आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

07926305065- टेलेफैक्स07926305136

रजिस्टर्ड डाक ए.डी. द्वारा **DIN: 20210364SW000061136A**

क फाइल संख्या : File No : V2(ST)18/GNR/2020-21

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP- 69/2020-21**

दिनॉक Date : **25-02-2021** जारी करने की तारीख Date of Issue

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in Original No **13/EXCISE/DC/20-21 dated 19.06.2020** issued by Deputy Commissioner, CGST, Gandhinagar Commissionerate.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s John Energy Limited, 220 GIDC Estate, Mehsana Industrial Estate, Mehsana.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944,may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

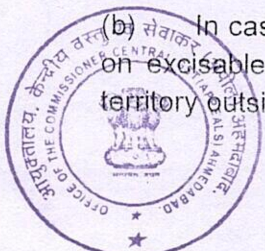
(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

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

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.



(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गत:–

Under Section 112 of CGST act 2017 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में **2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(30) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में **कर्तव्य मांग** (Demand) एवं **दंड** (Penalty) का 10% **पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा** 10 **करोड़ रुपए** है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

(31)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**

(ii) **लिया गलत सेनवैट क्रेडिट की राशि;**

(iii) **सेनवैट क्रेडिट नियमों के नियम** 6 **के तहत देय राशि.**

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(xl) amount determined under Section 11 D;

(xli) amount of erroneous Cenvat Credit taken;

(xlii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

6(I) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s John Energy Ltd., 220, GIDC Estate, Mehsana Industrial Estate, Mehsana (hereinafter referred as *'the appellant'*) against the Order-in-Original No. 13/EXCISE/DC/20-21 dated 19.06.2020 (hereinafter referred as *'the impugned order'*) passed by the Deputy Commissioner, Central GST & Central Excise, Commissionerate-Gandhinagar (hereinafter referred as *'the adjudicating authority'*).

2. The facts of the case, in brief, are that the appellant was holding Service Tax Registration No. AAACJ5184FST001 and engaged in providing services of mining of mineral, Oil or Gas, Business Auxiliary Services, supply of tangible goods service, management of business consultancy service alongwith other different services. They were also availing the benefit of Cenvat Credit on the input and input services used by them as per the provisions of Cenvat Credit Rules, 2004 in or in relation to the manufacturing of their final products/rendering of output services.

2.1 During the course of audit conducted by the officers of CERA Audit for the period from F.Y 2013-14 to 2015-16, it was observed that the appellant had imported some technical services from the Overseas Service Providers such as visit of technical personnel, technical inspection of rig, service of designing etc. and these were special services involving technical knowledge and inspection or designing by technical personnel, accordingly falling under the definition of import of technology in terms of the provisions of the R & D Cess Act, 1986. Further, it was also observed during the audit that the appellant had not paid the R & D Cess amounting to Rs. 30,03,905/- during the period from F.Y 2013-14 to F.Y 2015-16, leviable as per the provisions of Section 3(1) & 3(2) of the Research and Development Cess Act, 1986.

2.2 Further, in terms of the Notification No. 14/2012-ST dated 17.03.2012, "*the taxable service involving import of technology are exempted, from so much of the service tax leviable thereon under Section 66B of the said Act, as is equivalent to the amount of cess payable on the said import of technology under the provisions of section 3 of the R & D Cess Act, 1986*". However, the appellant has not paid the R & D Cess and instead, paid the full Service tax on the import of such services under reverse charge mechanism and has also taken Cenvat Credit of such

service tax paid, which resulted into excess availment of Cenvat Credit to that extent amounting to Rs. 30,03,905/- .

2.3 Thereafter, a Show Cause Notice (hereinafter referred as '*SCN*') bearing F.No. V.ST/11A-50/John Energy/2018-19 dated 04.10.2018 was issued to the appellant by the Assistant Commissioner, Central GST, Division-Mehsana proposing (i) recovery of excess availment of Cenvat Credit of Rs. 30,03,905/- under rule 14 of Cenvat Credit Rules, 2004 (ii) recovery of interest at the appropriate rate under Section 75 of the Finance Act, 1994 and (iii) penalty under Section 78 of the Finance Act, 1994 for suppression of the fact of non-payment of R&D Cess which resulted in excess availment of Cenvat Credit.

2.4 The SCN dated 04.10.2018 was adjudicated vide the impugned order, briefly reproduced as below:

(i) Confirmed the demand and ordered for recovery of excess credit of CENVAT of Rs. 30,03,905/- under Rule 14 of Cenvat Credit Rules, 2004.

(ii) Interest at the applicable rate ordered to be recovered at the applicable rate under the provisions of Section 75 of the Finance Act, 1994.

(iii) Imposed penalty of Rs. 30,03,905/- upon the appellant under Section 78 of the Finance Act, 1994.

3. Aggrieved with the impugned order, the appellant has filed the present appeal mainly on the following grounds:

(i) The demand of reversal of Cenvat Credit solely on the basis that the exemption granted under Notification No. 14/2012-ST dated 17.03.2012 was compulsory and the appellant could not have availed CENVAT Credit of the entire service tax paid. As exemption has not been availed and Service Tax was paid in excess under reverse charge mechanism and accordingly, it led to availment of excess Cenvat Credit. It is a settled legal position that the assessee cannot be forced to avail exemption unless it was an unconditional exemption and the statute provided that the assessee had no option to pay tax in case of availability of an unconditional exemption. The Finance Act, 1994, as amended from time to time, does not contain any provision which enjoins upon a service provider to compulsorily avail exemption.

Further, the Notification No. 14/2012-ST is not in the nature of an absolute exemption also.

(ii) As per the judgements of Appellate Tribunal in various cases, it is now a well settled legal position that the Revenue cannot force the assessee to avail exemption of any notification. Various judgments relied upon by them held as inapplicable by the adjudicating authority holding that payment of Cess was compulsory and it was not optional. In this regards, appellant submitted that the show cause notice was issued for recovery of cenvat credit availed in excess because of the Notification No. 14/2012-ST and it was not issued for recovery of Cess. Therefore, the nature of cess whether mandatory or not had nothing to do with the compulsory availment of Notification No. 14/2012-ST.

(iii) Rule 3 (1) of the Cenvat Credit Rules clearly provides that Cenvat Credit of Service Tax "paid" is admissible and therefore whether Service Tax was payable by the appellant or not is not a relevant factor at this stage. Placing reliance on various judgements, it has been submitted that since they have paid service tax, the credit of the same would be admissible to them and the fact whether service tax paid was correct or not is not relevant so long as the Cenvat Credit per se is admissible.

(iv) The Hon'ble Supreme Court in case of CCE Versus MDS Switchgear Ltd [2008 (229) ELT 485 (SC)] at paras 7 to 9 of the judgment held that the receiver of excisable goods was entitled to avail credit of duty paid by the supplier manufacturer even if there was over invoicing of the products.

(v) In a similar case of Commissioner of C.Ex., Madurai Versus Sundaram Industries Ltd. reported in 2016 (45) STR 110 (Tri. Chennai), Hon'ble Tribunal has noted that the department had accepted the payment of tax under reverse charge but objected to the availment and future utilization of credit for discharge of future liability by the respondent; such a view adopted by the department is bad in law. Further, in case of Gaziabad Precision Products P. Ltd. Versus CCE & ST, Gaziabad reported in 2016 (42) STR 369 (Tri. Del) where the assessee had paid service tax under reverse charge mechanism which was not required to pay and taken Cenvat Credit thereof, Hon'ble Tribunal allowed the appeal holding that the entire exercise was revenue neutral and there was no revenue implication at all.

(vi) The case laws relied upon by the appellant were held inapplicable by the adjudicating authority by holding that these cases pertain to situation where excess tax or duty is paid and equivalent amount of cenvat credit is taken whereas the tax paid by the appellant under RCM included CESS, which was to be 5% of the total 14% tax paid and the same was not eligible for credit of CENVAT. The appellant contended that the above reasoning of the adjudicating authority is incorrect because the appellant has not paid R & D Cess which is governed by a different act altogether and they have only paid service tax on the entire amount of services and taken cenvat credit of such amount of service tax.

(vii) Further, the Research & Development Cess Act, 1986 is a complete code by itself containing provisions for the levy and collection of cess, the power for recovery in case of non-payment, and the authorities empowered to take action in case of any default. In the present case, no such competent authority empowered under the said act has confirmed any liability to pay cess under the provisions of the said act. The findings of the adjudicating authority are based only upon his own conclusion that the appellant was required to pay R & D Cess during the disputed period which is wholly without his jurisdiction.

(viii) In the present case, all the facts discussed in the show cause notice were within the knowledge of various government departments from the day one and under these circumstances, the show cause notice issued to them is barred by limitation and there is no justification in the action of invoking extended period of limitation against them.

(ix) The imposition of penalty under the provisions of Section 78 of the Finance Act, 1994, also deserves to be set aside as there is no justification in demand of service tax leveled against them.

4. Personal hearing in the matter was held through virtual mode on 26.11.2020. Shri Amal P. Dave, Advocate, appeared on behalf of the appellant. He re-iterated submissions made in the Appeal Memorandum as well as additional written submission dated 25.11.2020, the relevant contents of which are reproduced below:

(i) It is an undisputed fact that in the present case, service tax has been collected from the appellant and that the appellant has taken Cenvat Credit of the Service Tax already assessed and collected from the appellant under the Reverse Charge Mechanism. The Hon'ble Supreme Court in the case of M/s. MDS Switchgear Ltd. reported at

2008 (229) ELT 485 has categorically held that once the duty has been paid, then cenvat credit of such duty is available to the recipient. Reliance is also placed on (i) the judgment of Hon'ble Gujarat High Court in the case of M/s. Nahar Granites Ltd. reported at 2014 (305) ELT 9 (ii) the judgment of Hon'ble Tribunal, Delhi in case of M/s. U.P. State Sugar Corporation Ltd. reported at 2013 (291) ELT 402 (iii) Hon'ble Tribunal, Ahmedabad Order No. A/10177/2019 dated 18.01.2019 issued in case of M/s. Maillis Strong Sraps Pvt. Ltd. and (iv) Hon'ble Tribunal, Mumbai in case of M/s. Raymond Uco Denim Pvt. Ltd. reported at 2017 (7) GSTL 346.

(ii) The similar findings have been given in the case of M/s. AIA Engineering, whereby the Commissioner (Appeals), Ahmedabad in his OIA No. AHM-EXCUS-001-APP-46/2020-21 dated 09.10.2020 has held that when the assessment has been finalized and duty has been collected then Cenvat Credit can only be denied, when such duty so collected has been refunded. This principle is applicable in the present case also.

(iii) The exemption from payment of Service Tax on R & D Cess was a conditional exemption and therefore it was not mandatory to avail the same, resultantly there has been no excess payment of tax and no irregular availment of cenvat credit in the present case.

5. I have carefully gone through the facts of the case, submissions made in the Appeal Memorandum as well as additional submission dated 25.11.2020 and submissions made at the time of personal hearing and evidences available on records. The issue to be decided in the case is whether the demand confirmed in the impugned order by the adjudicating authority by denying CENVAT Credit in respect of payment of Service Tax under reverse charge mechanism, without payment of R & D Cess, is legal and proper or otherwise.

5.1 The relevant provisions as per Section 3, Section 8 and Section 9 of the Research and Development Cess Act, 1986 are reproduced below:

*"**3. Levy and collection of cess on payments made towards import of technology.**—(1) There shall be levied and collected, for the purposes of this Act, a cess at such rate not exceeding five per cent, on all payments made towards the import of technology, as the Central Government may, from time to time, specify, by notification, in*

the Official Gazette. (2) The cess shall be payable to the Central Government by an industrial concern which imports technology on or before making any payments towards such import and shall be paid by the industrial concern to any specified agency.

8. Power to call for information.—*The Board may require an industrial concern to furnish, for the purposes of this Act, such statistical and other information in such form and within such period as may be prescribed.*

9. Penalty for non-payment of cess.—*(1) If any cess payable by an industrial concern is not paid on or before making payments towards the import of technology, if shall be deemed to be in arrears and the same shall be recovered by the "Board" in such manner as may be prescribed. (2) The "Board" may, after such inquiry as it deems fit, impose on the industrial concern, which is in arrears under sub-section (1), a penalty not exceeding ten times the amount in arrears: Provided that before imposing such penalty, such industrial concern shall be given a reasonable opportunity of being heard, and it, after such hearing, the Board is satisfied that the default was for any good and sufficient reason, on penalty shall be imposed under this sub-section."*

Further, in terms of the Section 2 (a) of the said act ***"Board" is defined as "the Technology Development Board constituted under the Technology Development Board Act, 1995 (44 of 1995);"***

5.2 In the present case, I find that the adjudicating authority has not been able to produce any order or demand issued by the competent authority against the appellant for recovery of Cess leviable under the provisions of the Research and Development Cess Act, 1986. In absence of any such order issued by the Competent Authority, the adjudicating authority has wrongly concluded that the appellant was liable to pay R & D Cess. Accordingly, the conclusion arrived by the adjudicating authority that R & D Cess was payable by the appellant is legally not sustainable as any such demand has to be determined and ordered by the competent authority under the Research and Development Cess Act, 1986.

5.3 Further, the provisions contained under Notification No. 14/2012-ST dated 17.03.2012 is reproduced below:

"G.S.R. (E). - In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central

Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service involving import of technology, from so much of the service tax leviable thereon under section 66B of the said Act, as is equivalent to the amount of cess payable on the said import of technology under the provisions of section 3 of the Research and Development Cess Act, 1986 (32 of 1986), subject to the following conditions, namely:-

(a) that the said amount of Research and Development Cess is paid within six months from the date of invoice or in case of associated enterprises, the date of credit in the books of account.

Provided that the exemption shall be available only if the Research and Development Cess is paid at the time or before the payment for the service;

(b) that the records of Research and Development Cess are maintained for establishing the linkage between the invoice or the credit entry, as the case may be, and the Research and Development Cess payment challan.

2. This notification shall come into force from the date on which section 66B of the Finance Act, 1994 comes into effect."

In view of the above, it is observed that the exemption of Service Tax to the extent of an equivalent amount of Cess payable is provided under the Notification No. 14/2012-ST dated 17.03.2012, subject to the conditions prescribed therein. Hence, it is apparent that even the exemption granted vide the above mentioned Notificat on is subject to the fulfillment of the conditions thereof.

Accordingly, the findings of the adjudicating authority that "the appellant should have paid service tax at the rate= (prevailing rate of ST)-(5% of R&D Cess)" are not sustainable, legally on merits.

5.4 The relevant provisions under the Cenvat Credit Rules, 2004 is reproduced below:

"Rule 3. CENVAT credit. -

(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;"

In the present case, it is undisputed that the appellant has paid Service Tax under Reverse Charge Mechanism which is subsequently

availed as Cenvat Credit on the basis of valid documents, as prescribed under Rule 9 (1) of Cenvat Credit Rules, 2004.

5.5 Further, it is observed that in respect of the judgements relied upon by the appellant viz. (i) 2015 (39) STR 684 (Tri. Bang.) in case of India Vision Satelite Communications Ltd. Versus CCE, C & ST, Cochin and (ii) 2008 (229) ELT 485 (SC) in the case of Commissioner of Central Excise & Customs Versus MDS Switchgear Ltd, the adjudicating authority held as under:

> *"Aforementioned both the orders relates to a situation, where excess or inapplicable tax or duty is paid and in the given situation the tax/duty paid was available as credit of Cenvat. Since the duty/tax was paid and the quantum of credit availed is equivalent to tax paid, the same was admissible as credit. Here, the position is not similar and thus the citations given by noticee are of no avail to them.* ***Therefore it is clear that they were eligible for availment of credit of Cenvat Credit to the extent of 9%, which was required to be paid besides applicable Cess.*** *...........The notice had taken shelter of Rule 3 (1) in support of their defence but here I find that the same is of no help to them* ***since the tax paid by them under RCM included Cess, which was to be 5% of the total 14% tax paid. Such 5% tax paid by them was to be payment of Cess*** *and the same was not eligible for credit of Cenvat."*

I am not in agreement with the abovementioned findings of the adjudicating authority as Service Tax and R & D Cess are two different class of levies/tax leviable under two different acts, which independently contains set of procedures and powers for recovery in case of non-payments. Accordingly, the duty paid as Service Tax represents the Service Tax leviable under the Finance Act only and in no case, such amount can be shown as representing two different components i.e. Service Tax as well as R & D Cess. Further, the findings of the adjudicating authority as regards the Cenvat Credit to the extent of 9% which was required to be paid besides applicable Cess, I find that the said contention is not supported by legal provisions made under the Finance Act, 1994 or under the Cenvat Credit Rules, 2004.

5.6 Further, I find that Hon'ble CESTAT, Ahmedabad in case of Balaji Multiflex Pvt. Ltd. Versus Commr. of C.Ex.& Service Tax, Rajkot reported at [2019 (370) ELT 773 (Tri. Ahmd.)] vide Final Order No. A/11920/2018-WZB/AHD, dated 27-8-2018 held as under:

> *"**4.** On careful consideration of the submission made by both the sides and the perusal of the records, I find that the appellant have availed the Cenvat credit of service tax paid by the job worker, firstly, the appellant is entitled for the Cenvat credit of the amount of service tax paid by the service provider irrespective whether it was payable or not. Secondly, the service provider has to pay service tax on gross value of the service including the material cost as per Section 67 of the Finance Act, 1994, which provides that service provider is required to pay service tax on gross value of the service. No exclusion in respect of the value of the goods is provided, it is only by the Notification the abatement to the extent of the value of the goods is provided. It is the option the assessee or the service provider whether he wants to avail the exemption Notification or otherwise. Therefore, if the service provider has opted not to avail the exemption Notification No. 12/2003-S.T. and paid the service tax on the entire value including material cost, no objection can be raised either on the payment of service Tax and consequently, on the part of the service recipient for availing the Cenvat credit. Unlike Section 5A of Central Excise Act, 1944, no such provision is made in service tax law regarding compulsion on availing exemption notification, therefore, service provider is at liberty either to pay service tax on the entire gross value or on the concessional rate. Therefore, the service tax paid by the service provider on the gross value which includes the material cost cannot be disputed consequently eligibility to Cenvat credit on the said service tax can also not be objected on the part of the appellant.*
>
> ***5.** As per the above discussion, I am of the view that the appellant is entitled for the Cenvat credit, accordingly, the impugned order is set aside and appeal is allowed."*

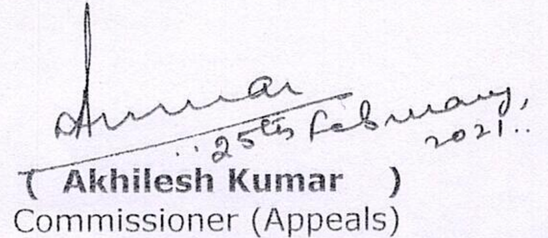
6. Further, on going through various judicial pronouncements, I find that it as a settled law that it is the option of the service provider whether he wants to avail the exemption notification or not, which is subject to fulfillment of certain conditions thereof. In the present case, I find that the appellant has not availed the benefit of exemption of Notification No. 14/2012-ST dated 17.03.2012, which was a conditional exemption and accordingly, had paid the Service Tax at full rate by not availing the benefit thereof. Further, in the present case, it is undisputed that the appellant had paid the Service Tax under reverse charge mechanism and in terms of the provisions of Rule 3 of the Cenvat Credit Rules, 2004, any service provider is entitled to take Cenvat Credit of such Service Tax paid on input services under reverse charge mechanism. Accordingly, I find that the findings of the adjudicating authority that the appellant has paid Service Tax, in excess to the exemption granted vide Notification No. 14/2012-ST dated 17.03.2012 and wrongly availed the Cenvat Credit thereof to the extent of Rs. 30,03,905/-, is not sustainable as per law.

7. Accordingly, on careful consideration of facts of the case alongwith relevant legal provisions, judicial pronouncements and submission made by the appellant, I find that the demand for recovery of Cenvat Credit amounting to Rs. 30,03,905/- confirmed by the adjudicating authority vide the impugned order fails to survive on merits before law and hence deserves to be set aside. When demand fails, there cannot be any question of interest or penalty.

8. Accordingly, I allow the appeal filed by the appellant and set aside the impugned order passed by the adjudicating authority for recovery of Cenvat Credit amounting to Rs. 30,03,905/- alongwith interest as well as the penalty imposed of Rs. 30,03,905/- under the provisions of Section 78 of the Finance Act, 1994.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

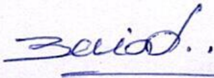
The appeals filed by the appellant stand disposed off in above terms.



(**Akhilesh Kumar**)
Commissioner (Appeals)

Date: February, 2021

Attested



(M.P.Sisodiya)
Superintendent(Appeals),
CGST, Ahmedabad.

BY SPEED POST TO:
M/s John Energy Ltd.,
220, GIDC Estate,
Mehsana Industrial Estate,
Mehsana

Copy to:-
1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Commissionerate-Gandhinagar.
3. The Deputy Commissioner, CGST & CE, Division-Mehsana Commissionerate-Gandhinagar.
4. The Assistant Commissioner, CGST (System), HQ, Ahmedabad-South.
5. Guard file.
6. P.A. File