आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By Regd. Post

DIN No.: 20230264SW0000916129

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/CEXP/168/2022-APPEAL / 2962 — 66
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-104/2022-23 and 31.01.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	02.02.2023
(ङ)	Arising out of Order-In-Original No. 11/AC/DEMAND/2021-22 dated 04.01.2022 passed by the Assistant Commissioner, CGST, Division-Mehsana, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Achyut Packaging Pvt. Ltd., 2108/1, Opp. Sahil Hotel, Unava, Unjha, Mehsana, Gujarat-384160

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 : -

(क) 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।

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 processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

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

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 विना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

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

(घ) 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।

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.

(2) 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.

(3) 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 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 :-

(2) उक्तलिखित परिच्छेद 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।

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

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

sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding 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 संषोधित कीं अनुसूची -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 का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपीलो 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)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

(6)(i) 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. Achyut Packaging Pvt. Ltd, 2108/1, Opposite Sahil Hotel, Unava, Unjha, Mehsana - 384160 (hereinafter referred to as the "appellant" for the sake of brevity) against the Order – in – Original No. 11/AC/DEMAND/2021-22 dated 04.01.2022 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Central GST, Division: Mehsana, Commissionerate - Gandhinagar (hereinafter referred to as the "adjudicating authority"). The appellant are engaged in the manufacture of the excisable goods viz. Aluminium Foil - Plain, Printed & Coated, falling under Chapter 76 of the CETA, 1985. They are having Central Excise Registration No. AANCA5200GEM001 and Service Tax Registration No. AANCA5200GSD001.

2. Audit of the records of the appellant was carried on by the officers of Central GST Audit, Ahmedabad for the period from August, 2015 to June, 2017. The observations of the audit officers, contained in the Final Audit Report (FAR) No. 1648/2019-20 (EX/ST) dated 12. 06. 2020, are as under:

> **Revenue Para No. - 1:** On reconciliation of the total sales (as per Sales Register/Invoices) with those declared in ER-1/ER-3 Returns filed by the appellant for F.Y. 2015-16, F.Y. 2016-17 and F.Y. 2017-18 (up to June-17), it was observed that there was a difference of Rs.1,29,045/-, Rs.5,96,530/- and Rs.3,16,878/- during these years respectively. This was due to the purchase returns cleared by raising the sales invoices and duty payable on such clearance being debited from CENVAT account for as such removals. The appellant appeared to have short reversed CENVAT credit amount during the F.Y. 2017-18 (up to June-17) in as much as the applicable duty on above differential clearance value came to Rs 39,610/, whereas the appellant had debited only Rs 37,921/- from Cenvat account. Therefore, they are liable to pay the differential duty of Rs 1,689/- along with interest and penalty.
>
> **Revenue Para- 2:** The appellant had availed Cenvat credit on capital goods amounting to Rs.25,29,800/- during F.Y. 2015-16, i.e., 100% of the Cenvat credit were availed in the year of purchase. They were required to avail only 50% of the amount i.e. Rs. 12.49,124/- as Cenvat credit and the remaining

amount should have been availed in the next Financial Year 2016-17. They were liable to pay the interest amount of Rs.55,441/- along with penalty.

Revenue Para- 3: Theappellant had failed to produce the documents for availment of Cenvat credit amounting to Rs. 5,14,109/- [Rs. 4,23,396/- for F.Y. 2016-17 and Rs. 90,713/- for F.Y. 2017-18 (April-June, 2017)]. Further, they have also taken CENVAT credit amounting to Rs. 28,390/- during April-June 2017 on some input services but failed to produce the relevant documents before the audit officers. Accordingly, they were liable to reverse/pay the CENVAT credit amounting to Rs. 5,42,499/-(Rs. 5,14,109/- and Rs. 28,390/-) along with interest and penalty.

Service Tax – Revenue Para- 1: The appellant had made short payment of service tax amounting to Rs. 13,999/- on account of Goods Transport Agency (GTA) services received by them under Reverse Charge Mechanism (RCM) as per details given below:

(Amount in Rs)

Sr. No.	Description	2015-16	2016-17	2017-18 (April-June)
1.	GTA expense made during F.Y. (as per ledgers)	6,05,604	3,68,7000	52,968
2.	Expense on which ST paid by the Consignor	4,07,501	1,00,136	0
3.	Expense under Rs. 750	2,970	6,452	990
4.	Taxable Value	1,95,133	2,62,112	51,978
5.	Abatement Admissible @ 70%	1,36,593	1,83,478	36,358
6.	Net Taxable Value	58,540	78,634	15,593
7.	Net Taxable Value as per ST-3 return	0	47,621	9,867
8.	Diff. Value	58,540	31,013	5,726
9.	ST payable	8,488	4,652	859

Service Tax - Revenue Para- 2: The appellant had not filed their service tax return of the period October, 2015 to March, 2016 for which they were liable to pay penalty of Rs. 20,000/- for non-filing of ST-3 returns.

2.1. The appellant was issued a **Show Cause Notice No.05/2020-21/CGST-Audit dated 23.06.2020**under F. No. VI/1(b)-142/Achyut Packaging/1A/18-19/AP-60 dated 23.06.2020 (in short SCN) with following proposals:

i. Demand and recovery of Central Excise duty amounting to **Rs. 1,689/-** under Section11A(4) of the Central Excise Act, 1944 along with interest under Section 11 AA of the Act and penalty under Section 11 AC (1) (C) of the Act.

ii. Demand and recovery of Cenvat credit amounting to Rs. **5,42,499/-** under the proviso to Section 11A(4) of the Central Excise Act, 1944 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 along with interestunder Section 11AA of the Central Excise Act, 1944 read with Rule 14(1)(i) of the CENVAT Credit Rules,2004 and penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of the Cenvat Credit Rules, 2004.

iii. Demand and recovery of service tax amounting to Rs. **13,999/- under** GTA services under the proviso to Section 73(1) of the Finance Act, 1994alongwith interest under Section 75 and penalty under Section 78 of the Finance Act, 1994.

iv. Recovery of late fees/penalty amounting to Rs. 20,000/- under Section 70 ofthe Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

v. Demand and recovery of interest amounting to Rs.55,441/- under Section 11AA of the Central Excise Act, 1944 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004,

2.2. The SCN was adjudicated vide the impugned order wherein the adjudicating authority has dropped the demand of Rs. 1,689/- as per Revenue Para No. 1 along with interest and penalty. He has confirmed the rest of the demand and ordered for their recovery alongwith interest and penalty. The adjudicating authority has also confirmed the late fees for non-filing of ST-3 Returns.

3. Being aggrieved with the impugned order, the appellant had preferred this appeal on following grounds:

(i) They were eligible to avail 100% Cenvat credit of central excise duty paid on capital goods, in the first year of its commencement of business, when the appellant was eligible to avail of the exemption under a notification based on the value of clearances in a financial year, but cleared goods on full rate of central excise duty without availing value based exemption and did not exceed turnover rupees four hundred lakhs in the

preceding financial year, in view of third proviso inserted vide Notification N0. 6/2010-CE (NT) to Rule 4(2)(a) of Cenvat credit Rules, 2004.

(ii) It is undisputed that this was the first audit of their firm covering the period of August-2015 to June-2017. The business of the company was started in the month of August 2015, and therefore, in the previous year there was NIL Turnover of the company.

(iii) The adjudicating authority have at Para 21.1 of the impugned order-in-original have accepted that SSI unit can take entire Cenvat credit immediately. However, at Para 22.2 of the impugned order-in-original have observed that the assess has not availed the exemption under a notification based on the value of clearances in a financial year as available to small-scale industry (SSI), as they were paying Central Excise duty at full rate on 1st clearance availing facility of Cenvat credit from the date of inception of the factory in the financial year 2015- 16. As they are not SSI unit, they cannot take entire Cenvat credit of duty paid on capital goods immediately in same financial year, as provided under third proviso to Rule 4 (2) (a) of the Cenvat credit Rules 2004 as contended by the assessee. The above contention of the assessee is, therefore, notacceptable.

(iv) They submit that actual availment of exemption is not necessary and the provision merely states that the assessee should be eligible to avail the exemption under notification based on value of clearances in a financial year.As there is no doubt as regards the eligibility of the appellant to avail the benefit of small scale exemption, the availment of 100% credit is legal and proper.

(v) The impugned order demanding interest is not at all tenable, on the ground that for availing 100% Cenvat credit on capital goods, the only condition is that assessee should be eligible to avail the benefit of exemption notification based on value of clearances in a financial year and actual availment of exemption benefit is not mandatory. This is also clear from the language of the third proviso inserted vide Notification No. 6/2010-CE (NT) to Rule 4(2) (a) of Cenvat credit Rules, 2004.

(vi) They have availed Cenvat credit only on the basis of Cenvat invoice and maintained Cenvat credit registers.The amount of Rs. 5, 42,499/- is also on the basis of Cenvat invoice. In fact, such objectionwas not raised till the date of issuance of show cause notice.As such, there is no communication during 25-09-2019 to 23- 06-2020 i.e. between the date of query memo and the date of show cause notice issued, which may indicate that department have demanded for copy of Cenvat invoices involving duty of Rs 5,42,999/- from the appellant.

(vii) They submit that the allegation is without any tangible support, as such objection was not even incorporated in the query memo issued by the audit officer, but incorporated only at the stage of issuance of notice to show cause. The appellant is in agreement to verify all Cenvat document with Cenvat register or urge to provide a list of Cenvat document involving Rs 5,42,499/-, in the interest of justice.

(viii) They submit that when such document or invoices not demanded vide the query memo dated 25-09-2019, which itself established that relevant document / Invoices were provided to the audit, even before preparing the said query memo dated 25- 09-2019. And therefore the demand on the ground that the appellant failed to produce the documents / invoices is not sustainable.

(ix) The adjudicating authority have at Para 26 of the impugned order- in-original stated that in this regards it is further to reiterate that during audit the assessee has furnished duty paying documents/ Cenvatable invoices only in respect of the Cenvat credit amounting to Rs. 40,58,832/- and Rs. 7,83,668/- against the Cenvat credit amounting to Rs 44,82,228/- and Rs 8,74,381/- availed on input goods as per FR-1/ER 3 returns during FY 2016-17 and FY 2017-18 (up to une-17), respectively. Further, during present adjudication proceedings also, they have not produced single missing duty paying document/Cenvatable invoice.

(x) In this regards the appellant submit that the contention at para 25, 25.1, 25.2, 25.3 and 25.4 of the impugned order in-original is grossly over lookedby the adjudicating authority, without assigning any reason or without

any inquiry with audit officer for any list of Cenvat documents not provided by the appellant. In absence of such list, it is impossible for the appellant to produced single missing duty paying document / Cenvatable invoice.

(xi) The clause (a) of Sub-rule (1) of Rule 9, inter alia, allows a manufacturer to claim Cenvat credit based on an Invoice. Therefore, any recovery of wrongly availed Cenvat credit must also be based on an invoice. Just by mere providing any arbitrary figures of difference for recovery of wrongly availed Cenvat credit in absence of any list of Cenvat invoice, is not tenable.

(xii) The adjudicating authority have at para 27 of the impugned Order- In-original further stated that as per Rule 9(5) of Cenvat Credit Rules, 2004, "the manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, Cenvat credit taken and utilized, the persons from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer or provider of output service taking such credit" and as per Rule 9(6) of Cenvat credit Rules 2004, "the manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, Cenvat credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer or provider of output service taking such credit.

(xiii) They submit that it is not the case of the department that there is any violation of Rule 9(5) and Rule 9(6) of Cenvat Credit Rules, 2004, as appellant have maintained proper records. The wording of Para 5.1 of the impugned order in original itself indicates that records of availing Cenvat credit, ER-1/ER-3 returns, purchase invoices and Cenvat registers were provided during audit.The appellant admits that under Rule 9(5) and Rule 9(6) of CENVAT Credit Rules, 2004, the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the

manufacturer.However, the grounds of invoices ineligible is also not much clear to the appellant at this stage in absence of any such list of ineligible invoices. And therefore, the appellant is unable to accept such responsibility to prove admissibility of the CENVAT credit, without any such list of CENVAT documents and grounds of ineligibility.The ground of Admissibility can be proved by the appellant only if ground of alleged ineligibility is provided for each CENVAT document.

(xiv) They further submit that instead of considering provisions under Finance Act, 1994 and the term "Goods Transport Agency" defined under the act, the audit have wrongly concluded that transportation expenses incurred by the appellant attracts service taxthough such transportation expenses are not covered under the definition of "Goods Transport Agency". In fact such expenses are covered under negative list. They had also submitted relevant figures from ledgers for the "Transportation Expense", with remarks as an "Annexure", for consideration of adjudicating authority. The "Annexure" was showing bifurcation such "BELOW 750", "GTA" and "PAID TO SUPPLIER". The adjudicating authority have at para 31.1 of the impugned order-in-original stated that it is worthwhile to mention that the assessee has notsubmitted any documentary evidence which shows that the service providers to whom freight paid by them, are not covered under the definition of "Goods Transport Agency", during the audit as well as present proceeding itself.

(xv) They submit that department is alleging that these are the services on which service tax payable by the appellant on GTA service if that be so, the audit might have found consignments notes issued by said service providers. Thus, the allegations are itself baseless. On the contrary, they have also submitted relevant figures from ledgers for the "Transportation Expenses", with remarks as an "Annexure", showing bifurcation such "BELOW 750", "GTA" and "PAID TO SUPPLIER.

(xvi) The adjudicating authority have at para 31.1 of the impugned order-in-original further stated that on the contrary, I find from the "Annexure" submitted by the assesse along with their defense reply, which shows the relevant figures from the ledger for the "Transport expenses" that the service

provider are GTA agencies, which are registered with service tax department and are paying service tax whereas they are liable to pay on forward charge basis.

(xvii) Explanation-1 of the Notification No. 30/2012-ST dated 20-6-2012 and definition of "goods transport agency under Section 65 of Finance Act (Service Tax) 1994 were required to consider before demanding service tax on "Transport expenses." It is very surprising that very important explanation provided in the Notification No. 30/2012-ST dated 20-6-2012 after the "TABLE", definition of "goods transport agency under Section 65 of Finance Act (Service Tax) 1994, provisions under Section 66D. The negative list are grossly overlooked and specifically not considered by the adjudicating authority.

(xix) They were not liable to pay late fee of Rs 20,000/- for non-filing of ST-3 return for the period of October-2015 to March-2016, as they were registered under service tax on 21-09-2016 and ACES system does not have any provision to file return for the period before the date of registration.Even in a case where a tax payer is liable to pay service tax for the period prior to the date of registration, there was no provision in the ACES system to file ST-3 returns for the period prior to the date of registration in ACES it was provided that for any tax due of the period prior to the date of service tax registration, an assessee can pay service tax along with interest and can report in the ST-3 return liable to file from the date of registration in the ACES system. In this view, in absence of any facility to file ST-3 returns in ACES system for the period prior to the date of service tax registration, the demand for late fees is not legally tenable.

4. Personal hearing in the case was held on 23.11.2022. Shri Hemant Patel, Director of the appellant firm, appeared for hearing. He re-iterated the submissions made in appeal memorandum.

5. I have carefully gone through the facts of the case available on records, submissions made by the appellant, both written as well as oral, and the impugned order passed by the adjudicating authority. The issues to be decided in this appeal are as under:

(i) Whether the adjudicating authority was correct in confirming the demand of CENVAT credit amounting to Rs. **5,42,499/-** under the proviso to Section 11A (4) of the Central Excise Act, 1944 read with Rule 14(1)(ii) of the CENVAT Credit Rules, 2004 along with interest under Section 11AA of the Central Excise Act, 1944 read with Rule 14(1)(i) of the CENVAT Credit Rules, 2004 and penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of the CENVAT Credit Rules, 2004;

(ii) Whether the adjudicating authority was correct in confirming the interest amounting to Rs. 55,441/- under Section 11AA of the Central Excise Act, 1944 read with Rule 14(1)(ii) of the CENVAT Credit Rules, 2004;

(iii) Whether the adjudicating authority was correct in confirming the demand of service tax amounting to Rs. 13,999/- underGTA services under the proviso to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 and penalty under Section 78 of the Finance Act, 1994; and

(iv) Whether the adjudicating authority was correct in confirming recovery of late fees/penalty amounting to Rs. 20,000/- under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.

6. It is observed from the case records that the SCN has proposed to deny CENVAT credit amounting to Rs. 5,42,499/- (Rs. 5,14,109/- and Rs. 28,390/-) in respect of inputs and input services which were availed during F.Y. 2016-17 and F.Y. 2017-18 (April-June, 2017 as the appellant had failed to produce the documents for availment of Cenvat credit before the audit officers. The adjudicating authority has, at Para 26.1 and 26.2 of the impugned order, held that the appellant had failed to produce the duty paying documents/Cenvatable invoices on the basis of which they had availed the Cenvat credit. Hence, he has confirmed the demand against them.

6.1. The appellant have, on the other hand, contended that they had provided all the documents before the audit and that this objection was not even incorporated in the query memo issued by the audit officer. This was incorporated only at the stage of issuance of notice to show cause. They have agreed to verify all CENVAT document with CENVAT register. They have along with appeal memorandum

submitted a compilation of invoices for the relevant period. These documents were apparently not produced before the adjudicating authority earlier. Since the dispute only relates to examination of documents, it would be in the interest of justice that the matter is remanded back to the adjudicating authority for examination of documents submitted by the appellant and satisfy himself regarding availment of Cenvat credit.

7. As regards the demand of interest amounting to Rs. 55,441/- on availment of 100% CENVAT credit of central excise duty paid on capital goods, it is observed that the appellant had contended that they were eligible for such availment in view of third proviso inserted to Rule 4(2)(a) of the CENVAT Credit Rules, 2004vide Notification No. 6/2010-CE(NT). It would be relevant to refer to the relevant Rule 4(2)(a) of the CENVAT Credit Rules, 2004, which reads as under:

> "(2)(a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service or outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory, or in the premises of the job worker, in case capital goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be, at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year".

Further, vide Notification No. 06/2010 – CE (NT) dated 27.02.2010, following proviso was inserted:

> "Provided also that where an assessee is eligible to avail the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year."

7.1. I find that the adjudicating authority has confirmed the demand of interest on the ground that the appellant had not availed the exemption under a notification based on the value of clearances in a financial year and had paid Central Excise duty at full rate on first clearances availing the benefit of Cenvat Credit from the

date of inception of the factory in F.Y. 2015-16. As they were not SSI Unit, they cannot take entire Cenvat credit of duty paid on capital goods immediately in same financial year, as provided in the third proviso to Rule 4(2)(a) of the Cenvat Credit Rules, 2004. The appellant have, on the other hand, contended that for availing 100% CENVAT credit on capital goods, the only condition is that assessee should be eligible to avail the benefit of exemption notification based on value of clearances in a financial year and actual availment of exemption benefit is not mandatory.

7.2. On plain reading of the legal provisions under third proviso to Rule 4(2)(a) of the Cenvat Credit Rules, 2004, it is observed that the assessee, who is eligible to avail the exemption under a notification based on the value of clearances in a financial year, he shall be allowed the CENVAT credit in respect of capital goods received for the whole amount of the duty paid on such capital goods in the same financial year. Hence, I find merit in the contention of the appellant that as they were eligible to avail the benefit of exemption notification based on value of clearances in the F.Y. 2015-16, they were eligible to avail 100% CENVAT credit on capital goods in that financial year and that the fact of actual availment of exemption benefit is not necessary for availing full Cenvat credit of capital goods, consequently the demand of interest amounting to Rs. 55,441/- raised vide the impugned order is not sustainable and liable to be set aside.

8. As regards the demand of service tax amounting to Rs. 13,999/- under GTA services, the appellant has contended that transportation expenses incurred by them attracts service tax,but such transportation expenses are not covered under the definition of "Goods Transport Agency" as there was no consignment note issued in the case. In fact, such expenses are covered under negative list.They had also submitted relevant figures from ledgers for the "Transportation Expenses", with remarks as an "Annexure", showing bifurcation such "BELOW 750", "GTA" and "PAID TO SUPPLIER". It is observed that the adjudicating authority has confirmed the demand on the grounds that the appellant had not submitted any documentary evidence which shows that the service providers to whom freight was paid by them, are not covered under the definition of "Goods Transport Agency".

8.1. It is observed in this regard that while calculating the service tax liability of the appellant, the SCN has already considered the amount below Rs. 750/- and the

amount on which service tax has been paid by the consignor and granted applicable abatement from taxable value. The only dispute pertains to the remaining GTA expenses made during the relevant financial years. I find that the term "Goods Transport Agency" has been defined under Section 65 B(26) of the Finance Act, 1994 to mean any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called. I find that there is no evidence on record to show that any consignment note was issued in the case. Further, as per Section 66D (p) of the Finance Act, 1994, services by way of transportation of goods by road except the services of goods transportation agency is covered under the negative list of services. I find that there is nothing on record to show that the appellant were engaged in the business of goods transportation agency either. Hence, I am of the considered view that the transport expenses made by the appellant in this case do not get covered under the definition of Goods Transport Agency, as defined underSection 65 B(26) of the Finance Act, 1994. The demand confirmed in this regard in the impugned order is not legally sustainable and is liable to be set aside.

9. The impugned order has ordered for recovery of late fees/penalty amounting to Rs. 20,000/- under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994 for failure to file ST-3 Returns for the period October, 2015 to March, 2016. It is the contention of the appellant that as they were registered under service tax on 21-09-2016 and ACES system does not have any provision to file return for the period before the date of registration. Even in a case where a tax payer is liable to pay service tax for the period prior to the date of registration, there was no provision in the ACES system to file ST-3 returns for the period prior to the date of registration in ACES. It was provided that for any tax due of the period prior to the date of service tax registration, an assessee can pay service tax along with interest and can report in the ST-3 return liable to file from the date of registration in the ACES System. I find that it is not forthcoming from records as to whether the appellant had provided any taxable service prior to the period for which they had taken registration. The only evidence which is available is the proposal for demand of service tax under GTA for F.Y. 2015-16. This demand is held to be not legally sustainable. Hence, the demand for late fee under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules,

1994 for failure to file ST-3 Returns for the period October, 2015 to March, 2016 is not legally sustainable and liable to be set aside.

10. In view of the above, the impugned order passed by the adjudicating authority is set aside and the appeal filed by the appellants is allowed.

11. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।
The appeal filed by the appellant stands disposed of in above terms.

31st January, 2022.

(AKHILESH KUMAR)
Commissioner (Appeals)

Date: 31st January, 2022

Attested:

(Somnath Chaudhary)
Superintendent (Appeals),
CGST, Ahmedabad.

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