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:20210664SW00008183E8)

क फाइल संख्या : File No : GAPPL/COM/STP/165/2021 & GAPPL/15/2020 /1645 TO 1650

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP- 10to11/2021-22**

दिनाँक Date : **21-05-2021** जारी करने की तारीख Date of Issue 17/06/2021

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **STC/AC-MPD/Kadi/05/2020-21 dated 12.05.2020** issued by Assistant Commissioner, Div-Kadi, Central Tax, Gandhinagar.

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

M/s Bisazza India Private Limited(Unit-1), Survey No.372/2, Near GAIL &GIDC Office, Village Budasan, Kadi-382715.

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.

(iii) 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश मे 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 ड्यूटी क्रेडिट मान्य की गई है और ऐसे प्रत्यक्ष जो इस ओर वित्त नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद मे 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 मे 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 सलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ सलग्न 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 मे 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 आदेश के लिए फीस का भुगतान उपयुक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

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 नियत्रण 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.

(40) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) के प्रति अपीलों के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 7.5% 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)

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

(i) (Section) खंड 11 D 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, अपीलीय प्राधिकारी के समक्ष पूर्व जमा की गई है या लगाए 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:

(lxxvi) amount determined under Section 11 D;
(lxxvii) amount of erroneous Cenvat Credit taken;
(lxxviii) 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. Bisazza India Pvt. Ltd. (Unit-I), Survey No.372/2, Near GAIL & GIDC Office, Village Budasan, Kadi-382715, Mehsana, (hereinafter referred as '*appellant*') has filed the present appeal against the Order-in-Original No. STC/AC-MPD/Kadi/05/2020-21 dated 12.05.2020 (hereinafter referred as '*impugned order*') passed by the Assistant Commissioner of CGST & Central Excise, Kadi Division, Gandhinagar Commissionerate (hereinafter referred as '*adjudicating authority*'). Besides the above referred appeal, in pursuance of the Review Order No.09/2020-21 dated 15.07.2020 issued by the Commissioner of CGST & Central Excise, Gandhinagar Commissionerate, another appeal has been preferred by the Assistant Commissioner of CGST, Kadi Division, Gandhinagar Commissionerate (hereinafter referred as '*Department*') against the same impugned order in case of the said appellant.

2(i). The facts of the cases, in brief, are that the appellant is engaged in the manufacture of Glass Mosaic Sheets falling under Chapter 7016 of the First Schedule to the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No.AAACB6284GXM003. The appellant was also holding Service Tax Registration No.AAACB6284GST002, for various services. During the course of departmental audit of the financial records of the appellant for the period April-2016 to June-2017, it was noticed that

(a) the appellant has availed the cenvat credit of the service tax amounting Rs.6,24,360/-, on Pre-Shipment Charges and Terminal Handling Charges. These services were found to be received after issuance of let export order. Thus, it appeared to the audit team that the same can not be considered to be input service as these service were received after the place of removal as per the Circular No.999/6/2015-CX dated 28.02.2015. Therefore, the cenvat credit is required to be recovered from the appellant; and

(b) the appellant has not reversed the cenvat credit amounting Rs.1,12,177/- on trading activity as per Rule 6(3) of Cenvat Credit Rules, 2004.

2(ii) A Final Audit Report No.1661/2018-19 dated 30.04.2019 (hereinafter referred as '*FAR*') was issued by the Assistant Commissioner of Central Excise & Central Tax, Audit Commissionerate, Ahmedabad in this respect, incorporating the said observations as Revenue Para-1 and Para-3 respectively. Accordingly, a Show Cause Notice dated 30.04.2019 (hereinafter referred as '*SCN*') was issued to the appellant proposing recovery of wrongly availed cenvat credit under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A alongwith interest under Section 11AA of Central Excise Act, 1944. Penalty under Section 11AC of the Central Excise Act, 1944 was also proposed to be imposed upon the appellant.

2(iii). The said SCN was adjudicated vide the impugned order under which the proposal made in the SCN regarding recovery of cenvat credit, amounting Rs.7,36,537/- (Rs.6,24,360/- + Rs.1,12,177/- = Rs.7,36,537/-) alongwith interest, was confirmed. A total penalty of Rs.3,68,269/- (Rs.3,12,180/- + Rs.56,089/- = Rs.3,68,269/-) was imposed upon the appellant.

3. Being aggrieved with the impugned order, an appeal was preferred by the appellant on the grounds that :

(i) *the Circular No.999/6/2015-CX dated 28.02.2015 referred by the Department is in respect of the place of provision of services;*

(ii) *it is not shown or claimed that in facts of the present case, place of removal would be factory gate, particularly when the transactions are relating to export of goods;*

(iii) *under para-6 of the Circular referred by the Department, it is clarified that if the manufacturer is exporter of the goods, then it is responsibility of the manufacturer to hand-over the goods to the shipping line at the place of export, which is a port of export; therefore if the manufacturer is the exporter, then the place of removal would be port;*

(iv) *they rely on Circular No. 1065/4/2018 dated 08.03.2018 issued by CBEC (which refers the earlier Circular dated 28.02.2015) wherein under para-4(ii), it has been stated that clearance for export of goods by manufacturer shall continue to be dealt in terms of Circular No.999/6/2015-CX dated 28.02.2015;*

(v) *vide Circular No.988/12/2014-CX dated 20.10.2014, CBEC has stated that the place where the sales take place is the place where transfer in property of goods takes place from seller to buyer;*

(vi) *the decision of Hon'ble Supreme Court in case of M/s. Ispat Industries Ltd. reported at 2015(324)ELT 670(SC) did not deal with issue of export of goods; in case of export of goods, the buyer is located outside India the thus the place of removal is at the port;*

(vii) *place of removal is not with reference to export order and export order can not have place of removal; thus place of removal applies only to goods in question and not to export order; their export order is prior to removal;*

(viii) *Rule 6 of the Cenvat Credit Rules, 2004 was amended by Notification No.13/2016-NT dated 01.03.2016 (effective from 01.04.2016) which has not been taken into consideration;*

(ix) *they invite attention to newly inserted sub rule 3AA where the assessee have option to pay/reverse credit as per rule 3(ii) even though no option is selected earlier; thus the benefit of the said sub rule may be granted and demand @ 6% would not be tenable;*

(x) *according to the Explanation-I under Rule 6(3D)(c), the 'Value' for the purpose of sub-rule (3) and (3A) in case of trading would be the difference between the sale price and the cost of goods sold (without including the expenses incurred towards their purchase) or 10% of the cost of goods sold whichever is more. Thus instead of sale value differential value has to be considered;*

(xi) *trading activity was carried out by them in earlier years also and is reflected in their annual accounts. Copies of the annual accounts were given to the department in all audits. Thus, the department was in knowledge of their activity and therefore the demand is partly time barred. The period covered is from 01.04.2016 to 30.06.2017 whereas the notice is issued on 30.04.2019. Thus, the period beyond two years i.e. upto March-2017 would be time barred;*

(xii) *since demand is not tenable on merit and on limitation, the question of interest and penalty does not arise.*

4. The Department also preferred the appeal against the imposition of lesser penalty upon the appellant under the impugned order, on the grounds that :

(i) the penalty imposed by the adjudicating authority under proviso to Section 11AC(1)(c) is not applicable in the present matter as the period involved in the present matter is from April-2016 to June-2017 whereas the proviso pertain to period from 08.04.2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive);

(ii) since period involved in the present matter is from April-2016 to June-2017, instead of proviso to Section 11AC(1)(c), Section 11AC(1)(c) of the Central Excise Act, 1944 will come into play for imposition of penalty and in the said Section, penalty imposable is equivalent to the amount of duty/tax involved;

(iii) the penalty equivalent to the amount of duty/tax involved is mandatory in nature and can not be amended. For this reliance is placed on the case of M/s. Dharmendra Textile Processors reported at 2008(231)ELT 3(SC) and on the case of M/s. Kalpesh Founders & Engineers reported at 2016(338)ELT A142(Guj).

5. Personal hearing in the case were held on 17.02.2021 and 29.04.2021 in the matters of appellant and Department respectively in virtual mode. Shri Shridev J. Vyas, Advocate, attended both the hearing for the appellant and for respondent (which is appellant itself) in case of Departmental appeal. He reiterated the submissions made in appeal memorandum.

6. I have carefully gone through the facts of the case available on records, submissions made by the appellant in the Appeal Memorandum as well as at the time of personal hearing. The issues involved in the matter are **(i)** whether the cenvat credit of the service tax on the charges paid by the appellant for export of goods, after the let export order, is admissible to them or not and **(ii)** whether the appellant is liable to reverse the cenvat credit at the rate decided by the adjudicating authority on the trading activity being non-taxable.

7(i). The first issue is regarding the availment of cenvat credit of the service tax on Pre-Shipment Charges and Terminal Handling Charges where these services were found to be received after issuance of let export order and thus it was held that the same could not be considered as input service as the same has been received beyond the place of removal. The relevant legal provisions in this respect are as under :

(A) Rule 2(l) of the Cenvat Credit Rules reads as under :

"[(l) "input service" means any service, -

(i) used by a provider of [output service] for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes ...."

[Emphasis supplied]

(B) Vide Circular No.988/12/2014-CX dated 20.10.2014, the Central Board of Excise & Customs, New Delhi determined the Place of removal under Para-(3), which reads as under :

> *"(3) The operative part of the instruction in both the circulars give similar direction and are underlined. They commonly state that the place where sale takes place is the place of removal. **The place where sale has taken place is the place where the transfer in property of goods takes place from the seller to the buyer**. This can be decided as per the provisions of the Sale of Goods Act, 1930 as held by Hon'ble Tribunal in case of Associated Strips Ltd. v. Commissioner of Central Excise , New Delhi [2002 (143) E.L.T. 131 (Tri.-Del.)]. This principle was upheld by the Hon'ble Supreme Court in case of M/s. Escorts JCB Limited v. CCE, New Delhi [2002 (146) E.L.T. 31 (S.C.)]."*
>
> [Emphasis supplied]

(C) The appellant and the Department, both have referred the Circular No.999/6/2015-CX dated 28.02.2015 issued by the Central Board of Excise & Customs, New Delhi. In the said Circular, clarification has been given regarding place of removal, on being sought by the trade in case of exports for purposes of cenvat credit of input service. The relevant part of the said Circular is reproduced below :

> *"4. In most of the cases, therefore, it would appear that handing over of the goods to the carrier/transporter for further delivery of the goods to the buyer, with the seller not reserving the right of disposal of the goods, would lead to passing on of the property in goods from the seller to the buyer and it is the factory gate or the warehouse or the depot of the manufacturer which would be the place of removal since it is here that the goods are handed over to the transporter for the purpose of transmission to the buyer. It is in this backdrop that the eligibility to Cenvat Credit on related input services has to determined."*
>
> *"6. In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS. Needless to say, eligibility to CENVAT Credit shall be determined accordingly."*
>
> [Emphasis supplied]

(D) The para-4(ii) of the Circular No.1065/4/2018-CX dated 08.06.2018, issued by the Central Board of Indirect Taxes & Customs, New Delhi is reproduced below :

> *"(ii) Clearance for export of goods by a manufacturer shall continue to be dealt in terms of Circular No. 999/6/2015-CX., dated 28-2-2015 as the judgments cited above did not deal with issue of export of goods. In these cases otherwise also the buyer is located outside India."*

7(ii). The conjoint reading of above legal provisions make it clear that in case of export of goods by manufacturer exporter, the place of removal will be the Port/ICD/CFS and that after Let Export Order is issued, the exporter has no control over the goods and

transfer of property in the said goods can be said to have taken place at the port. It has been clearly mentioned by the adjudicating authority in the impugned order that the services of Terminal Handling and Pre-shipment have been received by the appellant after issuance of Let Export Order. Hence, as per the Clarification issued vide the said Circular, the transfer of property has taken place after the issuance of Let Export Order and the appellant did not have any control over the goods. Therefore, any services received after the let export order can not be considered to be input service being used beyond 'upto place of removal' and cenvat credit of the service tax paid on such services can not be availed as input service tax cenvat credit. As discussed in para-3(iv) & 3(v) hereinabove, the appellant has also accepted the facts which is discussed hereinabove in this para.

7(iii). No cogent reply is found to have been received from the appellant that they have received the said services before the Let Export Order i.e. before the transfer of property in the said goods. Had these services been received before the Let Export Order, the same would have come under the purview of services received 'upto place of removal' and appellant could have been eligible for availment of such cenvat credit being input service. Since, no such situation is found in the present matter, the appellant is not eligible to avail such cenvat credit and the impugned order, rejecting such availment of cenvat credit in this respect and recovery of the same, is upheld to such extent.

8(i). As regards the second issue pertaining to reversal of cenvat credit at the rate decided by the adjudicating authority on the trading activity being non-taxable, it has been contended by the appellant that as per Rule 6(3AA) of Cenvat Credit Rules, 2004 even though no option is selected earlier, they have option to pay/reverse credit as per Rule 6(3)(ii) of Cenvat Credit Rules, 2004. Rule 6(3) of the Cenvat Credit Rules, 2004 reads as under :

> *"[(3) (a) A manufacturer who manufactures two classes of goods, namely :-*
> *(i) non-exempted goods removed;*
> *(ii) exempted goods removed;*
> ***or***
> *(b) a provider of output service who provides two classes of services, namely :-*
> *(i) non-exempted services;*
> *(ii) exempted services,*
> *shall follow any one of the following options applicable to him, namely :-*
> *[(i) pay an amount equal to six per cent. of value of the exempted goods and seven per cent. of value of the exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period; **or**]*
> *(ii) pay an amount as determined under sub-rule (3A)"*
>
> [Emphasis supplied]

It is pertinent to mention that Rule 6(3A) of the Cenvat Credit Rules, 2004 stipulates the procedure and conditions to be followed by the manufacturer of goods or the

provider of output service for determination of amount required to be paid under Rule 6(3)(ii) of Cenvat Credit Rules, 2004.

Rule 6(3AA) of the Cenvat Credit Rules, 2004 reads as under :

> *"[(3AA) Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) **and follow the procedure provided under sub-rule (3A)**, **the Central Excise Officer** competent to adjudicate a case based on amount of CENVAT credit involved, **may allow** such manufacturer or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, mutatis-mutandis in terms of clause (c) of sub-rule (3A), with interest calculated at the rate of fifteen per cent. per annum from the due date for payment of amount for each of the month, till the date of payment thereof."*
>
> [Emphasis supplied]

8(ii). Perusal of the above provisions of law makes it clear that the Assessee can opt to pay the duty/reverse the credit either under Rule 6(3)(i) or under Rule 6(3)(ii) of Cenvat Credit Rules, 2004. If the Assessee opts to pay the duty under Rule 6(3)(ii), they have to follow the procedure & condition stipulated under Rule 6(3A) of Cenvat Credit Rules, 2004. Rule 6(3AA) of Cenvat Credit Rules, 2004 further clarifies that in the event of failure to exercise any option, the Assessee can pay the duty under Rule 6(3)(ii) by following the procedure prescribed under Rule 6(3A). It nowhere entitles the Assessee to remain idle/silent and not to pay any duty until it is indicated by the Department. In any case, the Assessee will be required to pay the duty either under Rule 6(3)(i) or under Rule 6(3)(ii). Further, even if they pay the duty by following the procedure stipulated under Rule 6(3A), it would be the discretion of the competent Central Excise Officer to allow such Assessee to follow the said Rule 6(3)(ii). The Central Excise Officer can refuse to allow the Assessee to do so. Thus, it is not open for the Assessee to neither follow Rule 6(3)(i) nor Rule 6(3)(ii) of the Cenvat Credit Rules, 2004. The facts of the case reveal that the appellant has neither followed the Rule 6(3)(i) nor followed Rule 6(3)(ii). Therefore, the adjudicating authority has rightly ordered to pay them the duty under Rule 6(3)(i) under the impugned order. By this way the adjudicating authority has refused to allow the appellant to follow the Rule 6(3)(ii) of the Cenvat Credit Rules, 2004.

8(iii). It is also the contention of the appellant that the 'Value' for the purpose of ascertaining service tax is required to be taken as provided under Explanation-I under Rule 6(3D)(c) of the Cenvat Credit Rules, 2004. The said Explanation reads as under :

> *"[**Explanation I.** - "Value" for the purpose of sub-rules (3) and (3A), —*
>
> *(a) shall have the same meaning as assigned to it under section 67 of the Finance Act, read with rules made thereunder or, as the case may be, the value determined under section 3, 4 or 4A of the Excise Act, read with rules made thereunder;*
>
> *(b) in the case of a taxable service, when the option available under sub-rules (7), (7A), (7B) or (7C) of rule 6 of the Service Tax Rules, 1994, has been availed, shall*

be the value on which the rate of service tax under section 66B of the Finance Act, read with an exemption notification, if any, relating to such rate, when applied for calculation of service tax results in the same amount of tax as calculated under the option availed;

(c) in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten per cent. of the cost of goods sold, whichever is more;

(d) in case of trading of securities, shall be the difference between the sale price and the purchase price of the securities traded or one per cent. of the purchase price of the securities traded, whichever is more;

(e) shall not include the value of services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount :]"

[Emphasis supplied]

It is observed that value of trading activity has been mentioned as Rs.14,03,409/- for the F.Y. 2016-17 and Rs.4,66,201 for the F.Y. 2017-18 (upto June-2017) under Para-4 at Page-2 of the impugned order and from the liability shown at page-5 and 6, it is observed that value of Rs.14,03,409/- for the F.Y. 2016-17 and Rs.4,66,201 for the F.Y. 2017-18 (upto June-2017) has been taken into consideration for arriving at the liability of the appellant which appears to be contrary to the Rule 6(3D)(c) as seen above. I, therefore, find force in contention of the appellant that Rule 6 of the Cenvat Credit Rules, were substantially amended by Notification No.13/2016-NT dated 01.03.2016. The adjudicating authority has not offered any comments on changes in legal provision and its applicability to the case. Thus, the liability in respect of the second issue is required to be calculated afresh in terms of amendment brought by Notification No.13/2016-NT dated 01.03.2016. This will not only affect the charging of interest over the same but also the relevant penalty for the same. In view of this, the matter is remanded back to the adjudicating authority for passing the order afresh in respect of second issue. It goes without saying that the charging of interest and imposition of penalty will depend upon the new liability and as per the provisions of law in this respect.

9. The appellant has contended that the trading activity was carried out by them in earlier years also and is reflected in their annual accounts. Copies of the annual accounts were given to the department in all audits. Thus, the department was in knowledge of their activity and therefore the demand is partly time barred. The period covered is from 01.04.2016 to 30.06.2017 whereas the notice is issued on 30.04.2019. Thus, the period beyond two years i.e. upto March-2017 would be time barred. No proof has been submitted by the appellant to substantiate this contention. Therefore, I am not inclined to accept this contention. Moreover, I find that the appellant is not only holding the Central Excise Registration but also holding the Service Tax Registration. Therefore, it is not acceptable that they were not aware of their liability in respect of the said issues when they are working under self-assessment regime. In case, they were having any doubt, they could have always

approached the authority to clear their doubts and could have act accordingly. It lies upon them to show the correct figures in their returns and pay the duty/tax accordingly. Since they failed to do so, suppression of fact with intent to evade duty is proved. The same would have resulted into benefit to them of the duty unpaid in the matter and therefore the extended period has been correctly invoked by the adjudicating authority under the impugned order.

10. So far as the penalty imposed upon the appellant is concerned, the Department has contended that the penalty imposable in the present matter is equivalent to the recovery of cenvat credit confirmed under the impugned order. The relevant part of Section 11AC(1)(c) of the Central Excise Act, 1944 is reproduced below :

> *"Section [11AC. Penalty for short-levy or non-levy of duty in certain cases. — (1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows :-*
> *(a) ...*
> *(b) ...*
> *(c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined :*
> ***Provided** that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the duty so determined;"*

Perusal of the above make it clear that the proviso to Section 11AC(1)(c) of the Central Excise Act, 1944 is not applicable to the period of April-2016 to June-2017, which is involved in the present case. However, the adjudicating authority has imposed the penalty under proviso to Section 11AC(1)(c) instead of Section 11AC(1)(c). In the present case, penalty equal to the duty is imposable under Section 11AC(1)(c) of the Central Excise Act, 1944. The law is very clear in this aspect and notice in this respect is also clear. Therefore, the impugned order imposing penalty upon the appellant under proviso to Section 11AC(1)(c) instead of under Section 11AC(1)(c) is contrary to the existing provisions of law to that extent. Penalty imposable in the present case would be equivalent to the amount of cenvat credit ordered to be recovered, as stipulated under Section 11AC(1)(c) of the Central Excise Act, 1944. Since proviso to Section 11AC(1)(c) of the Central Excise Act, 1944 is pertaining to the different period, it will not be applicable in the present case. In view of above, the contention of the Department is accepted and the appeal filed by the Department is allowed.

11(i). In view of above, the first issue is decided against the appellant and therefore the impugned order confirming the demand is upheld along with interest and equivalent penalty is also imposable upon the appellant under the provisions stipulated under the law in

this respect. So far as the second issue is concerned, the same is remanded back to the adjudicating authority for the purpose of ascertaining value as per the law and as per the discussion under para-8 hereinabove. Since the amount in respect of duty pertaining to the second issue is going to change, interest would also change according to the new demand in the matter and penalty equivalent to the new amount of duty would be imposable in respect of the second issue accordingly.

11(ii). The appeal preferred by the Department against the imposition of reduced penalty is allowed and the impugned order is set aside to that extent.

12. In view of the discussions made above, the appeal of the appellant is partly allowed and Department appeal is allowed. Both the appeals are disposed of accordingly.

21st May, 2021

(Akhilesh Kumar)
Commissioner (Appeals)

Date : .05.2021.

Attested

09/06/21

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

BY R.P.A.D. / SPEED POST TO :

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2. Asstt. Commissioner of CGST,
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