# 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

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रजिस्टर्ड डाक ए.डी. द्वारा DIN: 20210564SW0000444B9F

क फाइल संख्या : File No : GAPPL/COM/CEXP/143/2020 /1451 TO 1456

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP- 01/2021-22**

दिनाँक Date : **20-04-2021** जारी करने की तारीख Date of Issue 02/06/2021

**श्री अखिलेश कुमार** आयुक्त (अपील) द्वारा ,पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **08/D/GNR/DK/2020-21 dated 05.05.2020** issued by Deputy Commissioner,Preventive Section, Central GST, Gandhinagar

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

**M/s Suvik Electronics Private Limited, Plot No. 102/A, GIDC Engineering Estate, Sector-28, Gandhinagar.**

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 पूर्वोक्त 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 रो बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

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

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

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

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

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

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

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

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

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

(xii) **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:

(lxx) amount determined under Section 11 D;
(lxxi) amount of erroneous Cenvat Credit taken;
(lxxii) 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

M/s. Suvik Electronics Pvt. Ltd., Plot No.102/A, GIDC Engineering Estate, Sector-28, Gandhinagar (hereinafter referred to as '*appellant*') has filed the present appeal against Order-in-Original No. 08/D/GNR/DK/2020-2021 dated 05.05.2020 (hereinafter referred to as '*impugned order*') passed by the Deputy Commissioner, Preventive Section, Central GST & Central Excise, Gandhinagar Commissionerate (hereinafter referred to as '*adjudicating authority*') .

2(i). The facts of the case, in brief, are that the appellant is engaged in the manufacture of Uninterruptible Power Supply System, Isolation Transformer, AC Drive, Renewable Energy Solar Home System & Parts thereof falling under Chapter sub-heading 8504 & 8543 and Automatic Servo Controlled Voltage Regulator and Spares falling under Chapter sub-heading 9032 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as '*CETA*') and was holding Central Excise Registration No.AADCS0866JXM001.

2(ii). The appellant vide its letter no. SE/EXC/05 dated 21.08.2009 intimated the Asstt. Commissioner of erstwhile Central Excise, Gandhinagar that as per judgement of Larger Bench of Hon'ble Tribunal in case of M/s. ABB Ltd., they shall take cenvat credit of service tax paid on outward GTA (Transport of Goods by Road) for the period from 01.01.2005 to 31.03.2009. They further vide their letter dated 25.09.2009 (addressed to the Superintendent of erstwhile Central Excise, AR-III, Gandhinagar) conveyed that they had availed cenvat credit to the tune of Rs.7,75,391/- (including Cess) vide RG23A Pt.II entries dated 28.08.2009. It was found that the Department has not accepted the judgement of the Larger Bench of Tribunal in case of M/s. ABB Ltd. and appeal had been filed by the Department before Hon'ble High Court of Andhra Pradesh and the Hon'ble High Court of Karnataka. It was further noticed that the availment of cenvat credit of service tax paid on outward freight is a post removal activity from the place of removal i.e. factory gate which was neither used for any output service nor used for manufacture of their final product directly or indirectly. Thus, a Show Cause Notice (hereinafter referred to as '*SCN*') dated 16.08.2010, was issued to the appellant proposing recovery of the said cenvat credit under Rule 14 of the Cenvat Credit Rules, 2004 alongwith interest in terms of Rule 14 ibid. Penalty under Rule15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 was also proposed to be imposed upon the appellant.

2(iii). The adjudicating authority vide the impugned order confirmed the recovery of the said cenvat credit alongwith interest and appropriated the amount of Rs.7,75,391/- (including Cess) paid back by the appellant vide Debit Entry No. 759 dated 28.11.2011 made

in their RG 23A Part-II Register. Penalty, equivalent to the availment of the said cenvat credit, was also imposed upon the appellant under the impugned order.

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

*(a) that the matter is directly covered by Supreme Court decision in the case of CCE, Belgaum v/s. Vasavadatta Cements Ltd. reported in 2018(3)TMI 993-SC therefore the confirmation of demand for the period prior to April-2008 is bad and required to be set aside;*

*(b) that for the period post April-2008, the matter is directly covered by the Tribunal decision in following matter:*

*Ultratech Cement Ltd. v/s. CCE Kutch (Gandhidham) – 2019(2)TMI 1487 – CESTAT, Ahmedabad.*

*Sanghi Industries Ltd. v/s. CCE Kutch (Gandhidham) – 2019(2)TMI 1488 – CESTAT, Ahmedabad.*

*(c) that since goods were sent by them on FOR destination (door delivery) basis, the above decisions of Tribunal will apply even in post April-2008 situation. Thus for both the period the matter is covered by precedent decisions;*

*(d) that reversal of credit without utilization has the effect as if the credit was not taken. Therefore also demand would not survive;*

*(e) that since demand is not tenable, question of interest or penalty would not arise;*

*(f) that penalty under Section 11AC can not be imposed as they have intimated before and after taking credit and the action of taking credit was based on legal ground and decision of larger bench. Thus, the requirements of Section 11AC are not satisfied and penalty therefore can not be imposed.*

4. Personal hearing in the matter was held on 19.01.2021. Shri S. J. Vyas, Advocate, appeared for the appellant. He reiterated the submissions made in appeal memorandum. He further stated that their case is covered by judicial pronouncement for the period prior to 2008 and post 2008 which are of binding in nature.

5(i). I have carefully gone through the facts of the cases, the records/documents available in the matter and the submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The issue to be decided in this case is whether in the facts and circumstances of the case, the cenvat credit availed by the appellant on outward GTA (Transport of Goods by Road) for the period from 01.01.2005 to 31.03.2009 is legal and correct or not.

5(ii). It is observed that the appellant had availed cenvat in question as per the decision of the Larger Bench of Tribunal in case of M/s. ABB Ltd. reported at 2009(15)STR 23(Tri-LB) which held as under :

*"Cenvat credit of Service tax - Input service - Goods Transport Agency service - Outward freight for transportation of final product from place of removal whether an input service - Expression "activities relating to business" covers transportation upto customer's place and word "relating" widens scope - Credit not deniable relying on coverage of outward transportation upto place of removal in inclusive clause - No restriction on "activities*

*relating to business" being related to main or essential activities - All activities relating to business fall under input service - Input service not restricted to services specified after expression "such as" as it is purely illustrative - Transportation of goods to customer's premises is an activity relating to business and credit of Service tax thereon admissible - Rules 2(l) and 3 of Cenvat Credit Rules, 2004. - We also note that transportation of goods to customer's premises is an activity relating to business. It is an integral part of the business of a manufacturer to transport and deliver goods manufactured. If services like advertising, market and research which are undertaken to attract a customer to buy goods of a manufacturer are eligible to credit, services which ensure physical availability of goods to the customer i.e. services for transportation should also be eligible to credit. [paras 1, 3, 4, 12, 13, 14, 15, 25]"*

[Emphasis supplied]

By relying on this decision of Larger Bench of the Tribunal, the appellant intended to avail the cenvat credit on the outward GTA (Transport of Goods by Road) for the period from 01.01.2005 to 31.03.2009 and accordingly availed it on 28.08.2009 and informed the Department on 25.09.2009. However, the Department found that the said decision of Larger Bench of Tribunal has not been accepted by the Department and appeal has been filed against it before the Andhra Pradesh High Court and Karnataka High Court. This led the Department to issue SCN which ultimately resulted into the confirmation of demand and recovery with interest and imposition of penalty vide the impugned order.

5(iii). It is observed that the Rule 2(l) of the Cenvat Credit Rule, 2004 before 01.04.2008 read as under :

*" 'input service' means any service, -*
*(i) used by a provider of taxable service for providing an output service, or*
*(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal*
*and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales, promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;"*

5(iv). W.e.f. 01.04.2008, vide Notification No. 10/2008-CE(NT) dated 01.03.2008, the words *"clearance of final products **from** the place of removal"* were substituted with *"clearance of final products **upto** the place of removal".*

5(v). It is further observed that the Hon'ble Supreme Court of India in the case of M/s. Vasavadatta Cements Ltd. reported at 2018(11)GSTL 3(SC) has held as under :

*"6. The aforesaid approach of the Full Bench of the CESTAT, as affirmed by the High Court, appears to be perfectly correct and we do not find any error therein. For the sake of convenience, we would like to reproduce the following discussion contained in the judgment of the High Court.*

*'30. The definition of 'input service' contains both the word '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. What are the services that normally a manufacturer would render to a customer from the place of removal? They may be packing, loading, unloading, transportation, delivery, etc. Though the word transportation is not specifically used in the said section in the context in which the phrase 'clearance of final products from the place of removal' is used, it includes the transportation charges. Because, after the final products has reached the place of removal, to clear the final products nothing more needs to be done, except transporting the said final products to the ultimate destination i.e. the customer's/buyer of the said product, apart from attending to certain ancillary services as mentioned above which ensures proper delivery of the finished product upto the customer. Therefore, all such services rendered by the manufacturer are included in the definition of 'input service'. However, as the legislature has chosen to use the word 'means' in this portion of the definition, it has to be construed strictly and in a restrictive manner. After defining the 'input service' used by the manufacturer in a restrictive manner, in the later portion of the definition, the legislature has used the word 'includes'. Therefore, the later portion of the definition has to be construed liberally. Specifically what are the services which fall within the definition of 'input service' has been clearly set out in that portion of the definition. Thereafter, the words 'activities relating to business' - an omni-bus phrase is used to expand the meaning of the word 'input service'. However, after using the omni-bus phrase, examples are given. It also includes transportation. The words used are (a) inward transportation of inputs or capital goods (b) outward transportation upto the place of removal. While dealing with inward transportation, they have specifically used the words 'inputs' or 'capital goods'. But, while dealing with outward transportation those two words are conspicuously missing. The reason being, after inward transportation of inputs or capital goods into the factory premises, if a final product emerges, that final product has to be transported from the factory premises till the godown before it is removed for being delivered to the customer. Therefore, 'input service' includes not only the inward transportation of inputs or capital goods but also includes outward transportation of the final product upto the place of removal. Therefore, in the later portion of the definition, an outer limit is prescribed for outward transportation, i.e., up to the place of removal.'*

*7. As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.*

*8. Our view gets support from the amendment which has been carried out by the rule making authority w.e.f. 1-4-2008 vide Notification No. 10/2008-C.E. (N.T.), dated 1-3-2008 whereby the aforesaid expression "from the place of removal" is substituted by "upto the place of removal". Thus from 1-4-2008, with the aforesaid amendment, the Cenvat credit is available only upto the place of removal whereas as per the amended Rule from the place of removal which has to be upto either the place of depot or the place of customer, as the case may be. This aspect has also been noted by the High Court in the impugned judgment in the following manner :*

*"However, the interpretation placed by us on the words 'clearance of final products from the place of removal' and the subsequent amendment by Notification 10/2008-C.E. (N.T.), dated 1-3-2008 substituting the word 'from' in the said phrase in place of 'upto' makes it clear that transportation charges were included in the phrase 'clearance from the place of removal' upto the date of the said substitution and it cannot be included within the phrase 'activities relating to business'."*

Thus, the aforesaid ruling by the Hon'ble Apex Court makes it clear that the cenvat credit on outward transportation of goods from the place of removal i.e. factory gate upto first point of delivery viz. depot or a customer's premises is admissible to the Assessee

prior to 01.04.2008. Accordingly, I hold that the cenvat credit, which had been availed by the appellant for the period from 01.01.2005 to 31.03.2008, is admissible to them, and therefore set aside the impugned order so far as it relates to recovery for the same.

5(vi). Since the cenvat credit availed by the appellant for the period prior to 01.04.2008 is admissible to them, and the impugned order pertaining to its recovery for the said period is set aside, the question of charging any interest thereon and imposition of penalty in this respect does not arise and the same is also set aside.

6(i). For the period w.e.f. 01.04.2008, it would be appropriate to refer the judgement of Hon'ble Supreme Court in case of M/s. Ultratech Cement Ltd. reported at 2018(9)GSTL 337(SC) under which the Hon'ble Court has held as under :

> *"Cenvat Credit – Input Service – Goods Transport Agency Service – Used for transport of goods from place of removal to buyer's premises – **HELD : Assessee was not entitled to credit** – In definition of input service in Rule 2(l) of Cenvat Credit Rules, 2004 "from place of removal" has been replaced in 2008 by "upto place of removal" – 'From' was the indicator of starting point and 'upto' signifies terminating point – CBEC Circular No.97/8/2007-ST dated 23.08.2007 had not dealt with this change, and its application to post-amendment cases would violate Rule 2(l) of Cenvat Credit Rules, 2004".*

Thus, the above decision of Hon'ble Apex Court makes it clear that the cenvat credit on outward transportation of goods from the place of removal i.e. factory gate to customer's premises is not admissible to the Assessee after 31.03.2008. Accordingly, I hold that the cenvat credit which had been availed by the appellant for the period 01.04.2008 to 31.3.2009 for outward transportation of goods is not admissible to them and the same has been rightly recovered by the adjudicating authority under the impugned order.

6(ii). The appellant has contended that '*reversal of credit without utilization has the effect as if the credit was not taken*'. However, I am not in agreement with the said contention of the appellant in view of the decision of Hon'ble Apex Court in case of M/s. Ind-Swift Laboratories Ltd. reported at 2011(265)ELT 3(SC), the provisions of Rule 14 of the Cenvat Credit Rules, 2004 and also in view of the clarification issued by the Board vide Circular No.942/3/2011-CX dated 14.03.2011. In the judgement of the Hon'ble Apex Court, in case of M/s. Ind-Swift Laboratories Ltd. it is held as under :

> *"Interest on irregular credit whether arises from date of availing such credit or date of utilization – Rule 14 of Cenvat Credit Rules, 2004 specifically providing for interest when cenvat credit taken or utilized wrongly or erroneously refunded hence interest on irregular credit arises from date of taking such credit".*

Further, Rule 14 of the Cenvat Credit Rules, 2004 reads as under :

> *"Where the cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same alongwith interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act*

*or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries".*

Further, the clarification issued by the Board vide Para-3 of the Circular No.942/3/2011CX dated 14.03.2011 reads as under :

> *"3. The matter has been examined. It is observed that the issue has now been conclusively settled by the Apex Court in the departmental appeal against the above mentioned judgement of P&H High Court. The Apex Court vide its judgement dated 21-2-11 in Civil Appeal No. 1976 of 2011 [2011 (265) E.L.T. 3 (S.C.)] has set aside the aforesaid order of Hon'ble High Court. The Apex Court has ruled that "if the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken or utilized wrongly or has been erroneously refunded' as the word "AND". On the happening of any of the three circumstances such credit becomes recoverable along with interest." In effect, therefore, the view taken by the Board in circular dated 3-9-09 has now been endorsed by the Apex Court."*

The above legal provision makes it clear that even if the cenvat credit is availed wrongly, the interest would be chargeable alongwith its recovery. In view of above, I uphold the charging of interest upon the wrong availment of cenvat credit pertaining to the period in dispute i.e. from 01.04.2008 to 31.03.2009, under the impugned order.

6(iii). It is further observed that the adjudicating authority has imposed penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. I find that the said Rule pertains to a situation on account of fraud, willful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty. It is observed that the appellant has intimated the Department about their intention as well as the availment of cenvat credit by them and thereafter the Department has issued the SCN. This makes it clear that the Department was in knowledge of the facts of availment of cenvat credit by the appellant and the same was intimated to the Department by appellant itself. Had there been any intention of the appellant to evade the duty, the same would not have been disclosed by the appellant themselves. Hence, the aspect of suppression etc. is not forthcoming from the case records. Thus, equivalent penalty imposed upon the appellant is no sustainable in the present circumstances of the case. The maximum penalty which can be imposed upon the appellant is Rs.2,000/- only under Rule 15(3) of the Cenvat Credit Rules, 2004. In view of above, I reduce the penalty to Rs.500/- only.

6(iv). Keeping in view that the appeal has been decided in view of the decisions of the Hon'ble Supreme Court discussed here-in-above, the cases relied upon by the appellant do not require any consideration.

7. In view of above, the appeal of the appellant is partly allowed to the extent it relates to the demand pertaining to the period from 01.01.2005 to 31.03.2008 and is partly rejected to the extent it relates to the demand pertaining to the period from 01.04.2008 to

31.03.2009. The impugned order stands modified to the same extent. The appeal is disposed of accordingly.

20th April, 2021..

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

Date : .04.2021.

Attested

25/05/21

(Jitendra Dave)
Superintendent (Appeal)
CGST, Ahmedabad.

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4. The Dy./Asstt. Commissioner, CGST & Cen. Excise, Gandhinagar Divn, Gandhinagar Comm'rate.
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