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 : 20211264SW0000111961

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1485/2021/5168 To 5162

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-76/2021-22**
दिनाँक Date : **16-12-2021** जारी करने की तारीख Date of Issue 17.12.2021

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

ग Arising out of Order-in-Original No. **49/AC/MEH/CGST/20-21** दिनाँक: **02.03.2021** issued by Assistant Commissioner, CGST& Central Excise, Division Mehsana, Gandhinagar Commissionerate

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

M/s Starline Cars Private Limited
Nagalpur, Highway,
Mehsana- 384002

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 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.

(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 सलग्नरकम 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 अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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.

(53) 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 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 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:

(cxlii) amount determined under Section 11 D;

(cxliii) amount of erroneous Cenvat Credit taken;

(cxliv) 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. Starline Cars Private Limited, Nagalpur Highway, Mehsana – 384 002 (hereinafter referred to as the appellant) against Order in Original No. 49/AC/MEH/CGST/20-21 dated 02-03-2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Mehsana, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant was holding Service Tax Registration No. AADCS0317EST001 and engaged in providing the services of Repairs. Reconditioning, restoration or decoration or any other similar services of any motor vehicle and Business Auxiliary service. The appellant was issued a SCN No. VI/1(b)/CTA/Tech-12/SCN/Starline/2018-19 dated 08.10.2018 by the Commissioner of Central Tax, Audit, Ahmedabad demanding service tax amounting to Rs.6,89,40,376/- short paid during the period from April, 2013 to March, 2017. The appellant was requested to submit the details for the period from April, 2017 to June, 2017, which was submitted by them on 03.02.2020. It was observed that the appellant had filed their ST-3 returns belatedly after 208 days from the due date but had not paid the late fee amounting to Rs.18,800/-.

2.1 It was further observed from the details submitted by them that :

(I) The appellant had wrongly availed cenvat credit of service tax paid on Transport/GTA amounting to Rs.6,42,201/- during the period April, 2017 to June, 2017 which was not admissible to them as per Rule 3 (1) of the Cenvat Credit Rules, 2004 (CCR, 2004).

(II) The appellant had performed trading activity which is exempted service, in their business premises and had not

followed the procedure laid down under the provision of Rule 6 (3) of CCR, 2004 while availing cenvat credit on input services. They had neither paid the amount as determined under clause (ii) of sub-rule (3) nor have they maintained separate accounts as required under clause (a) of sub-rule 3 (A). In terms of Rule 6 (3) (b) (i) of the CCR, 2004, the appellant was required to pay an amount equal to sever per cent of the value of exempted services, subject to a maximum of the total credit available in their account at the end of the period to which the payment relates. It was found that the total amount of credit available with the appellant was Rs.7,42,153/- which was lower than the amount equal to seven per cent of the value of exempted services. Therefore, the appellant was required to pay an amount of Rs.7,42,153/-.

(III) The appellant had received income under 'showroom income/workshop income' but had not paid service tax on such amount which appeared to be taxable under Business Auxiliary service. The service tax short paid/not paid amounted to Rs. 24,91,373/-.

3. The appellant were, therefore, issued a SCN No. V.ST/11A-35/Starline Cars/19-20 dated 13.02.2020, in terms of Section 73(1A) of the Finance Act, 1994, seeking to :

- Demand and recover the cenvat credit amounting to Rs.6,42,201/- under Rule 14(1)(ii) of the CCR, 2004 read with Section 73(1) of the Finance Act, 1994.
- Demand and recover the cenvat credit amounting to Rs.7,42,153/- under Rule 6(3) read with Rule 14 (1) (ii) of the CCR, 2004 and proviso to Section 73(1) of the Finance Act, 1994.
- Demand and recover interest under Rule 14 (1) (ii) of the CCR, 2004 read with Section 75 of the Finance Act, 1994.

- Impose penalty under Rule 15 (3) of the CCR, 2004 read with Section 78 of the Finance Act, 1994.
- Demand and recover Service Tax amounting to Rs.24,91,373/- under Section 73 (1) of the Finance Act, 1994.
- Demand and recover interest under Section 75 of the Finance Act, 1994.
- Impose penalty under Section 78 of the Finance Act, 1994.
- Charge and recover the late fee of Rs.18,800/- under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994.

4. The said SCN was adjudicated vide the impugned order wherein the demands were confirmed along with interest and penalties were also imposed under Rule 15 (3) of the CCR, 2004 and Section 78 of the Finance Act, 1994. The late fee was also ordered to be recovered.

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

i) The adjudicating authority has failed to appreciate that in respect of service tax paid on Transport, they being service provider of exempted and taxable service, it is used in relation to providing the taxable service and, therefore, there is a direct nexus between exempted and taxable service related to output service and therefore, there is no violation of Rule 3(1) and 2(1).

ii) The adjudicating authority has failed to appreciate that Rule 6 (3) merely offers option to output service provider who does not maintain separate accounts. If such option is not exercised, the provision does not contemplate that the authorities can choose one of the options on behalf of the service provider.

iii) They had shown income received under Showroom income as Rs.1,63,57,489.87 and Workshop income of Rs.2,51,633, aggregating to Rs.1,66,09,123/-. In the impugned order, the

adjudicating authority has erroneously shown that value as per ST-3 return is zero. However, in their ST-3 return for the period 01.04.2017 to 30.06.2017, they had shown income of Rs.1,57,85,531/- and the service tax thereon to the tune of Rs.23,67,829.65 has been paid. Therefore, there is only a difference of Rs.1,23,543/- instead of Rs.24,91,373/-. They submit a copy of the challan for Rs.1,23,543/-.

iv) The adjudicating authority has erred in imposing penalty under Section 78 of the Finance Act, 1994.

6. The appellant had also filed written submissions on 15.04.2021, inter alia contending that :

- They are an authorized dealer of M/s.Maruti Suzuki India Limited (MSIL) and engaged in the activity of sales, services and repairing of vehicles of MSIL and also engaged in the sales of spares for the cars of MSIL. They are also engaged in the business of purchase and sale of used/pre-owned vehicles belonging to others through their division named as Maruti True Value.
- They are taking input credit of service tax on RCM basis on the transport amount inclusive of service tax as mentioned in the invoice of MSIL. They were availing GTA services from MSIL, thus they had availed cenvat credit of inputs and service tax on input services. They being recipient of GTA are liable to pay service tax in terms of Rule r (r) of the CCR, 2004 and are covered by the output service definition under Rule 2 (p) of the CCR, 2004.
- There is a direct nexus of GTA service with the taxable service as authorized service station and business auxiliary service. They rely upon the decision in the case of Badrika Motora Pvt ltd as well Shariff Motors.
- It is pertinent to note that unless the vehicles are received and sold, there would not be any service of the same. The definition of

input service is broad enough to cover the input service availed by them and their output service.

- They rely upon the decision in the case of CCE Vs. Simplex casting Ltd; CCE Vs. Adishiv Forge (P) Ltd; Hindustan Zink Ltd. Vs. Commissioner of CGST, Udaipur – 2021 (44) GSTL 163 (Tri.-Del).
- They refer and rely upon Notification No. 32/2004-ST dated 3.12.2004 as well as Master Circular No.97/08/2007 dated 23.08.2007. The restriction envisaged in the said notification about non availment of cenvat credit should be in respect of the service provider of GTA service and cannot be applied to the recipient of services merely because they were required to pay the service tax.
- The service of providing motor vehicle by specified person to body corporate is specified in Notification No. 30/2012-ST dated 20.6.2012. The service received is entitled to avail the credit of service tax on input services received by them on receipt of invoice.
- In addition to the case laws referred above, they also rely upon the decisions in the case : CCE Vs. Nahar Exports Ltd; Commissioner of Service Tax Vs. Hero Honda Motors Ltd; The Oudh Sugar Mills Ltd Vs. Customs, Excise and Service Tax; Kundan Cars Pvt Ltd. Vs. CCE; CCE Vs. Modi Motors.
- They had worked out the ratio exempted goods to the total turnover and whatever excess credit has been claimed i.e. Rs.7,31,050/- has been paid vide CTIN No. 2003217776 dated 05.03.2020 to the GST department as per Rule 6 (3).
- They rely upon the decisions in the case of Tiara Advertising Vs. UOI in Writ Petition No. 18590 oof 2017 decided on 27.09.2019; Lally Automobiles Pvt Ltd. Vs. Commissioner – 2018 (17) GSTL 422 (Del); Bombay Minerals Ltd. Vs. Commissioner of C.Ex. & ST, Rajkot – 2019 (29) GSTL 361 (Tri-Ahmd); Orion Applicances Ltd – 2010 (19) STR 205 (Tri.-Ahmd); Shree Rama Multi Tech Ltd Vs.

UOI – 2011 (2670 ELT 153 (Guj); Mercedez Benz India (P) Ltd Vs. Commissioner of C.Ex., Pune-1 – 2015 (40) STR 381 (Tri.-Mum); Final Order No. A/8556/16/EBH in the case of Sahyadri Starch & Industries Pvt Ltd; Ciron Drugs & Pharma P. Ltd – 2016 TIOL 1415 CESTAT Mum.

7. Personal Hearing in the case was held on 28.10.2021 through virtual mode. Shri Shailesh Shah, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum and additional written submission.

8. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. I find that there are three issued involved in the present appeal, which are as under :

(I) Whether the cenvat credit has been correctly availed by the appellant in respect of Transport/GTA or not ?

(II) Whether the reversal of proportionate cenvat credit by the appellant, as against the demand for payment of seven per cent of the value of exempted services, is proper of not ?

(III) Non-Payment of Service Tax on income booked under Showroom Income/Workshop income under Business Auxiliary Service.

9. Regarding the issue of cenvat credit availed by the appellant in respect of Transport/GTA, I find that the appellant is an authorized dealer of MSIL and is buying vehicles from them. The adjudicating authority has in the impugned order recorded at Para 13 that the cars have been delivered by MSIL on FOR destination basis, the transportation is arranged by MSIL and payment of freight is made by MSIL. The appellant have not disputed these facts. They have in submitted a copy of Invoice issued to them and on examination of the

same, I find that it contains details of the basic price, excise duty, sales tax, Freight amount inclusive of service tax and service charges. The appellant have submitted a sheet showing the manner in which they have worked out the element of service tax involved in the freight, on reverse charge basis and availed the amount so worked out as cenvat credit.

9.1 In the case of GTA services, the service tax is charged on Reverse Charge basis. I find that as the cars are sold by MSIL to the appellant on FOR destination basis, the transportation has been arranged by them and the freight has also been paid by them. Accordingly, the service provider in the instant is the transport company, while the service recipient is MSIL. The cenvat credit of the service tax paid on such GTA service is available only to MSIL and not the appellant. The GTA service has not been availed by the appellant and neither have they made any payment towards such service to the service provider. Merely because the amount of freight charged by MSIL from the appellant is inclusive of service tax would not mean they being the recipient of GTA service. The appellant cannot under any stretch of imagination be considered as recipient of service, as claimed by them. Consequently, the appellant are not eligible to avail cenvat credit of the service tax paid by MSIL on GTA services.

9.2 I find that the appellant have cited decisions of the Hon'ble Tribunal in support of their contention. However, I find that the reliance upon the cases cited by the appellant is entirely mis-placed. The dispute in those cases pertained to the nexus between the output service of Authorised Service Station and Business Auxiliary Service with the GTA service. I further find that in the said cases, the freight was paid to the GTA service provider by the appellants, who challenged the denial of credit before the CESTAT. Therefore, those cases are on an entirely different footing and accordingly, they have no application to the issue involved in the present appeal.

9.3 I therefore, am of the considered view that the adjudicating authority has rightly held that the appellant are not entitled to cenvat credit of the service tax on transport/GTA.

9.4 I find that the adjudicating authority has imposed penalty under the provisions of Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004. However, I find that the SCN was issued under the provisions of Section 73(1A) of the Finance Act, 1994 seeking to recover cenvat credit for the period subsequent to the issuance of the earlier SCN dated 08.10.2018. Therefore, the imposition of penalty, equal to the cenvat credit, under the said provisions is not justified and is required to be revisited. Therefore, for determining the amount of penalty, the matter is required to be remanded back to the adjudicating authority.

10. The second issue in the present appeal is regarding reversal of proportionate cenvat credit by the appellant, as against the demand of the department for payment of seven per cent of the value of exempted services. In this regard, I find that the appellant is providing taxable as well as exempted services and were availing cenvat credit on common input services but had not maintained separate records in respect of the same. I further find that the appellant is not disputing the fact that they are liable to reverse the cenvat credit of input services used in exempted output services. They have basically contended that the option under Rule 6 (3) of the CCR, 2004 cannot be chosen by the department. I also find that the appellant have calculated the cenvat credit on proportionate basis amounting to Rs.7,31,050/- and submitted that the same has been paid by them on 05.03.2020.

10.1 It is relevant to refer to Rule 6 (3) of the CCR, 2004. I find that Rule 6(3) of the CCR, 2004 was amended w.e.f 01.04.2016 vide

Notification No. 13/2016-CE(NT) dated 01.03.2016, the amended rule is reproduced 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 total credit available in the account of the assessee at the end of the period to which the payment relates; or
>
> (ii) pay an amount as determined under sub-rule (3A):"

10.2 From a plain reading of the above rule indicates that there are two options available for a service provider, who is providing exempted as well as taxable output services – pay an amount equal to seven per cent of the value of the exempted goods or reverse the proportionate credit calculated in the manner specified in Rule 6 (3A) of the CCR, 2004. The appellant have though not exercising the option at any time prior to the issuance of the SCN to them, claimed the option under Rule 6 (3) (ii) of the CCR, 2004 i.e. reverse proportionate credit in terms of Rule 6 (3A) of the CCR, 2004. They have, in support of their claim, relied upon the decisions of the Hon'ble High Courts and Tribunals.

10.3 I find that in the case of Tiara Advertising Vs. Union of India – 2019 (30) GSTL 474 (Telangana), the Hon'ble High Court had held that :

> **"14.** Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of

the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-.

15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced."

10.4 I find that the facts involved in the present appeal are similar to that in the case before the Hon'ble High Court. Therefore, applying the ratio of the judgment in the said case, it is clear that the department cannot choose and force the option upon the appellant. I, therefore, hold that the appellant are entitled to choose the option under Rule 6 (3) (ii) of the CCR, 2004 and pay the amount calculated in terms of Rule 6 (3A) of the CCR, 2004.

10.5 I find that the demand of the department is for Cenvat Credit amounting to Rs.7,42,153/- and the same was confirmed by the adjudicating authority in the impugned order. The appellant have submitted that the correct amount of Cenvat Credit payable by them is Rs.7,31,050/-. I also find that the appellant had made their submission in this regard before the adjudicating authority. The computation of the amount of cenvat credit payable by the appellant is required to be verified by the adjudicating authority and re-determine the amount payable by the appellant in terms of Rule 6 (3) (ii) of the CCR, 2004. The quantum of penalty and interest would be dependent upon the re-worked amount payable by the appellant. Therefore, the issue is required to be remanded back to the adjudicating authority for this limited purpose.

11. As regards the issue of non-Payment of Service Tax on income booked under Showroom Income/Workshop income under Business Auxiliary Service, I find that the appellant have, while not disputing the issue of taxability of the service involved, disputed the amount of service tax determined to be payable by them. The appellant have contended that as per the SCN and the impugned order they have declared zero in their ST-3 returns for the period under dispute in respect of the said services. However, the appellant have claimed that they had in their ST-3 returns shown income of Rs.1,57,85,531/- and paid service tax amounting to Rs.23,67,829.65. They have admitted to a short payment of service tax amounting to Rs.1,23,543/-, which they have submitted has been paid by them. These facts are required to be verified by the adjudicating authority to determine the correct amount of service tax short paid by the appellant and which is recoverable from them. The quantum of penalty and interest would be dependent upon the re-worked amount payable by the appellant. Therefore, the issue is required to be remanded back to the adjudicating authority for this limited purpose.

12. In view of the above, I hold that the appellant are not eligible to avail cenvat credit amounting to Rs.6,42,201/- in respect of the Transport/GTA. I accordingly uphold the impugned order in so far as it pertains to this issue and reject the appeal filed by the appellant. However, in view of the findings at Para 9.4 above, the amount of penalty is to be re-determined. The matter insofar as this issue is concerned is remanded back to the adjudicating authority for the sole purpose of re-determining the amount of penalty.

12.1 The impugned order pertaining to the reversal of cenvat credit on common input services used in exempted and taxable services and the short payment/non-payment of service tax on income booked under Showroom Income/Workshop income under Business Auxiliary Service is set aside and remanded back to the adjudicating authority to decide

afresh in light of the directions contained hereinabove. The appeal filed by the appellant is allowed to this extent.

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.

16th December, 2021.

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

Attested:

Date: .12.2021.

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

BY RPAD / SPEED POST

To

M/s. Starline Cars Private Limited, Appellant
Nagalpur Highway,
Mehsana – 384 002

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

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.