any case, there cannot be any intention to evade payment of duty/tax on our part and there was no suppression as such on our part either. We were regularly audited as well as had filed returns from time to time, clearly showing this fact. That we were always under a bona fide belief regarding this legal position as laid down by the higher appellate authorities. Moreover, the issue involved is of substantial interpretation of statutory provisions. That the view of eligibility of credit also stands vindicated by the orders and decisions of the various courts. Under the facts and circumstances of the case, "intention to evade" or "fraud" or "suppression" cannot be alleged against us so as to invoke extended period of limitation. Moreover, as has been consistently held by the Hon'ble Supreme Court, mere failure to disclose some fact does not amount to "suppression with an intent to evade" unless the department shows some positive act on part of the assessee in intentionally withholding material information, which shows their malafide intent. That the present proceedings do not bring existence of any such facts or circumstances on record. That accordingly, the same is patently time-barred. We crave leave to refer to and rely upon the following decisions in support of this contention:

a. In Re: M/s. BALCO 2007(8) STR 27(Tri-Del)
b. CCE V/s. HMM Ltd. 1995 (76) E.L.T. 497 (S.C.)
c. 2004(173) ELT 337 (All)

d. 2004(174) ELT A034 (SC)
e. 2005(179) ELT 120 (Tri)
f. 2004(178) ELT 596 (Tri)
g. 2003(161) ELT 287 (Tri)
h. L&T Ltd. 2007(211) ELT 513(SC)
i. Continental Foundation Jt. Venture 2007 (216) E.L.T. 177 (S.C.)

3.9 That special attention is invited to the judgment of the Hon'ble Supreme Court in the case of Continental Foundation (Supra). That it has been held that acts of fraud or suppression must be proved by the revenue in order to invoke extended period of limitation. That it is also been held that mere omission to give correct information does not ipso facto mean there is suppression coupled with intention to evade duty/tax.

3.10 That for the above reasons, even otherwise CENVAT Credit cannot be denied to us in the present case inasmuch as the transportation was upto the place of removal only. That as such, neither credit can be denied and/or recovered, much less along with interest nor any penalty be imposed against us, in the facts and circumstances of the case. That accordingly, the subject SCN deserves to be dropped / vacated."

Discussion and Findings:

4.1 I have carefully gone through the entire case records, SCNs issued, contentions raised in written reply as well as during personal hearing held before the then Commissioner. I find that the issue to be decided in present case is whether the Noticee is eligible for Cenvat credit of Service Tax paid on Goods Transport Agency Service (GTA) availed by them for outward transportation of final products, from their factory to the buyer's premises or otherwise. As the issue involved in all the six show cause notices referred above are similar, I proceed to adjudicate all these notices by a common adjudication order. In addition to one SCN issued by the Commissioner, I also take up other five SCNs issued by the Additional Commissioner/Joint Commissioner, Central Excise, Bhavnagar in view of para 6 of CBECs Circular No. 752/68/2003-CX dated 01/10/2003 and Para 3 of CBECs Circular no 362/78/97-CX dated 09/12/1997 for adjudication by common order.

4.2 With regards to denial of Cenvat credit of GTA service for outward transportation of goods up to the point of delivery to the customer, the noticee has contended that they are eligible for taking Cenvat credit of GTA service and mainly in support of their claim they relied upon the decision passed by the Hon'ble High Court of Gujarat in the case of Commissioner of C. Ex. & Customs Vs. Parth Poly Wooven Pvt. Ltd. [2012 (25) STR 4 (Guj)]. I have gone through the subject decision passed by the Hon'ble High Court of Gujarat and at the same time I have also gone through the recent decision passed by the Kolkata High Court in the case of Commissioner of Central Excise, Kolkata-VI V/S Vesuvious India Ltd; [2014 (34) S.T.R. 26 (Cal)] wherein the identical issue has been decided by the Hon'ble of Kolkata. I also find that while passing the decision by the Kolkata High Court in the case of Commissioner of Central Excise, Kolkata-VI V/S Vesuvious India Ltd; [2014 (34) S.T.R. 26 (Cal)], the Hon'ble High Court of Kolkata have thoroughly taken into consideration the decision passed by the Gujarat High Court in the case Commissioner of C. Ex. & Customs v/s. Parth Poly Wooven Pvt. Ltd;[2012 (25) STR 4 (Guj)] and have given detail reasons/findings for not agreeing with the said decision. Further, I also find that the decision passed by the Gujarat High Court in the case Commissioner of C. Ex. & Customs v/s. Parth Poly Wooven Pvt. Ltd;[2012 (25) STR 4 (Guj)] wherein period of dispute covered was prior to 01.04.2008 whereas period covered in the present show cause notices is after 01.04.2008 that is after amendment of definition of input Service". So, the decision passed by the Gujarat High Court in the case Commissioner of C. Ex. & Customs v/s. Parth Poly Wooven Pvt. Ltd;[2012 (25) STR 4 (Guj)] is not relevant to the

present case as period of dispute is not same. I would like to reproduce the relevant paragraphs of the decision passed by the Kolkata High Court in the case of Commissioner of Central Excise, Kolkata-VI V/S Vesuvious India Ltd; [2014 (34) S.T.R. 26 (Cal)]:

> ***7.*** *Mr. Majumder in support of his submission also relied upon the judgment of the Hon'ble Gujarat High Court in the case of Commissioner of C. Ex. & Customs v. Parth Poly Wooven Pvt. Ltd., reported in 2012 (25) S.T.R. 4 (Guj.). He relied upon paragraphs 18, 21 and 22. Paragraphs 18 and 21 do not support the contention of Mr. Majumder as would appear from a plain reading of those two paragraphs. Paragraph 22 of the judgment relied upon by Mr. Majumder reads as follows :*
>
> *"22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturers for transportation of finished goods from the place of removal up to the premises of the purchaser is covered within the definition of "input service" provided in Rule 2(1) of the Cenvat Credit Rules, 2004."*
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> ***8.*** *The Hon'ble Division Bench expressed their aforesaid opinion, but no reasons or appropriate reasons are ascertainable by us for the purpose of aforesaid proposition.*
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> ***9.*** *We are, as such, of the considered view that the opinion expressed by the Hon'ble Division Bench of the Gujarat High Court cannot be accepted. No other submission was made. We find that the Tribunal has dismissed the appeal of the Revenue only on the basis of the judgment of the Karnataka High Court. We already have discussed one reason as to why the judgment of the Karnataka High Court has not impressed us.*
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> ***10.*** *There are more reasons. In paragraph 30, the Hon'ble Division Bench of the Karnataka High Court opined that "The definition of "input service" contains both the words 'means' and 'includes', but not 'means and includes'. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of 'input service' deals with service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products, it also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service."*
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> ***11.*** *We are, with respect to the Hon'ble Division Bench, unable to see how can it be said from the restrictive part of the definition that "the services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service".*
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> ***12.*** *Yet another reasoning given by the Hon'ble Division Bench is as follows :*
>
> *"Therefore, it is clear that till such amendment made effective from 1-4-2008 notwithstanding the clarification issued by the Central Government by way of their circular, transportation charges incurred by the manufacturer for 'clearance of final products from the place of removal' was included in the definition of input service."*
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> ***13.*** *By the amendment made with effect from 1st April, 2008 substituting the word "from" by the word "upto" all that has been done is to clarify the issue. Neither the services rendered to the customer for the purpose of delivering the goods at the destination was covered by the definition of input service prior to 1st April, 2008, nor is the same covered after 1st April, 2008. If the definition provided in Section 2(l)(ii) is read a whole, if would appear that outward transportation charges or taxes paid in regard thereto is claimable only with regard to those transports which were made from one place of removal to another place of removal.*
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> ***14.*** *We are, as such, of the considered view that the judgment rendered by the Learned Tribunal cannot be sustained and the same is, therefore, set aside.*

Following the ratio of the above judgment, I hold that the Cenvat credit of service tax paid on outward transportation of goods up to the point of delivery to the customer is not admissible. Accordingly, I deny the Cenvat Credit taken by the notice and hold to recover the amount shown in the respective SCN under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944.

4.3 Coming to the issue of imposing penalty, this issue is no more *res integra* in view of the judgments of the Supreme Court in the case of ***Dharamendra Textile Processors and Ors., 2008 (231) E.L.T. 3 (S.C.) and Rajasthan Spinning and Weaving Mills - 2009 (238) E.L.T. 3 (S.C.).*** The Apex Court has held that penalty is civil liability and the ratio of the same is applicable in all case of tax evasion. In the present case, as discussed above, it is proved beyond doubt that the Noticee has wrongly availed and utilized the Cenvat Credit of Service Tax paid under the category of Goods Transport Agency Services for outward transportation of finished goods manufactured and cleared to their customers at their destinations which are situated beyond the place of removal as defined under Section 4(3)(C) of the Central Excise Act, 1944. The Act on the part of the said assessee as discussed in foregoing paras, resulted into wrong availment of huge amount of cenvat credit as mentioned in the Annexures attached with the respective SCNs and thereby rendered themselves for penalty as provided under Rule 15 of the said Rules. Regarding the question of charging interest, I find that interest is statutory liability following every short-payment or non-payment of duty and wrong availment or wrong utilization of Cenvat Credit. So, I hold that the noticee shall also pay the interest as provided under section 75 of the Finance Act,1994. Accordingly, I hold that the assessee is liable for penalty under Rule 15 of CCR, 2004 and interest is chargeable under Rule 14 of CCR, 2004 read with Section 11AB/11AA of Central Excise Act, 1944.

4.4 In view of above discussion and findings, I pass the following order:

: O R D E R :

(i) I deny the Cenvat credit amounting to **Rs. 1,11,58,470/-** (Rupees One Crore Eleven Lakh Fifty Eight Thousand Four Hundred Seventy only) in respect of SCN F. No. V/15-68/Dem/HQ/2010-11 dated 05.07.2011, **Rs. 28,69,930/-** (Rupees Twenty Eight Lakh Sixty Nine Thousand Nine Hundred Thirty only) in respect of SCN F. No. V/15-08/Dem/HQ/2011-12 dated 06.09.2011, **Rs. 9,38,318/-** (Rupees Nine Lakh Thirty Eight Thousand Three Hundred Eighteen only) in respect of SCN F. No. V/15-56/Dem/HQ/2011-12 dated 22.06.2012, **Rs. 23,31,012/-** (Rupees Twenty Three Lac Thirty One Thousand Twelve only) in respect of SCN F. No. V/15-82/Dem/HQ/2012-13 dated 22.03.2013, **Rs. 38,31,982/-** (Thirty Eight Lac Thirty One Thousand Nine Hundred Eighty Two only) in respect of SCN F. No. V/15-39/Dem/HQ/2013-14 dated 01.10.2013 & **Rs. 20,44,567/-** (Twenty Lac Forty Four Thousand Five Hundred Sixty Seven only) in respect of SCN F. No. V/15-102/Dem/HQ/2013-14 dated 27.03.2014 including education cess and higher education cess under the provisions of Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944.

(ii) I order to charge and recover interest at the appropriate rate as per the provisions of Rule 14 of CCR, 2004 read with Section 11AB /11AA of the Central Excise Act, 1944 on the amount of Central Excise duty confirmed as above in respective SCNs, which should be paid by / recovered from the Noticee forthwith.

(iii) I impose a penalty of **Rs. 1,11,58,470/-** (Rupees One Crore Eleven Lakh Fifty Eight Thousand Four Hundred Seventy only) in respect of SCN F. No. V/15-68/Dem/HQ/2010-11 dated 05.07.2011, **Rs. 28,69,930/-** (Rupees Twenty Eight Lakh Sixty Nine Thousand Nine Hundred Thirty only) in respect of SCN F. No. V/15-08/Dem/HQ/2011-12 dated 06.09.2011, **Rs. 9,38,318/-** (Rupees Nine Lakh Thirty Eight Thousand Three Hundred Eighteen only) in respect of SCN F. No. V/15-56/Dem/HQ/2011-12 dated 22.06.2012, **Rs. 23,31,012/-** (Rupees Twenty Three Lac Thirty One Thousand Twelve only) in respect of SCN F. No. V/15-82/Dem/HQ/2012-13 dated 22.03.2013, **Rs. 38,31,982/-** (Thirty Eight Lac Thirty One Thousand Nine Hundred Eighty Two only) in respect of SCN F. No. V/15-39/Dem/HQ/2013-14 dated 01.10.2013 & **Rs. 20,44,567/-** (Twenty Lac Forty Four Thousand Five Hundred Sixty Seven only) in respect of SCN F. No. V/15-102/Dem/HQ/2013-14 dated 27.03.2014 under the provisions of Rule 15 of CCR, 2004, which should be paid by / recovered from Noticee forthwith.

This order is issued without prejudice to any other action that may be taken against the Noticee under the provisions of the Central Excise Act, 1994 or the Rules framed there under or under the provisions of any other law for the time being in force.

(H. S. Narang)
Commissioner
Bhavnagar

F. No. V/15-68/Dem/HQ/2010-11 Bhavnagar, Date: -19.02.2015

By Registered Post A.D.:

To,
M/s. Saurashtra Cement Limited,
Near Railway Station,
Ranavav,
Distt: Porbandar - 360 560.

Copy to:

(1) The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
(2) The Assistant Commissioner, Recovery Cell, Central Excise, HQ, Bhavnagar.
(3) The Assistant Commissioner, Central Excise Division, Junagadh.
(4) The Superintendent, Central Excise, Porbandar with a direction to ensure that the Noticee has received the subject Order in Original.
(5) Guard file.