आयुक्त(अपील)का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136

DIN : **20211164SW0000666D8A**

स्पीड पोस्ट

क फाइल संख्या File No : GAPPL/COM/STP/1183/2020/4659 TO 4663

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-61/2021-22**
दिनाँक Date : **22-11-2021** जारी करने की तारीख Date of Issue 30.11.2021

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **23/D/GNR/KP/2020-21** दिनाँक: **14.09.2020** issued by Assistant Commissioner, CGST& Central Excise, Division Gandhinagar, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s PMC Projects (India) Pvt Ltd
AMDC Building, AT Shantigram,
Ground Floor to 5th Floor,
Nr. Vaishnodevi Circle, S.G. Highway,
Ahmedabad - 382421

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 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 हानिकार खाने 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 मे 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.

(क) 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।

(A) 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.

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

(B) 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।

(c) 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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 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,BahumaliBhawan,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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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 प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर 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:

(c) amount determined under Section 11 D;
(ci) amount of erroneous Cenvat Credit taken;
(cii) amount payable under Rule 6 of the Cenvat Credit Rules.

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।

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."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. PMC Projects (India) Pvt Ltd, AMDC Building, At. Shantigram, Ground Floor to 5th Floor, Near Vaishnodevi Circle, S.G. Highway, Ahmedabad – 382 421 (hereinafter referred to as the appellant) against Order in Original No. 23/D/GNR/KP/2020-21 dated 14-09-2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Gandhinagar, Commissionerate: Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant is engaged in providing taxable services viz. Renting of Immovable Property service, Site Formation and Clearance, Excavation, earth moving and demolition services, Storage and Warehousing service, Technical Testing services etc. and were holding Service Tax Registration No. AADCP5841LST001. During the course of audit of records of the appellant by the departmental officers for the period from F.Y. 2012-13 to F.Y.2015-16, it was observed by audit officers that the appellant was also engaged in the business of trading of project materials which is included in the negative list as an exempted service. It was noticed that during the F.Y. 2012-13 to F.Y. 2014-15, the appellant had reversed proportionate Cenvat Credit on common input services under Rule 6(3) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004) after being pointed out by the EA-2000 audit. However, it was observed that the appellant had not reversed the proportionate credit amounting to Rs.7,19,928/- in terms of Rule 6(3) of the CCR, 2004 for the F.Y. 2015-16.

2.1 It was further observed in the course of the audit that the appellant had claimed service tax credit amounting to Rs.1,45,543/- on services received towards outdoor catering from M/s.Ashapura Canteen and M/s.Sodexo Food Solutions India Pvt Ltd in the month of August,

2015 and service tax credit amounting to Rs.62,114/- on service of Mandap & Decoration in different months during F.Y.2015-16 from various vendors. From the definition of input service provided under Rule 2 (l) of the CCR, 2004, it appeared that the said services are not eligible for service tax credit. Therefore, the Service Tax credit totally amounting to Rs.2,07,657/- was required to be recovered from them.

3. Accordingly, the appellant was issued Show Cause Notice No. V/4-01/O&A/PMC/20-21 dated 08.05.2020 wherein it was proposed to :

- Recover an amount of Rs.7,19,928/- under Section 73 of the Finance Act, 1994 read with Rule 6 (3) of the CCR, 2004 along with interest under Section 75 of the Finance Act, 1994;
- Impose penalty under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004 ;
- Recover an amount of Rs.2,07,657/- under Rule 14 of the CCR, 2004 read with Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994;
- Impose penalty under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004.

4. The said SCN was adjudicated vide the impugned order wherein :

- The amount of Rs.7,19,928/- was confirmed under Section 73 of the Finance Act, 1994 read with Rule 6 (3) of the CCR, 2004. The said amount already reversed was appropriated.
- Interest was ordered to be recovered under Section 75 of the Finance Act, 1994;
- Penalty of Rs. 7,19,928/- was imposed under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004 ;
- The amount of Rs.2,07,657/- was confirmed under Rule 14 of the CCR, 2004 read with Section 73 of the Finance Act, 1994. The said amount already reversed was appropriated.

- Interest was ordered to be recovered under Section 75 of the Finance Act, 1994;
- Penalty of Rs.2,07,657/- was imposed under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004.

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

i) The notice based on which the impugned order was passed was illegal in terms of Section 73 (1) of the Act. The period involved in the notice is 2015-16 whereas the notice was issued on 08.05.2020. The notice was issued beyond the period of normal limitation.

ii) The notice has failed in discharging onus cast upon revenue to allege and establish necessity for invocation of larger period of limitation as contemplated by proviso to sub-section (1) of Section 73 of the Act.

iii) The revenue did not bring any iota of evidence on record nor has it brought any conducive facts on surface to attribute any of the grave allegations contemplated by proviso to sub-section (1) of Section 73 of the Act.

iv) Willful intent on their part has not been sufficiently and adequately established and the onus is sought to be shifted on to them.

v) They rely upon the decision of the Hon'ble Supreme Court in the following cases : Pushpam Pharmaceuticals Company Vs. CCE, Bombay – 1995 (78) ELT 401 (SC); CCE Vs. Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC); Padmini Products Vs. CCE - 1989 (43) ELT 195 (SC); Continental Foundation Jt. Venture Vs. CCE – 2007 (216) ELT 177 (SC).

vi) The adjudicating authority has failed to appreciate that the facts were very much within the knowledge of the revenue before issuance of the notice.

vii) The finding as to non-reversal of credit was merely based on the verification of the periodical returns and no extensive examination of facts was made. They had made full disclosure of the facts in the periodical returns and the notice has not dispute this facts.

viii) The adjudicating authority has erred in confirming the demand based on notice issued in violation of Circular No. 122/41/2019-GST dated 05.11.2019 which required DIN to be issued. The notice was issued on 08.05.2020 which the DIN was generated on 11.05.2020.

ix) The notice is bad in law as Cenvat Credit has been demanded under Rule 6(3) and Rule 14 of the CCR, 2004. If the demand fails under these rules, question of demand under Section 73 (1) shall not arise.

x) Notification No. 20/2017-CE (NT) dated 30.6.2017 was issued prescribing Cenvat Credit Rules, 2017 in supercession of CCR, 2004. Pursuant to which no recovery of whatsoever nature shall survive under erstwhile CCR, 2004. The notice was issued on 08.05.2020 when the CCR, 2004 did not exist.

xi) The provisions of Section 174 (2) of the CGST Act, 2017 will have no relevance and bearing. The provisions of Chapter-V of the Finance Act, 1994 have been saved in specified circumstances as against omission of Chapter-V under Section 173 but the same shall not have any impact of saving CCR, 2004 which was issued under the provisions of the Central Excise Act, 1944 and have been specifically superceded.

xii) They rely upon the judgement in the case of Kolhapur Canesugar Works Ltd Vs. UOI – 2000 (119) ELT 257 (SC).

xiii) The demand for interest was not sustainable as the demand itself fails to survive. No interest was required to be paid for suo moto reversal of credit as the alleged credit was never utilized by them which is evidenced from their returns, copies of which are enclosed. They had sufficient balance of credit

available at all times, more than the credit involved in the present case. Also no allegation of utilization of credit has been made in the notice or the impugned order.

xiv) It is settled position of law that no interest can be demanded under the rules when the credits were not utilized.

xv) The adjudicating authority was not justified in imposing penalty when the demand itself failed to hold ground.

xvi) The grounds submitted on limitation shall mutatis mutandis apply to the grounds of penalty. No penalty can be imposed when the notice is barred by normal limitation.

xvii) Penalty was not imposable as the credit was not utilized by them as is evident from their periodical returns.

6. The appellant were called for Personal Hearing on 23.07.2021, and 28.08.2021. Since nobody appeared and neither was any adjournment sought, they were again called for a Personal Hearing on 16.09.2021. The appellant informed vide letter dated 17.09.2021 that they received the intimation of personal hearing on the date of hearing and sought a fresh date. The appellant was, therefore, called for a Personal Hearing on 12.10.2021. The appellant again sought adjournment on the ground that they received the intimation of personal hearing on the date of hearing. The appellant was, therefore, again called for a personal hearing on 28.10.2021, however, they neither appeared nor sought any adjournment. The appellant were again called for a personal hearing on 17.11.2021. The appellant vide letter dated 17.11.2021 again sought an adjournment on the grounds that their authorized representative was pre-occupied due to unavoidable circumstances.

6.1 As per Section 85 (5) of the Finance Act, 1994, the provisions of the Central Excise Act, 1944 are made applicable to the appeals under Section 85 of the Finance Act, 1994. In terms of the provisions of Section 35(1A) of the Central Excise Act, 1994, hearing of the appeal

can be adjourned on sufficient cause being shown. However, as per the proviso to the said Section 35 (1A), no adjournment shall be granted more than three times to a party during hearing of the appeal. In the present appeals the appellant were called for a personal hearing on six different dates, however, they did not attend on any of the dates and sought adjournment in respect of the hearing granted on 16.09.2021, 12.10.2021 and 17.11.2021. I am, therefore, satisfied that the appellant have been granted ample opportunities to be heard, which they have not availed. I therefore, proceed to decide the case, ex-parte, on the basis of the material on available on record.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum and material available on records. I find that the appellant have not disputed the fact that they were required to reverse the proportionate credit amounting to Rs.7,19,928/- in terms of Rule 6(3) of the CCR, 2004. I find that they have also not disputed the wrong availment of Service Tax credit totally amounting to Rs.2,07,657/- on ineligible input services. Therefore, I am not going in to the merit of these issues.

8. I find that the appellant have contested the issue on the grounds of limitation. In this regard, I find that the issue of the appellant not reversing proportionate Cenvat Credit in terms of Rule 6(3) of the CCR, 2004 arose even in respect of the period of F.Y. 2012-13 to F.Y. 2014-15 and the appellant had reversed the credit when pointed out by EA-2000 audit. The present appeal is for the subsequent period of F.Y. 2015-16. It, therefore, is clear that the appellant was aware that they were required to proportionately reverse the Cenvat credit in respect of common inputs services in terms of Rule 6(3) of the CCR, 2004. Despite this, they have failed to do so and the failure of the appellant to reverse the proportionate credit was noticed only in the course of the audit for the subsequent period.

8.1 The appellant have contended that they have furnished all details in the periodical returns filed by them with the department. However, I find that the fact of whether the appellant had availed Cenvat Credit on common inputs, which is liable to be reversed, is not reflected in the ST-3 returns. Only the amount of Cenvat Credit utilized for payment under Rule 6(3) of the CCR, 2004 is indicated in the ST-3 returns. The availment of Cenvat Credit on common input services are only within the knowledge of the appellant, and therefore, merely because it was pointed out in the audit for the earlier period would not foreclose the department from invoking the extended period of limitation particularly when the fact of availment of such credit was not disclosed to the department and nor was the department aware of such credit having been availed by the appellant. On the contrary, the repeated failure on the part of the appellant to reverse the proportionate credit on common input services leads to the conclusion that it was a deliberate act on their part inasmuch as despite being aware of their obligation to reverse the credit they failed to do so. Hence, I am of the view that the extended period of limitation has been rightly invoked. I, therefore, do not find any merit in the contention of the appellant as regards the notice being barred by limitation.

9. I find that the appellant have also contended that the notice has been issued under the CCR, 2004 after its supersession by the Cenvat Credit Rules, 2017 and therefore, the demand under CCR, 2004 fails to survive. I find that Section 174 (2) of the CGST Act, 2017 is a saving clause of the acts under the erstwhile Act and Rules framed thereunder. Clause (e) of sub-section 2 of Section 174 of the CGST Act, 2017 is reproduced as under for easy reference :

> "(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced,

> and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;"

9.1 From the above provisions, it is clear that Section 174 (2) (e) of the CGST Act, 2017 provides for the saving clause for proceedings initiated for recovery and adjudication. Therefore, the contention of the appellant in this regard is without merit and hence, is not legally sustainable.

10. I find that the appellant have also contended that no interest was required to be paid for suo motto reversal of credit as the alleged credits were never utilized by them and they were having sufficient balance of credit at all times which was more than the credits in dispute. I find that Rule 14 of the CCR, 2004 provides for recovery of wrongly taken Cenvat Credit. Rule 14(1) (i) & (ii) of the CCR, 2004 is reproduced as under :

> "(i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;
>
> (ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries."

10.1 From a reading of the above provision of the CCR, 2004, I find that Rule 14 (1) (ii) specifically provides for recovery of the Cenvat Credit taken and wrongly utilized with interest under Section 11AA Central Excise Act, 1944 or Section 75 of the Finance Act, 1994. However, Rule 14 (1) (i) of the CCR, 2004 only provides for recovery of the wrongly taken Cenvat Credit, but not utilized, under the Section 11A of the Central Excise Act, 1944 or Section 73 of the Finance Act, 1994. It, therefore, is evident that where the Cenvat Credit has not

been utilized, Rule 14 only provides for recovery of the same but there is no provision for recovery of interest.

10.2 I find that the appellant was having sufficient credit balance in their Cenvat account and this is also evidenced from the ST-3 return for the F.Y. 2017-18, a copy of which was submitted by them with the appeal memorandum. I further find that fact of the appellant having sufficient balance in their Cenvat Account has also not been disputed in the impugned order. Therefore, I find merit in the contention of the appellant that the disputed credit was not utilized by them. Consequently, the provisions of Rule 14 (1) (i) of the CCR, 2004 are applicable and the appellant are not liable to pay interest on the amount of Cenvat Credit which was wrongly availed by them but reversed without the same being utilized.

10.3 I find that in the case of Jaypee Greens Vs. Commissioner of Customs, C.Ex. & ST, Noida – 2020 (33) GSTL 109 (Tri.-All), the Hon'ble Tribunal had held that :

> **"3.** The contention of the appellant is that inasmuch as the credit availed by them was not utilized and remained only a paper entry, the confirmation of interest against them is not in accordance with the law. For the above proposition they have relied upon the Hon'ble Karnataka High Court decision in the case of *CCE & ST* v. *Bill Forge Private Limited* 2011 TIOL-799-HC-KAR-CX = 2012 (279) E.L.T. 209 (Kar.) = 2012 (26) S.T.R. 204 (Kar.). On the other hand the lower authorities have referred to the Hon'ble Supreme Court decision in the case of *Ind Swift* reported as 2011 (265) E.L.T. 3 (S.C.).
>
> **4.** We note that the said decision of the Hon'ble Supreme Court in the case of *Ind Swift* was considered by the Hon'ble Karnataka High Court in the case of Bill Forge and it is only after consideration of the said Apex Court decision, it was held that in case the availed Cenvat credit is not utilized, no interest liability would arise. The credit availed by the appellant in the present case was not utilized and remained only in their account books. The same was subsequently reversed by the appellant *suo motu* on realization that the same was not available to them. In such a scenario, no loss of revenue has occurred to the department so as to confirm the interest, which is nothing but payment to compensate any monetary loss. In the absence of the same, confirmation of the interest for making the entry in the records, is neither justified nor in accordance with law declared by the Hon'ble Karnataka High Court in the above referred decision. We find no reason for upholding the interest or imposing any penalty upon the appellant.

10.4 In view of the provision of Rule 14 (1) (i) of the CCR, 2004 and the judgement of the Hon'ble Tribunal supra, I am of the considered view that the appellant are not liable to pay interest on the Cenvat Credit wrongly availed but which was not utilized by them and subsequently reversed.

11. The appellant have also contested the imposition of penalty on the grounds that the credit was not utilized by them and that the alleged contravention had caused no loss to the exchequer. In this regard, I find that the judgement in the case of Jaypee Greens supra holds good even on the issue of imposition of penalty when the Cenvat Credit was not utilized. I further find that in the case of CCE, Bangalore Vs. Flexitronics Technologies (India) Pvt Ltd – 2015 (323) ELT 273 (Kar), the Hon'ble High Court of Karnataka had held that :

> **"6.** From the records, it is observed that the assessee had availed the wrong credit in their account but has not utilized the same and after it was pointed out by the audit party the same was reversed by the assessee. In such circumstances, the Tribunal has rightly held that there was no intention on the part of the assessee to evade payment of tax and the assessee had not utilized the amount credited.
>
> **7.** To attract levy of penalty as per the provisions of Section 11AC of the Central Excise Act, 1944, the Revenue has to prove that the assessee has availed the Cenvat credit wrongly by reason of fraud or collusion or any wilful misstatement or suppression of facts, which is not forthcoming in the present case.
>
> **8.** In view of the same, the issue involved in this appeal is mainly related to the facts of the case and the Revenue having failed to establish the case of imposing penalty under Section 11AC, we are not inclined to interfere with the order passed by the Tribunal and in the circumstances, we do not find any substantial question of law arising for consideration.
>
> **9.** Accordingly, the appeal is dismissed."

11.1 In view of the above judgements, I am of the view that since the appellant had not utilized the Cenvat Credit wrongly availed by them and which was subsequently reversed, penalty is not imposable on them.

12. In view of the above discussions and the judicial pronouncements, I hold that the impugned order confirming the demand of Cenvat Credit wrongly availed is legal and proper and is, therefore, upheld. However, the order for recovery of interest and imposition of penalty by the impugned order is not legally sustainable and therefore, is set aside. Accordingly, the impugned order is partially set aside and the appeal of the appellant is partially allowed as above.

13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed off in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: .11.2021.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. PMC Projects (India) Pvt Ltd,
AMDC Building, At. Shantigram,
Ground Floor to 5th Floor,
Near Vaishnodevi Circle, S.G. Highway,
Ahmedabad – 382 421

Appellant

The Assistant Commissioner,
CGST & Central Excise,
Division- Gandhinagar
Commissionerate : Gandhinagar

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.

2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
(for uploading the OIA)
4. Guard File.
5. P.A. File.