आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
सत्यमेव जयते
07926305065- टेलेफैक्स07926305136

DIN: 20230164SW000000F05C

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/704/2022 & GAPPL/COM/CEXP/156/2022 /7028-83

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-103 &104/2022-23**
दिनाँक Date : **06-01-2023** जारी करने की तारीख Date of Issue 10.01.2023

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

ग Arising out of Order-in-Original No. **14/AC/Dem/AP/2021-22** दिनाँक: **24.02.2022**, issued by Deputy/Assistant Commissioner, CGST, Division-V, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s. Firefly Batteries Pvt. Ltd.,
   Survey No. 61/20/415, Opposite Super Gas Plant,
   Bavla-Bagodara Highway, Village- Kalyangadh,
   Bavla, Ahmedabad-382240

2. Respondent
   The Deputy/ Assistant Commissioner, CGST, Division-V, Ahmedabad North , 2nd Floor, Shahjanand Arcade, Memnagar, Ahmedabad - 380052

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 हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(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 भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति 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,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य 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 संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

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

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

(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:

(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.

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

Two appeals, as per the details given below, have been filed by M/s. Firefly Batteries Pvt. Ltd., Survey No.61/20/415, Opposite Super Gas Plant, Bavla-Bagodara Highway, Village-Kalyangadh, Bavla, Ahmedabad – 382240 (hereinafter referred to as "the appellant") against Order-in-Original No.14/AC/Dem/AP/2021-22 dated 24.02.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division-V, Ahmedabad North (hereinafter referred to as "the adjudicating authority"). The appellant is holding Service Tax Registration No. AACCE7935MSD001.

Sr.No.	Appeal Number
01	GAPPL/COM/STP/704/2022-Appeal
02	GAPPL/COM/CEXP/156/2022-Appeal

2. Briefly stated, the facts of the case are that during the course of audit conducted by the CGST, Audit Ahmedabad Commissionerate, on scrutiny of records maintained by the appellant, following audit observations were made;

a) **Revenue Para-01:** It was noticed that the appellant had availed excess Cenvat credit on three invoices issued by M/s. Welcome Impex Private Ltd. during June 2017. It appeared that the credit availed by the appellant was more than the eligible credit which was in contravention to the provisions of Rule 9(1) and Rule 9(6) of the Cenvat Credit Rules, 2004. Hence, the differential Cenvat credit availed by them amounting to **Rs.13,91,933/-** was required to be recovered. The appellant agreed with the audit objection and paid the excess amount of credit availed vide Debit Entry No.D12409190461598 dated 21.09.2019 but they did not pay the interest and penalty amount as applicable.

b) **Revenue Para-02:** The appellant had shown an amount of Rs.1,51,88,951/- as indirect income under "sundry balance written off" in their balance sheet for the period F.Y. 2016-17. It appeared that as per the legal provisions, contained in clause (e) of Section 66E of the F.A, 1994, the said activity tantamount to *'agreeing to tolerate an act or a situation'* classified as 'Declared services' under Section 66E(e) of the F.A., 1994, hence liable to Service Tax. The appellant contested the said audit para. Hence, the service tax liability of **Rs.22,78,343/-** is liable for recovery alongwith interest and penalty.

2.1 A Show Cause Notice No.240/2019-20 dated 03.02.2020 was therefore issued by the Joint Commissioner, Central Tax, Audit, Ahmedabad vide F.No.CTA/04-103/CIR-VII/AP-43/2018-19 (in short SCN) proposing Service Tax demand amounting to Rs.13,91,933/- alongwith interest under proviso of Section 73(1) & Section 75 of the Finance Act, 1994, respectively; imposition of penalty under the provision of Section 11AC(1)(c) of the CEA, 1944 read with Rule 15(2) of the CCR, 2004 and appropriation of amount of Rs.13,91,933/- already paid against the proposed demand. Recovery of service tax amount of Rs.22,78,343/- not paid, was also proposed under proviso to Section 73(1) of the F.A., 1994 alongwith interest under Section 75 and imposition of penalty under Section 78 (1) of the Act.

2.2 The Show Cause Notice was adjudicated vide the impugned order, wherein the Service Tax demand on Revenue Para-1 was confirmed alongwith interest and the amount of Rs.13,91,933/- already paid by the appellant was appropriated against the demand. The service tax demand of Rs.22,78,343/- in respect of Revenue Para-2 was also confirmed along with interest. Penalty equivalent to service tax demands confirmed were also imposed.

3. Being aggrieved with the impugned order, the appellant preferred the present appeals on the grounds elaborated below:

- The notice issued by the Joint Commissioner, CGST Ahmedabad Audit Commissionerate is devoid of jurisdiction and contrary to the spirit and intent of the Central Excise Act and the order passed by Apex Court in the case of Cannon India Pvt Ltd - 2021 (376) E.L.T. 3 (S.C.); ITC Ltd. V CCE- 2019(368) ELT 216 (SC); Sayed Ali – 2011 (265) ELT 17 (SC). They claim that the appellant were registered with Ahmedabad North Commissionerate under whose jurisdiction they filed the returns and did self assessment of tax payable. The Central Excise Officer is empowered to issue notice and adjudicate the same, thus, the SCN issued by the Joint Commissioner, CGST, Ahmedabad Audit Commissionerate is without jurisdiction and contrary to the provisions.

- The excess credit of Rs.13,91,933/- was taken without any malafide intention. Instead of taking proportionate credit to the quantity of goods procured, full credit was taken, however the same was deposited. When the credit has not been utilized, question of interest and penalty does not arise.

- As regards the demand for Rs.22,78,343/-, the income of Rs.1,51,88,951/- was written off in the books of accounts and transferred to miscellaneous income. The amount received pursuant to the agreement, is not a consideration towards rendition of any taxable services, hence, they are not liable to pay service tax. There must be an activity and consideration in order to constitute service. In the present case there is no agreement to forbore, obligation to refrain from an act or tolerate an act or situation. Moreover, the original supply undertaken by supplier was already tax paid and from such paid amount deductions are made. Therefore, such deductions neither constitute service nor consideration. They claim that the matter is directly covered by the decision of Appellate Commissioner, Ahmedabad under Order dated 28.08.2020 and the decision passed by Hon'ble Tribunal in the case;
  - Accounts Officer, Madhya Pradesh Kshetra Vidyut Vitran Co. Ltd. – 2019(7) TMI 500-CESTAT, New Delhi.
  - Amit Metaliks Ltd – 2019 (11) TMI 183-CESTAT Kolkata

- The appellant has prayed to set-aside the demand, interest and penalty.

Personal hearing in the matter was held on 23.12.2022. Shri Shridev Vyas, Advocate, appeared on behalf of the appellant. He reiterated the submissions made in both the appeal memorandums.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the submissions made at the time of personal hearing. The issues to be decided in the present appeal are as to whether;

a) The appellant are liable to pay the interest and penalty on the excess credit (Rs.13,91,933/-) availed?

b) The amount of Rs.1,51,88,951/- shown as indirect income under "sundry balance written off" in their balance sheet for the period F.Y.2016-17 is a consideration against an activity covered under service falling with the meaning of the 'declared services' as per clause (e) to Section 66E of the Act ?

The demand pertains to the period April, 2016 to June, 2017

6. Before deciding the above issues on merits, I shall first examine the jurisdictional issue as to whether the show cause notice issued by the Joint Commissioner, CGST Ahmedabad Audit Commissionerate were within jurisdiction or not? The appellant have stated that the SCN issued by the Jt.Commissioner, CGST, Ahmedabad Audit Commissionerate is without jurisdiction and contrary to the provisions of the law as he is not the 'proper officer' to issue SCN under Section 11A of the CEA, 1944 or Section 73 of the Finance Act, 1994. This argument appears to be inspired from the decision of the Hon'ble Supreme Court passed in *Commissioner* vs. *Sayed Ali* - 2011 (265) E.L.T. 17 (S.C.) and in *Canon India Pvt. Ltd.* vs. *Commissioner* - 2021 (376) E.L.T. 3 (S.C.).

6.1 It is observed that CBIC vide Circular No. 985/9/2014-CX., dated 22-9-2014, issued guidelines regarding Structure, Administrative set up and Functions of Audit Commissionerates. At **para 5.3** of the Circular, it was clarified that the Audit Commissionerate shall issue the show cause notice, wherever necessary, after the audit objections are confirmed in the MCMs. Relevant para is reproduced below:-

> *"5.3 Audit Commissionerate shall issue the show cause notice, wherever necessary, after the audit objections are confirmed in the MCMs. The show cause notice shall be answerable to and adjudicated by the Executive Commissioner or the subordinate officers of the Executive Commissionerate as per the adjudication limits prescribed the Board. Audit function will end with the issuance of show cause notice and further action including adjudication and follow-up shall be the responsibility of Executive Commissioner."*

6.2 Further, CBIC vide Circular No. 31/05/2018-GST, dated 9-2-2018, at Para-4, clarified that all officers up to the rank of Additional/Joint Commissioner of Central Tax are assigned as the proper officer for issuance of show cause notices and orders under sub-sections (1), (2), (3), (5), (6), (7), (9) and (10) of sections 73 and 74 of the CGST Act. Further, they are so assigned under the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the "IGST Act") as well, as per Section 3 read with Section 20 of the said Act. Further, at Para-6, it is also clarified that the central tax officers of Audit Commissionerates and Directorate General of Goods and Services Tax Intelligence (hereinafter referred to as "DGGSTI") shall exercise the powers only to issue show cause notices. A show cause notice issued by them shall be adjudicated by the competent central tax officer of the Executive Commissionerate in whose jurisdiction the noticee is

registered. In case there are more than one noticees mentioned in the show cause notice having their principal places of business falling in multiple Commissionerates, the show cause notice shall be adjudicated by the competent central tax officer in whose jurisdiction, the principal place of business of the noticee from whom the highest demand of central tax and/or integrated tax (including cess) has been made falls. I therefore find that the argument of the appellant that the SCN is devoid of jurisdiction cannot be accepted as CBIC has clearly stated that the officers of Audit Commissionerate can issue the notice based on audit objection.

6.3 I also find that the reasoning of the Hon'ble Supreme Court in *Commissioner* v. *Sayed Ali* - 2011 (265) E.L.T. 17 (S.C.) and in *Canon India Pvt. Ltd.* v. *Commissioner,* 2021 (376) E.L.T. 3 (S.C.) cannot be imported in the context of the Central Excise Act, 1944 and/or the Finance Act, 1994 as both the above Apex Court's decision have dealt with the powers of customs officers who have been assigned specific functions of "proper officers" in terms of Section 2(34) of the Customs Act.

7. Coming to the first issue, whether the appellant are liable to pay the interest and penalty on the excess credit of Rs.13,91,933/- availed during June, 2017, it is observed that the adjudicating authority held that the appellant had availed the excess credit and since the credit availed has been debited by the appellant on being pointed out by the audit, interest and penalty is recoverable. The appellant on the other hand have accepted their mistake of availing excess credit but claim that such mistake was not intentional and as the credit availed was not utilised, there should not be any recovery of interest and penalty.

7.1 I find that Rule 14 .of the Cenvat Credit Rules, 2004 was amended vide Notification No. 06/2015-C.E. (N.T.), dated 01.03.2015. This amendment was made effective from 1st March, 2015. The amended Rule 14 of the CENVAT Credit Rules, 2004 reads as under:

> ***"14. Recovery of CENVAT credit wrongly taken or erroneously refunded. -***
>
> *(1) (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.*
>
> *(2) For the purposes of sub-rule (1), all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilisation thereof shall be deemed to have occurred in the following manner, namely : -*
>
> *(i) the opening balance of the month has been utilised first;*
>
> *(ii) credit admissible in terms of these rules taken during the month has been utilised next;*

(iii) credit inadmissible in terms of these rules taken during the month has been utilised thereafter.".

7.2 In terms of above amendments made in Rule 14 of the CCR, 2004, with effect from 1-3-2015, as per sub-rule (1)(i) above, where the Cenvat credit has been taken wrongly but not utilized, the same shall be recovered under Section 11A of the CEA, 1944 or Section 73 of the F.A., 1994. However, in terms of sub-rule (1) (ii), where the Cenvat credit has been taken and utilized wrongly, then the same shall be recovered alongwith interest under the provisions of Section 11A and Section 11AA of the CEA, 1944 or Section 73 and Section 75 of the F.A., 1994, as the case may be. I find that the said amended provision would be applicable to the present case which covers period June, 2017.

7.3 However, on going through the Revenue Para-1, it is observed that the audit observation is limited to availing of excess Cenvat credit. Similarly, the charging Para-15 of the SCN also mentions about wrongly availed Cenvat credit. Besides, I find that the impugned order is also silent on the utilization of such credit as the adjudicating authority at Para-24 only mentions about availing of the excess credit. So far as there is no dispute on utilization in the present case, I find that in terms of the above amended provisions of Rule 14, the question of liability to pay interest would not arise. In this regard, I place reliance on the decision of the Hon'ble High Court of Karnataka in the case of *CCE, Bangalore* v. *Bill Forge Pvt. Ltd.* reported in 2012 (279) E.L.T. 209 (Kar.), wherein it was held that if credit is taken and reversed without utilization for payment of excise duty, no interest is required to be paid under Rule 14 read with Section 11AB of the Central Excise Act, 1944. Therefore, the demand of interest is not legally sustainable and is set-aside.

7.4 As regards the penalty imposed under Section 11AC(1) (c) of the CEA, 1944 read with Rule 15(2) of the CCR, 2004, it is observed that in terms of Rule 15(2) of the CCR, 2004, the manufacturer is liable to penalty under Section 11AC, if the credit is wrongly taken or utilized by reasons of fraud, collusion or willful mis-statement or suppression of facts or contravention of any provisions of Excise Act of Rules made thereunder with intent to evade payment of duty. Relevant text of Rule 15(2) is re-produced below:-

Rule 15(2): *In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of [clause (c), clause (d) or clause (e) of sub-section (1) of section 11AC of the Excise Act.]*

7.5 In the instant case, the excess credit of Rs.13,91,933/- was availed by the appellant but was subsequently reversed vide Debit Entry No.D12409190461598 dated 21.09.2019, on being pointed out by the audit. The appellant have contended that though the credit was wrongly availed, it was subsequently reversed before utilization hence malafide intention cannot be alleged. I find that imposition of penalty is not warranted in the facts of the present case as it was a bona fide mistake of carrying forward excess credit which was not utilized and on being pointed out by the audit was reversed. Also there is no other allegation or evidence brought on record by the audit

officers that intentionally and purposefully the appellant had shown wrong opening balance, thereby, continued to enjoy excess credit for a period of time till it is pointed out by the audit. I, therefore, find that imposition of equivalent penalty under Rule 15(2) of CCR, 2004 is not sustained. I place reliance on the decision of Hon'ble CESTAT, West Zonal Bench, Mumbai passed by in the case of ***Tetra Pak India Pvt. Ltd.- 2021 (378) E.L.T. 201 (Tri. - Mumbai),*** wherein at para 8, it was held that;

> *" 8. However, I find merit in the contention of the Learned Advocate for the appellant with regard to imposition of penalty equivalent to the amount of Cenvat credit reversed on being pointed out by the audit. In my view it is not warranted in the facts of the circumstances of the present case as it was a bona fide mistake of carrying forward excess credit as on 1-9-2008 on account of switching over from ERP to SAP system. There is no other allegation or evidence brought on record by the revenue that intentionally and purposefully the appellant had shown wrong opening balance thereby continued to enjoy excess credit for a period of time till it is pointed out by the audit. Therefore, imposition of penalty equal to the amount of credit availed cannot be sustained. In the result, the appellant is required to pay interest of Rs. 4,10,480/- only which they have already reversed on 16-6-2011. However imposition of equivalent penalty under Rule 15(2) of CCR, 2004 cannot be sustained. The impugned order is modified accordingly the Appeal is partly allowed to the extent on setting aside imposition of penalty."*

8. On the second issue, the demand of **Rs.22,78,343/-** was proposed on the sole argument that the indirect income of Rs.1,51,88,951/- shown under "sundry balance written off" in the balance sheet of the appellant for the period 2016-17 is a consideration against an activity covered under 'service' falling with the meaning of the 'declared services' as per clause (e) to Section 66E of the Act. The SCN and the impugned order both are silent on the nature of activity performed by the appellant. The appellant, however, claimed that the amount received pursuant to the agreement is not a consideration towards rendition of any taxable services. They claim that the credit balances in the books of accounts was written off which was in respect of liability for payment recorded in the books e.g. for purchase of material, there is a liability to pay the vendor which is shown by way of credit balance in the account of vendor. This liability was subsequently written off as the payment for such credit balances need not be paid for the reasons known to the Management. The appellant, however, have not produced any agreement to substantiate their above claim.

8.1 I find that neither the adjudicating authority nor the appellant have come up with proper facts of the case. It is not forthcoming from the SCN, impugned order or the appeal memorandum as to why the credit amount was written off. Was it against any non-discharging of liability from the vendor's side or was it in lieu of not taking any action against the vendors. Unless the nature of service rendered is discussed or any evidence is brought on records, the matter cannot be decided. I, therefore, find that in the interest of justice it would be proper to remand the matter to the adjudicating authority who shall decide the issue afresh after examining the supply agreement entered by the appellant with the third party to arrive at a decision whether the income received by the appellant was against an activity of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act, falling under **clause (e)** to Section 66E of the F.A., 1994.

8.2 Thus, in view of above discussion, I find that as regards the demand confirmed on sundry creditors written off, the impugned order passed, being non-speaking order would not be sustainable in the eyes of law. I remand the matter back to the adjudicating authority who shall pass the order after examination of the documents and verification of the claim of the appellant. The appellant is also directed to submit all the relevant documents and details to the adjudicating authority, in support of their contentions, within 15 days to the adjudicating authority. The adjudicating authority shall decide the case afresh on merits and accordingly pass a reasoned order, following the principles of natural justice.

9. Accordingly, the impugned order is set-aside and appeal filed by the appellant is allowed to the extent discussed in Para 7.3, 7.5 and 8.2 above.

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.

(अखिलेश कुमार)
आयुक्त (अपील्स)

Date:06.01.2023

Attested
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. Firefly Batteries Pvt. Ltd., - **Appellant**
Survey No.61/20/415,
Opposite Super Gas Plant,
Bavla-Bagodara Highway,
Village-Kalyangadh,
Bavla, Ahmedabad – 382240

The Assistant Commissioner, - **Respondent**
Central GST, Division-V,
Ahmedabad North

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. The Superintendent (System), CGST, Appeals, Ahmedabad, for uploading the OIA on the website.
5. Guard File.