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

सत्यमेव जयते

DIN: 20230164SW000000B5AA

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/106/2022-APPEAL / 6782-82

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-99/2022-23**
दिनाँक Date : **30-12-2022** जारी करने की तारीख Date of Issue 04.01.2023

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

ग Arising out of Order-in-Original No. **37/JC/GB/2021-22** दिनाँक: **24.12.2021**, issued by Joint/Additional Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s. Astra Life Care (India) Ltd.(100% EOU),
   Plot No. 57/P, Sarkhej Bavla Highway,
   Taluka: Bavla, Ahmedabad

2. Respondent
   The Joint/Additional Commissioner,CGST, Ahmedabad North , Custom House, 1st Floor, Navrangpura, Ahmedabad - 380009

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

The present appeal have been filed by M/s. Astra Life Care (India) Pvt. Ltd., (100% EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taluka: Bavla, Ahmedabad (hereinafter referred to as the "appellant") against Order-in-Original No.37/JC/GB/2021-22 dated 24.12.2021 (hereinafter referred to as "the impugned order") passed by the Joint Commissioner, Central GST and Central Excise, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant is engaged in the manufacture and clearance of Pharmaceutical Products falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985, and having Central Excise Registration No. AAECA6553DXM001. The appellant was also engaged in the trading of Pharmaceutical products which is an "exempted service" as per Rule 2(e) of the Cenvat Credit Rules, 2004. Acting on intelligence, the Preventive Wing of the erstwhile Central Excise, Ahmedabad-II had searched the premises of the appellant and found that they were not maintaining separate accounts for receipt of the common input services used for manufacturing dutiable goods as well as for provision of the exempted service i.e. trading of goods, as required under Rule 6(2) of the Cenvat Credit Rules, 2004 and thereby failed to reverse the Cenvat Credit in terms of Rule 6(3) of the Cenvat Credit Rules, 2004. The appellant had also failed to reverse Cenvat Credit of duty paid on inputs, which had later expired and were not used in the manufacturing process. Accordingly, a show cause notice dated 27.02.2017 was issued to them for recovery of Cenvat Credit amounting to Rs. 1,16,67,599/- which was required to be reversed under Rule 6(3)(i) and Rs. 52,301/- along with interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 besides proposing imposition of penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. In the said show cause notice, personal penalty under Rule 26 of the Central Excise Rules, 2002 was also proposed on the Director of the appellant firm Shri Mahendrasinh Fulubha Rana.

2.1 The said show cause notice was first adjudicated by the Additional Commissioner vide Order-in-Original No. 08/ADC/2017/RMG dated 13.11.2017 by confirming Rs. 1,16,67,599/- as demanded and as the appellant had reversed the said amount and hence appropriating the same. In the said order, another amount of Rs. 47,740/- was also confirmed and ordered recovery of interest on both the amount and also imposed penalty of Rs. 41,76,237/- + Rs. 33,62,866/- under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 on the appellant as well as a personal penalty of Rs. 50,000/- on Shri Mahendrasinh Fulubha Rana, Director of the appellant.

2.2 Being aggrieved by the impugned order dated 13.11.2017, the appellant and it's Director Shri Mahendrasinh Fulubha Rana filed separate appeals before the Commissioner (Appeal), Ahmedabad, who vide Order-in-Appeal No. AHM-EXCUS-002-APP-341-342-17-18 dated 27.02.2018 / 24.03.2018 remanded the matter back to the adjudicating authority to decide the case afresh. The relevant portion of Para 6 of the Order-in-Appeal dated 27.02.2018 are as under:

"6. I find that the appellant was only trading in finished goods and not in any common inputs. As such the appellant was maintaining accounts of the inputs used in manufacturing of dutiable goods as there was no inputs involved in the trading of finished goods, they were fulfilling the criteria of maintaining separate accounts for inputs used in dutiable goods and separate accounts used for exempted service. This fact has been overlooked in the impugned order. The appellant's reply dated 3.04.2017 to the show cause notice explicitly informs at Para 8.1 that they Maintain accounts for inputs used for manufacturing and separate account for inputs used for trading. This facts has not been put forth by the adjudicating authority while concluding that the appellant had to pay an amount equal to 6% / 7% of the value of exempted services as per option 3(i) of the Rule 6 of the Cenvat Credit Rules, 2004. The decision of the Hon'ble Tribunal passed in the case of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381(Tri.Mum)], and relied upon by the appellant, also appears to have been distinguished overlooking the similarity of the facts of this case. At para 5.4 of the said order the Hon'ble Tribunal states that:

> *"The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat credit attributed to the input or input services used in exempted goods".*

The Adjudicating Authority should have brought the facts on record and arrived at conclusion based on those facts."

2.3 The Additional Commissioner had during denovo proceeding come to a conclusion that the officers of the preventive wing ascertained that the appellant were not maintaining separate accounts in terms of Rule 6(2) of the Cenvat Credit Rules, 2004 and the said facts has been admitted by the Director of the company in his statement dated 20.07.2016 and subsequently the appellant admitted the liability and reversed Rs. 1,16,67,599/- and Rs. 52,301/- vide Entry No. 464 & 465 dated 20.07.2016 voluntarily; that the contention of the appellant that they maintain separate accounts for taxable and exempted goods / services separately is clearly a well devised plan, as an afterthought; that the director has not retracted his statement and during personal hearing held on 10.10.2019, no additional documents to substantiate their contention has been produced and hence unable to consider the case laws in the case of Mercedes Benz (I) Pvt. Ltd. (2015 (40) STR 0381 (Tri.-Mum)) on the basis of which the Hon'ble Commissioner (Appeals) remanded the case. Accordingly, the Additional Commissioner, vide Order-in-Original No. 08/ADC/2019-20/MLM dated 14.11.2019, again confirmed the demand along with penalty on the appellant. The Additional Commissioner also imposed personal penalty on Shri Mahendrasinh Fulubha Rana, the Director of the appellant.

2.4 Being aggrieved by the said OIO dated 14.11.2019, the appellant and it's Director Shri Mahendrasinh Fulubha Rana filed separate appeal before the Commissioner (Appeal), Ahmedabad who vide Order-in-Appeal No. AHM-EXCUS-003-APP-25 to 26/2020-21 dated 21.09.2020 / 09.10.2020 remanded the matter back to the adjudicating authority to decide the case as per the direction contained in the said order. The Commissioner (Appeal) in his order dated 21.09.2020 held as under:

"10. The appellant was consistently contending this fact and also referring to the case of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)] to which the adjudicating authority has not agreed for reason recorded in para 22 and 23 of the impugned order. However, it is observed that the adjudicating authority has not given any answer with respect to the observation of Commissioner (Appeals) who while remanding the case to him referred the decision of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)] relied by the appellant and observed that it also appears to have been distinguished overlooking the similarity of the facts of this case and referred para 5.4 of the said order of the Hon'ble Tribunal. Thus, the Commissioner (Appeals) had specifically directed to examine the case in the light of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)], however, I observed that the adjudicating authority has failed to do so.

11. It is further observed that while clarifying the objective of Rule 6, the Joint Secretary (TRU), CBEC has issued a letter No. 334/8/2016-TRU dated 29.02.2016 which states that:

(a) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.

(b) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.

(c) sub-rule (2) of rule 6 is being amended to provide that a manufacturer who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.

(d) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products excluding exempted goods or when a provider of output services provides two classes of services, namely exempted services and output services excluding exempted services, then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) 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 taken or (b) pay an amount as determined under sub-rule (3A).

(e) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.

12. I find that, this amendment reflects the interpretation and intent of the Government and it has been clearly mentioned in the said letter that the rules are being redrafted with the objective of simplifying and rationalizing the CCR without altering the established principles of reversal of such credit. Even otherwise, to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal. Though the above referred amendment has been made as a clarification nature and not specified any retrospective effect, the intent of Government is very clear.

13. It is further observed that the appellant have re-quantified demand keeping in view the decision of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)], by applying Option under Rule 6(3)(iii) at the appeal stage and were not submitted before the adjudicating authority. The matter of applicability of option under Rule 6(3)(i) or Rule 6(3)(iii) of the CCR, 2004 to the case was the subject matter of remand proceeding. This requires verification by the adjudicating authority for which I have no option but to remand the case to him to decide afresh.

14. As regards to demand of goods received for destruction, the appellant contended that they have not availed the cenvat credit on the goods received back after expiry date and had also not claimed any remission of duty which also required verification for the cenvat credit account. Hence, the contention made by the appellant requires verification of documents as to whether the claim made by them is correct or not. Hence, I have no option but to remand the case to the adjudicating authority to decide afresh.

15. I find that the adjudicating authority has imposed penalty under Rule 26 of the Central Excise Rules, 2002 on appellant-2. Since, the matter is being remand back, the

contention of the appellant should also be looked into in the de-novo adjudication proceeding.

16. In view of above discussion, I remand the case back to the adjudicating authority to decide the case as per the direction contained here-in-above. The appeals filed by the both the appellants stand disposed off in above term."

2.5 During the denovo proceedings, the adjudicating authority, vide the impugned order again confirmed the demand amounting to Rs. 1,16,67,599/- under provisions of Section 11A(4) of the Central Excise Act, 1944 and confirmed the demand of Rs. 47,740/- under Rule 14 of the Cenvat Credit Rules, 2004 along with interest under Section 11AA of the Central Excise Act, 1944 read with Rule 14(2) of the Cenvat Credit Rules, 2004. The adjudicating authority also imposed penalty of Rs. 75,39,103/- on the appellant under Section 11AC(1) of the Central Excise Act, 1944 and penalty of Rs. 50,000/- under Rule 26 of the Central Excise Rules, 2002 on Shri Mahendrasinh Fulubha Rana, the Director of the appellant.

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

i. The impugned order has been passed in gross dishonor to the directions given in the remand order passed by the Honorable Commissioner (Appeals) asking the adjudicating authority to pass order after properly appreciating the facts involved in the case.

ii. In para 10 of the impugned order, the adjudicating authority correctly framed the questions required to be decided on the basis of remand order of Commissioner (Appeals). The first point the adjudicating authority examined is whether or not the appellants had maintained separate records for inputs and did not maintain separate records only for input services. The appellants were maintaining separate records for inputs was mentioned in the panchnama, it was mentioned in the show cause notice and in the first OIA passed by the Commissioner (A). However, the adjudicating authority chose to refer to the statement of Director, which is only an oral statement. For this the appellants have already submitted that Director was not fully aware about these facts at the material point of time and therefore he did not counter the officers. Moreover, the bald statement cannot be given more weightage than the documentary evidences.

iii. In this regard, the appellants would like to place reliance on the judgment of Godavari Khore Cane Transport Co. Vs. Commissioner of Central Excise (2012) wherein it was held by Honorable Bombay High Court that Tribunal upheld levy of service tax based on statement of employee of assessee without considering merits and documents furnished by assessee. It is well established in law that it is open to assessee to demonstrate on basis of documentary evidence that statement recorded is erroneous.

iv. As regards the applicability of Tribunal's decision in the case of Mercedes Benz, the adjudicating authority has distinguished the judgment by looking at the procedures of filing intimation to the department given by Mercedese Benz and not followed by the appellants and hence, she has observed that the benefit as made available in Mercedes Benz was not applicable to the appellants for want of not following the procedure. The moot question to be decided was whether the appellants were required to be extended the option 6(3)(iii) of reversing the CENVAT credit proportionate to the input services used in the exempted output services, which the adjudicating authority has failed to find out.

v. In this regards, the appellants submitted that in the first Order dated 24.03.2018 of Commissioner (A) which is also reflected in para 22 of the 2nd OIO. It is stated that ".....the assessee was only trading in finished goods and not in any common inputs." In the present impugned order as stated above, the adjudicating authority has erred in holding that since the appellants did not filed declaration or intimation to the department, they were not eligible for second option.

vi. Another difference which the learned adjudicating authority found and discussed in para 18 of the impugned order about non applicability of the ratio of Mercedes Benz is that in that case Mercedes Benz suo moto had worked out the proportionate CENVAT credit used in the exempted services and reversed it, whereas, in the present case, the appellants have not done so. The question again is that the adjudicating authority was not asked to examine the applicability of Mercedes Benz case on these similarities or dis-similarities. If this was so, the position remained even at the first appeal before the Commissioner (Appeals), but, this fact was never raised for dispute by the Commissioner (A). The fact is that since the appellants had not maintained separate record for input services for which they are liable for reversal at proportionate rate along with interest and penalty. It cannot be said that because the appellants have been caught by the department having not reversed the CENVAT credit proportionately suo moto, therefore, the provisions for proportionate reversal cannot be extended to them. Hence, there is no crux in the findings of the adjudicating authority in this regard.

vii. The adjudicating authority while finding out the applicability of Board's Circular dated 29.02.2016 wherein it is clearly held that actual CENVAT credit required to be reversed, in any case should not exceed the actual CENVAT credit taken. The adjudicating authority has held that because there is doubt about the correctness of quantification of proportionate reversal figures submitted by the appellants, this guideline given by the Board would also not be applicable. There is nothing mentioned in the Board's Circular that the reversal can be denied in some circumstances. There is clear cut instruction of the Board that the reversal of CENVAT credit cannot be more than the actual CENVAT

credit taken. The adjudicating authority has imposed her own conditions to discard the Board's Circular.

viii. The adjudicating authority has observed that because they have not maintained any separate record for the same, they could not provide the actual input service tax credit attributable to the input services used for trading services only. Now, the moot question which the adjudicating authority has missed is that if there would have been separate record maintained by the appellants, there would not have been any question to reverse the proportionate CENVAT credit. The law has made provision for reversal of proportionate CENVAT credit only to cover those manufacturers or service providers who did not maintain separate records for input or input services for dutiable and non-dutiable goods or taxable and nontaxable services, hence, now the total CENVAT credit taken by the assessee is required to be reversed proportionate to the value of the exempted services or exempted goods. The appellants have provided the figure of Rs.33,76,418/- after working out total turnover vis-à-vis turnover of dutiable and exempted goods/services and comparative total CENVAT credit taken divided by the proportionate value of exempted services.

ix. In para 21, on one hand the adjudicating authority has found that the appellants have given the figure of Rs.33,76,418/- which is common input service used in manufacture and trading activities, whereas on the other hand, the adjudicating authority has stated that the appellants should have provided the details of input service credit which are used exclusively for trading. This again as stated in the above paragraph would have been possible only if the appellants have maintained separate record for input services used for taxable service and exempted services and then this case would not have been there.

x. The total CENVAT credit availed on Input service is comprises of two category of services.

(a) Category one is the input services viz. Logistic Services, Laboratory Services, Export C&F Charges, are directly linked and used in the manufacture of goods on which excise duty is paid. The CENVAT Credit on such services is available in terms of Rule 6(2)(b)(ii).

(b) Category two is the input services viz. (i) Financial Services, (ii) Consultancy Services, (iii) Insurance Service, (iv) Courier Services, (v) Software Maintenance Services, (vi) Security & Manpower Services, (vii) Telephone Expenses, and (viii) Insurance & Repair maintenance Services are commonly used in the manufacture of goods on which Excise duty is paid as well as Traded goods whose account is not maintained separately. For this category of services the provision of Rule 6(3A) shall be made applicable as per Option 6(3)(iii) of CENVAT Credit Rules, 2004.

Thus, based on the records viz. RG-23A-II maintained by the appellant, for the sake of brevity the details of two category of Input services are summarized as under.

Bifurcation of Input Service used in the Manufacture of Excisable goods and Commonly used in Manufacturing and Trading						
	2012-13	2013-14	2014-15	2015-16	2016-17 up to June	Grand Total
Used in manufacture	63,21,994	62,59,144	75,90,948	68,53,049	6,02,499	2,76,27,634
Commonly used	8,86,154	6,66,962	10,46,897	6,39,934	1,40,216	33,80,163
Total	**72,08,148**	**69,26,106**	**86,37,845**	**74,92,983**	**7,42,715**	**3,10,07,797**

The entire genesis of Rule 6(3A) is to determine the amount to be payable first on monthly basis which will be provisional only calculated in terms of Rule 6(3A)(b) and finally in terms of Rule 6(3A)(c). The difference if on higher side the same will have to be paid along with Interest. And if the same is on lower side, the same will be available as re-credit. In the instant case the appellant have neither calculated an amount payable in terms of Rule 6(3A), the amount can be quantified finally and liable to be paid. The said amount is worked out as under.

Year	Value of manufactured goods on which Central Excise duty was paid As Per ER-1	Value of Trading as per Explanation As per P & L account read with Explanation No 1(c) below Rule 6(3D) of CCR,2004	Total value	CENVAT Credit availed on Input -ER-1 exclusively used in manufacture of excisable goods	CENVAT credit availed on Input services used exclusively in the manufacture of excisable goods.	Common Input Service used in manufacture and Trading activities	Total CENVAT Credit	Reversal required in terms of Rule 6(3)(iii) option
(A)	(B)	(C)	D=(B+C)	E	F	G	H=E+F+G	I= C/D*G
2012-13	95,38,06,980	5,44,26,262	1,00,82,33,242	1,43,78,271	63,21,994	8,86,154	2,15,86,419	47,836
2013-14	1,01,99,88,722	4,89,54,928	1,06,89,43,650	1,27,70,073	62,59,144	6,66,962	1,96,96,179	30,545
2014-15	1,29,90,55,581	3,57,02,390	1,33,47,57,971	1,97,63,379	75,90,948	10,46,897	2,84,01,224	28,003
2015-16	1,20,18,46,160	4,58,99,480	1,24,77,45,640	5,09,50,949	68,53,049	6,39,934	5,84,43,932	23,541
2016-17 (up to 30-06-2016)	27,43,95,953	15,66,000	27,59,61,953	1,72,42,847	6,02,499	1,40,216	1,79,85,562	796
Total	4,74,90,93,396	18,65,49,059	4,93,56,42,455	11,51,05,519	2,76,27,634	33,80,163	146,113,316	130,720

The above bifurcation of Input Services used in the manufacturing of excisable goods and commonly used in fracturing and trading activity have been computed month wise from the period 2012-13 to June 2016 and also submitted to the adjudicating authority in soft copies. The bifurcation of input services was done in each month of RG Part 23 II along with reconciliation CENVAT credits on taken in Excise returns with RG 23 Part –II and submitted to the adjudicating authority. However the adjudicating authority has not discussed anything about the same nor verified the computations submitted by them

rather discussed only similarities and dissimilarities of the Mercedes Benz case and that the same is not applicable to them.

(a) Thus, the contend that total amount payable under option 6(3)(iii) comes to Rs.1,30,720/- as against amount of Rs.1,16,67,599/- calculated by the department under option 6(3)(i) @ of 6% or 7% of the value determined in terms of Rule 6(3) ibid in the show cause notice.

(b) In either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied.

(c) The legislator has not enacted any provision by which CENVAT credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee.

(d) Further to exercise option under Rule 6(3) is a procedural lapse. To choose one of the option out of three as provided in 6(3) is the prerogative of the assessee and department cannot invoke and compel the assessee to discharge an amount under option 6(3)(i) of CCR,2004, just for not intimating to the Range Superintendent as provided in Rule 6(3A)(a) of CCR,2004.

(e) The main objective of the Rule 6 is to ensure that the assessee should not avail the CENVAT Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than CENVAT Credit attributed to the input or input services used in the exempted goods.

xi. The appellants say and submit regarding the appellants having not informed the department about trading activity and therefore they were required to follow the options of Rule 6(3) is also erroneous findings as maintaining separate record for the inputs and input services is the first criteria to fulfill the condition of the said Rule, not informing the department is a procedural condition, if the substantial condition is fulfilled, there is no question of penalizing the assessee for not fulfilling procedural condition. In following judgments it has been held that merely because assessee failed to intimate department regarding option exercised under rule 6(3), it could not be said that rule 6(3)(i) would automatically apply

- Mercedes Benz India Pvt. Ltd. vs. CCE, Pune-1 – 2015 (40) S.T.R. 381 (Tri. - Mumbai)
- Aster (P.) Ltd Vs. CCE, Hyderabad-III – 2016 (43) S.T.R. 411 (Tri. - Hyd.)

- Mahindra & Mahindra Ltd. Vs. CCE, Jaipur-I – 2016 55 GST 394 (New Delhi-CESTAT)

xii. As regards the demand of Rs.47,740/- availed on inputs which later on expired and could not be used in the manufacture of finished goods which was required to be reversed as prescribed under the CENVAT Credit Rules, 2004, the appellants would like to submit that the inputs which could not be used in manufacturing and had expired during the past period, they have already reversed the CENVAT credit. Nevertheless, the appellants would like to submit that the details for calculating central excise duty on expired inputs is shown in Annexure-B to the show cause notice. It is not shown which statutory or private records were verified by the officers to allege that the appellants have destroyed the inputs without taking permission of the department. Besides, a look at Annexure-B would show that the title of the said Annexure states "Duty calculation of expired materials for last 3 years" and the said search in the factory premises was on 20.07.2016 so last three years means upto 20.07.2013 period should be covered, whereas, column relating to GRN No. & Date would show that certain entries of 2011, 2012 and April, 2013 are also covered. This shows that the Annexure is incorrect. There is no record discussed in the show cause notice which has been seen by the officers to come at the conclusion that the inputs received under GRN mentioned in this Annexure B had expired and they had destroyed the same. It is a trite of law that the allegations have to be made on the basis of some authentic record and the onus to substantiate the allegation that the said inputs were destroyed by the appellants lies on the department who has made these allegations. If the allegations are substantiated with the documentary evidence, the onus shifts upon the assessee to prove that the said allegation is incorrect. Merely Director of the company confessing in the statement that a particular amount of CENVAT credit is reversible on the inputs which could not be used for manufacture of finished goods as they had expired is not sufficient evidence to make allegations and demand duty. Annexure-C to the show cause notice would also show that there is no document being relied upon by the department. The said Annexure only shows Panchnama, statements of Director and OIO refunds for past years. Amongst these documents, Panchnama is a document created in presence of two independent witnesses and would reveal the proceedings undertaken by the Government officers in the premises of the assessee, it is a separate piece of evidence but incapable of being the sole basis to prove the allegations. Statement recorded under Section 14 of the Central Excise Act, 1944 is also not sufficient evidence to prove the allegations unless it is corroborated by the documentary evidence. The OIOs relating to refund granted to the appellants in the past years is on the contrary an evidence which shows that department was aware that the appellants were taking CENVAT credit on various input services. Hence, apart from these 3 documents there are no other documents relied upon by the department for issuing the show cause notice which shows that entire case is booked on oral statement of Director. Statement of Director was required to be supported by the department with

some documentary evidence. Therefore, the said demand is not sustainable in the eyes of law as being unsubstantiated with documentary evidence.

xiii. Without prejudice to the above, the appellants would also like to say and submit that entries at 1 and 3 are for the goods received beyond five years period of issuance of show cause notice and the CENVAT credit on these entries cannot be demanded even in the present show cause notice invoking extended period.

xiv. As regard to demand of Rs.47,740/- availed on inputs which later on expired and could not be used in the manufacture of finished goods it is contended by the appellant that the goods which were earlier removed on payment of duty, were brought back in the factory as the date of expiry have gone. Here it will be pertinent mention that the said goods were meant for destruction only. When duty paid goods being back in to the factory of manufacture the CENVAT Credit is available under Rule 16 of Central Excise Rules, 2002, however the same was not availed as no goods could be manufactured out of this material returned back. The said goods is duty paid, hence no question for reversal of CENVAT Credit would arise as the appellant have not claimed any remission on the said goods.

xv. It is clear from the provisions of Rule 16 of Central Excise Rules, 2002 that if CENVAT Credit is not availed at the time of receipt of goods back in the factory after the expiry date, the question of payment of duty does not arises. Further for the destruction of the goods, if remission on payment of duty is claimed, than only the question of reversing of CENVAT Credit does arises. Therefore the demand of reversal on this issue was ipso-facto was wrong from ***ab-initio*** and not tenable.

xvi. Without prejudice to the above, the appellants would also like to submit that the entire demand is time barred for the reason that the appellants have not suppressed any fact from the department. The trading activities being done by them are reflected in their Profit & Loss Account, Trading Account and Balance Sheet. The central excise officers and CERA officers have audited these records on more than one occasion in past five years. It is a well-known fact that whenever any audit is conducted, the Balance sheet is the primary document required to be seen and the trading activity mentioned in the balance sheet could not have escaped the site of the officers. Para 8.1 of the show cause notice shows that sales figures are taken from Balance Sheet, so there is no suppression as alleged by the department. For that matter, even the inputs expired and destroyed would not escape the officers. Therefore, the entire demand is time barred.

xvii. The present adjudicating authority in this regard has not given any separate findings except by observing that the earlier adjudicating authority has already decided this matter and reduced the demand amount from Rs.52,301/- to Rs.47,740/-. The Commissioner (A) in the Order had observed that the appellants have contended that they have not availed

CENVAT credit on the goods received back after expiry date and have also not claimed any remission of duty which also required verification from the CENVAT credit account. However, the adjudicating authority having utter disregard to the Order and directions of the Commissioner (A) has given ridiculous finding that earlier authority has already considered this issue and reduced the demand. There being no independent finding of the adjudicating authority on this aspect, the impugned order confirming the demand of Rs.47,740/- is required to be quashed and set aside.

xviii. In this regard, the appellants would like to place reliance on the below mentioned judgment.

- **Judgment of the Honorable Tribunal in the case of SDL Auto Pvt. Ltd. reported in 2013 (294) ELT 0577 (Tri-Del)**
- ***Continental Foundation Jt. Venture* v. *CCE, Chandigarh* reported in 2007 (216) E.L.T. 177 (S.C.)**
- ***Jaiprakash Industries Ltd.* v. *CCE, Chandigarh* reported in 2002 (146) E.L.T. 481 (S.C.).**
- ***Pushpam Pharmaceuticals Company* v. *CCE, Bombay* reported in 1995 (78) E.L.T. 401 (S.C.);**
- ***CCE* v. *Chemphar Drugs & Liniments* reported in 1989 (40) E.L.T. 276 (S.C.)**
- ***Continental Foundation Joint Venture* v. *CCE, Chandigarh-I* reported in 2007 (216) E.L.T. 177 (S.C.)**
- **CCE Aurangabad v/s Rohit Industries Limited reported in 2009 (242) ELT 0240 (Tri-Mum)**
- **2005 (188) E.L.T. 251 (*Gopal ZardaUdyog* v. *CCE*)**
- **2005 (184) E.L.T. 117 (*Primella Sanitary Products Pvt. Ltd.* v. *CCE*)**
- **2005 (188) E.L.T. 146 (*Anand Nishikawa Co. Ltd.* v. *CCE***
- **2005 (189) E.L.T. 257 (*Pahwa Chemical Pvt. Ltd.* v. *CCE)***
- **1995 (75) E.L.T. 721 (*Cosmic Dye Chemical* v. *CCE*)**
- **1995 (78) E.L.T. 401 (*Pushpam Pharmaceuticals Company* v. *CCE*)**
- **2003 (152) E.L.T. 251 (*T.N. Dadha Pharmaceuticals* v. *CCE, Madras*)**
- **2000 (115) E.L.T. 35 (*National Radio & Electronics Co. Ltd.* v. *CCE*)**

xix. Without prejudice to the above contentions, the appellants would like to say and submit that the adjudicating authority has remained silent about the cross examination sought by the appellants in the first round of litigation and even in the second round.

xx. The appellants sought cross examination of the investigating officer, Shri A.S. Kundu, Superintendent as the appellants had given reason for the cross examination to prove that the officer had with malafide intention to show his own performance and to show higher recoveries chose wrong option for demanding reversal of CENVAT credit. It is a fact

clearly evident from panchnama that separate records were maintained by the appellants for the inputs (which is also admitted by the Honorable Commissioner (A) in the earlier OIA) and still the officer chose to get the reversal @ 6%/7% of the value of trading activity, whereas, if the officer had chosen option 3 the CENVAT credit only on input services which has been commonly used without separate accounts was required to be reversed proportionately, but that amount would not be so high as has been done by the officer to get commendation from the officers of the department. The appellants also cited another reason that the officer had pressurized Shri Rana, Director to debit the cenvat credit immediately, whereas, there is no provision under the law which authorizes the officer visiting the factory to get any liability reversed/paid by the company forthwith. This only has been done to show his performance.

xxi. Based on the above grounds of appeal, the appellant contend that the Order In Original is factually and legally not correct and deserves to be set aside.

4. Personal hearing in the case was scheduled on 23.11.2022. Shri Bhavesh T. Jhalawadia, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He submitted a written submission during hearing. They reiterated submission made in appeal memorandum as well as those made in additional written submission.

4.1 In their additional written submission dated 17.11.2022 submitted during the course of personal hearing, the appellant, inter alia, reiterated the grounds / arguments put forth by them in appeal memorandum.

5. I have carefully gone through the facts of the case and submission made by the appellant in the appeal memorandum as well as additional submission made at the time of personal hearing. It is observed that the issue involved in the present case pertains to reversal of CENVAT credit under Rule 6(3) of the Cenvat Credit Rules, 2004 for failure to maintain separate accounts for receipt of common input services used for manufacturing of dutiable goods as well as for provision of exempted service i.e. trading of goods. The matter was remanded back to the adjudicating authority to give a finding on the contention of the appellant in reply to SCN that they were fulfilling the criteria of maintaining separate accounts for inputs used for dutiable goods and separate accounts for inputs used for exempted services. Further, it was also directed to examine the applicability of case law of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)] in this case. I also find that the main question on the basis of which the appellant has filed the present appeal is whether the appellant is eligible for option (iii) of Rule 6(3) of the Cenvat Credit Rules, 2004 to reverse the proportionate credit as per Rule 6(3A) of the Cenvat Credit Rules, 2004. It is the contention of the department that appellant is required to reverse the amount @ 6% / 7% as per Rule 6 (3)(i) of the Cenvat Credit Rules, 2004 when the appellant did not file declaration or intimation to the department to exercise the option under Rule 6(3) of the Cenvat Credit Rules, 2004.

6. It is observed that the below mentioned facts emerged from the case records.

(a) The appellant are a 100% EOU and engaged in manufacturing and clearing P. P. Medicaments.

(b) The appellant are also engaged in trading of pharmaceutical products.

(c) They were storing and clearing the manufactured as well as traded products from their factory premises as they have no separate, storage facility for the trading business undertaken along with manufacturing activity under 100% EOU scheme from their factory premises.

(d) The appellant was only trading in finished goods and not in any common inputs. Thus, there are no common inputs. Therefore, it can be said that the appellant was maintaining separate record for the inputs used in dutiable and exempted services i.e. trading of goods.

(e) The appellant was not maintaining separate accounts for receipt of common input services on which Cenvat Credit of service tax paid, availed and utilized, for the manufacturing of pharmaceuticals products in their premises as well as provision of exempted service i.e. trading of goods which were required as per the provisions of Rule 6(3) of CENVAT Credit Rules, 2004.

(f) The appellant did not file any declaration or intimation to the department to exercise the option as required under Rule 6(3) of the Cenvat Credit Rules, 2004.

(g) Total value of the excisable goods manufactured and cleared by the appellant during the relevant time is Rs. 4,74,90,93,396/-.

(h) In the present case, during the relevant time, total sales value of traded goods amounted to Rs. 1,92,23,16,974/-; total purchase value of the traded goods amounted to Rs. 1,86,54,90,591/- and thus difference of sales value minus purchase value comes to Rs. 5,68,86,383/- and 10% profit margin on purchase value comes to Rs. 18,65,49,059/- on which the reversal of Rs. 1,16,67,599/- @6% for the period from FY 2012-13 to FY 2014-15 and @7% for the period from FY 2015-16 to FY 2016-17 (up to 30.06.2016) was required to be made by the appellant. **(As provided in the SCN)**

(i) During the relevant time, the appellant availed and utilized total input credit to the tune of Rs. 11,51,05,519/-, which were exclusively used for manufacturing of excisable goods. **(As provided by the appellant)**

(j) During the relevant time, the appellant availed and utilized total input service credit to the tune of Rs. 2,76,27,634/- and out of the same common input service credit comes to the tune of Rs. 33,46,718/-, which were used for manufacturing of excisable goods as well as trading goods. **(As provided by the appellant)**

7. I find that the Commissioner (Appeal) in his order dated 21.09.2020 given mainly the below mentioned directions and directed to issue order after properly appreciating the facts involved in the case:

(i) Factual verification that the appellant have maintained records of inputs separately as prescribed under Rule 6(2)(a) and not maintained separate records for input services as prescribed under Rule 6(2)(b) and whether they are entitled to avail option under Rule 6(3)(iii) of CCR;

(ii) The applicability of case law in the case of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)] as the case law has been distinguished in the instant OIO overlooking the similarity of the facts of this case and referred Para 5.4 of the said order of the Hon'ble Tribunal, while passing the denovo order in the first time while passing the OIA;

(iii) The applicability of clarification letter F.No. 334/8/2016-TRU dated 29.02.2016 in the instant case;

(iv) To examine the authenticity of re-quantification of the demand presented by the appellant during appeal proceeding but kept pending for verification at the time of adjudication; and

(v) To verify the claim of the appellant that they have not availed any Cenvat credit on the goods received back after expiry date.

7.1 I also find that it is the contention of the appellant that the impugned order has been passed in gross dishonor to the directions given in the remand order passed by the Honorable Commissioner (Appeals) asking the adjudicating authority to pass order after properly appreciating the facts involved in the case.

8. Therefore, to examine whether the aforesaid directions were followed in the remand proceedings or otherwise, I will take up the issue-wise findings recorded by the adjudicating authority.

8.1 As regard the first issue, I find that there are, inter-alia, three directions (i) whether the appellant have maintained records of inputs separately as prescribed under Rule 6(2)(a); (ii) whether the appellant have not maintained separate records for input services as prescribed under Rule 6(2)(b); and (iii) whether they are entitled to avail option 6(3)(iii) of CCR. I find that the adjudicating authority in Para 16 of the impugned order quoted the statement of appellant-2 dated 20.07.2016, which is as under:

"16. Now, in view of the above facts, I would like to discuss the matter point wise. As far as first point is concerned, while passing the OIA, the Com(A) ordered to factually verify the said assessee have maintained records of inputs separately as prescribed under Rule 6(2)(a) and not maintained separate records for input services as prescribed under Rule 6(2)(B) and whether they are entitled to avail option 6(3)(iii) of CCR. In this regard,

statement of Shri Mahendrasinh Fulubha Rana, Director of the said firm, was recorded on 20.07.2016 and 22.12.2016 under Section 14 of the central Excise Act, 1944 wherein he admitted that "On being asked, I state that our company is 100% EOU and carrying our manufacturing as well as trading activities of pharmaceutical products from our factory premises. I also admit that trading of goods is exempted service. I also state that we are not maintain separate accounts for receipt of common input services on which Cenvat credit of service tax paid, are taken & utilized for the manufacturing of pharmaceutical products in our factory premises as well as for provision exempted service i.e. trading of goods." On perusal of the statement, it can be seen that the Director himself admitted that they have not maintained separate records as required under Rule 6(2) and therefore they are not eligible for any benefit of option under Rule 6(2) of CCR. As they are not eligible for the benefit of Rule 6(2) of CCR, they have to opt for any one of the options under Rule 6(3) of CCR."

8.1.1 After quoting the said statement, the adjudicating authority concluded that the Director himself admitted that they have not maintained separate records as required under Rule 6(2) and jumped directly on the conclusion that the appellant have to opt for any one of the options under Rule 6(3) of CCR. I find that in the statement of the Director, he admitted that they were not maintaining separate accounts for input services, however, there is no mention about maintenance of the accounts for inputs. I also find that in this regard, the appellant have contended that the Director was not fully aware about the facts at the material point of time that they were maintained separate account for inputs and not maintaining separate accounts only for input service and, therefore, he did not counter the officers. I also find that the Commissioner (Appeal), Ahmedabad, who vide Order-in-Appeal No. AHM-EXCUS-002-APP-341-342-17-18 dated 27.02.2018 / 24.03.2018 remanded the matter taken the same view, and I also find that the same order not reviewed by the department. The relevant portion of Para 6 of the Order-in-Appeal dated 27.02.2018 are as under:

"6. I find that the appellant was only trading in finished goods and not in any common inputs. As such the appellant was maintaining accounts of the inputs used in manufacturing of dutiable goods as there was no inputs involved in the trading of finished goods, they were fulfilling the criteria of maintaining separate accounts for inputs used in dutiable goods and separate accounts used for exempted service. This fact has been overlooked in the impugned order."

8.1.2 In view of the above, I find that the adjudicating authority, by repeatedly taking the contrary view on the basis of merely statement of the Director of the appellant, without verifying the facts of the case and overlooking the findings of the Commissioner (Appeals), Ahmedabad in the OIA dated 27.02.2018, committed judicial indiscipline against the order of the higher authority.

8.1.3 Thus, I find that the adjudicating authority has not properly examined the facts as per direction given in the OIA dated 09.10.2020. However, I find that as stated in Para 6 above, the appellant was only trading in finished goods and not in any common inputs. Thus, there are no common inputs and question of maintenance of separate records for inputs not arise. Therefore, it can be said that the appellant was maintaining separate record for the inputs used in dutiable and exempted services i.e.. trading of goods. As regard, the maintaining separate accounts for receipt of common input services on which Cenvat Credit of service tax paid, availed and utilized, for the manufacturing of pharmaceuticals products in their premises as well as provision of exempted service i.e. trading of goods, the appellant has also agreed that they have not maintained separate records for input services. Now, only question which remains that whether they are entitled to avail option under Rule 6(3)(iii) of CCR or otherwise, which will be discussed in later part of the order.

8.2 As regard the second issue, I find that the adjudicating authority in Para 18 of the impugned order, inter alia, held that the ratio of the case M/s. Mercedez Benz (India) Pvt. Ltd. is not applicable in the present case. The adjudicating authority, in Para 18 of the impugned order, has given findings as under:

> *"18. ..... A great difference in between the two cases is that in the case of M/s. Mercedez Benz (India) P. Ltd., they calculated the proportionate credit of common input services availed and reversed the proportionate Cenvat credit attributed to exempted service willingly alongwith interest himself and intimated same to the jurisdictional Superintendent of Central Excise. The intimation and reversal was an suo moto and was not an after thought or consequential act after investigation or inquiry by the Department or any other agency. However, in the instant case, the said assessee keep availing input service credit till the preventive wing of the Department reached the place of business and started investigation in the matter. On pointing out the discrepancy by the investigation Wing of the Department only, the said assessee agreed with the irregularity and reversed the input service tax credit without any protest. In the view of these facts, it cannot be compared the circumstances under which both the parties have reversed the cenvat credit attributable to common input services. Hence, I find that in the case of M/s. Mercedez Benz (India) Pvt. Ltd., the party reversed the proportionate Cenvat credit, along with interest and intimated the calculation to the concerned Range office. Hence it can be clearly say that it was just a procedural lapse from the part of party and they themselves rectified at a later stage. But in the instant case, on perusal of the records of the case, it can be concluded that the party deliberately not paid or reversed the proportionate credit till the investigation starts. It proved beyond doubt that if the investigation wing of the Department had not acted, the wrongly availed input service credit will not have been reversed by the said assessee. On pointing out the mistake by the Preventive Wing of the Department, the said assessee that this is only a procedural lapse hence the same may be condoned is meritless and cannot be considered. As both circumstances and situation are entirely different as in the former case the assessee*

willingly reversed the ineligible credit along with interest and intimated the Department and in the later case they have neither reversed the same suo moto nor informed the jurisdictional range office regarding the availability of Cenvat credit as prescribed in the Cenvat Credit Rules 6 (3) of CCR. In view of the above, I find that the ratio of the case M/s. Mercedez Benz (India) Pvt. Ltd., is no way applicable in this case."

8.2.1 I find that the adjudicating authority agree that nature of the business in both the case are same, they have common balance sheet; they have used common input service for manufacturing and trading activities; they have never maintained separate accounts for input services used for manufacturing and trading goods. However, as the appellant neither reversed the same suo moto nor informed the department, the adjudicating authority in view that the ratio of the case of M/s. Mercedez Benz (India) Pvt. Ltd., is no way applicable in the present case as in the case of M/s. Mercedez Benz (India) Pvt. Ltd. the intimation and reversal of proportionate Cenvat credit was an suo moto and was not an after thought or consequential act after investigation or inquiry by the Department as in the present case.

8.3 As regard the third issue, I find that the adjudicating authority, in Para 20 of the impugned order, inter alia, held that the applicability of this letter is relevant only when attributable credit is quantifiable from the records maintained by the appellant and in the absence of exact Cenvat credit attributable to exempted services, the applicability of this clarification letter will not have any implication in this case. The adjudicating authority, in Para 20 of the impugned order, has recorded the findings as under:

"20. The third point is regarding the applicability of Board's clarification letter dated 29.02.2016 wherein it was emphasized that in any case the Cenvat credit demand should not be more the credit attributable. The applicability of this letter is relevant only when attributable credit is quantifiable from the records maintained by the said assessee. However, here in this case, the assessee availed and utilized common input service credit to the tune of Rs. 33,46,718/- lacs, as quantified by the said assessee, for manufacturing as well as trading goods. However, as they have not maintained any separate record for the same, they could not provide the actual input service credit attributable to the input services used for trading purpose only. The assessee themselves expressed their inability to segregate the commonly availed input service credit of Rs. 33,46,718/- lacs between manufacturing activity and trading activity i.e. exempted service. In the absence of segregation, the implementation of the letter is not possible as certain portion of input service have common in nature others are not in the absence of exact Cenvat credit attributable to exempted services, the applicability of this clarification letter will not have any implication in this case."

8.3.1 I find that the adjudicating authority has not verified applicability of clarification letter F. No. 334/8/2016-TRU dated 29.02.2016 and simply stated that "*The assessee themselves expressed their inability to segregate the commonly availed input service credit of Rs.*

33,46,718/- lacs between manufacturing activity and trading activity i.e. exempted service". I do not understand that how the commonly availed input service credit segregated for manufacturing activity and trading activity. Thus, I find that the finding of the adjudicating authority is vague in nature.

8.4 As regard the fourth issue, I find that the adjudicating authority, in Para 21 of the impugned order, inter alia, held that the appellant could not quantify the amount of input service tax credit utilized during the course of providing exempted service i.e. trading activity. If they have provided the details of input service credit, which are used exclusively for trading, the same can be allowed as eligible Cenvat credit. In absence of the segregation, he was not in a position to identify the same and allow the Cenvat credit attributable only to input service. The adjudicating authority in Para 21 of the impugned order submitted as under:

> *"21. The fourth point in which the Com(A) to examine the applicability of re-quantification of the demand presented by the assessee during appeal procedure but kept pending for verification at the time of adjudication. The assessee vide letter dated 08.12.2021 submitted more documents such as details of trading sales (factory), trading purchase (factory), export sales, DTA sales, turnover details, excise duty availed as per RG 23 Part-II, service tax credit availed as per RG 23 Part-II and re-quantification statement. On perusal of re-quantification statement submitted by the said assessee, I find that total value of excisable goods manufactured during the period 2012-13 to 30.06.2016 is Rs. 474,90,93,396/- and trading value to the tune of Rs. 18,65,49,059/-. They have quantified an amount of Rs. 33,76,418/- as their common input service used in manufacture and trading activities. However, they could not quantify the amount of input service tax credit utilized during the course of providing exempted service i.e. trading activity. If they have provided the details of input service credit which are used exclusively for trading, the same can be allowed as eligible Cenvat credit. In the absence of the segregation, I am not in a position to identify the same and allow the Cenvat credit attributable only to input service."*

8.4.1 I find that the adjudicating authority has not verified the eligibility of re-quantification of the demand as submitted by the appellant during appeal proceeding and stated that "they could not quantify the amount of input service tax credit utilized during the course of providing exempted service i.e. trading activity". I further find that if the appellant had quantified the said amount, the question of common credit does not arise. Thus, I find that the finding of the adjudicating authority are vague.

8.4.2 I also find that it is the contention of the appellant that they have submitted the bifurcation of Input Services used in the manufacturing of excisable goods and commonly used in manufacturing and trading activity, computed month wise from the period FY 2012-13 to June 2016 to the adjudicating authority in soft copies. The bifurcation of input services was done in each month of RG Part 23 II along with reconciliation CENVAT credits on taken in Excise

returns with RG 23 Part –II. However, I find that the adjudicating authority has not discussed anything about the same nor verified the computations submitted by the appellant.

8.5 As regard the fifth issue, I find that the adjudicating authority, in Para 23 of the impugned order, inter alia, held that the issue has already discussed in the previous OIO and the adjudicating authority has already considered the appellant's request and reduce the amount to Rs. 47,740/-, accordingly it was held that the amount payable by the appellant on that account is Rs. 47,740/-. The adjudicating authority, in Para 23 of the impugned order, submitted as under:

> *"23. As far as the non-reversal of Cenvat credit of Rs. 52,301/- on time expired inputs (which were not utilized in the manufacture of their finished goods) is concerned, I find that Rule 3 of the CCR, 2004 allows Cenvat credit of duty paid on input / input services as the case may be, used in the manufacture of final products. The credit of duty on inputs which were not used in subsequent manufacturing process is not admissible. The issue has already discussed in the previous OIO and the adjudicating authority has already considered the assessee's request and reduce the amount to Rs. 47,740/-. I am also of the view that the amount is payable by the assessee on that account is Rs. 47,740/-."*

8.5.1 I find that there was specific directive for verification of the claim of the appellant that they have not availed any Cenvat credit on the goods received back after expiry date. However, the adjudicating authority has not carried out the verification of the claim of the appellant and directly jumped to the conclusion that the amount payable by the appellant is Rs. 47,740/- as already discussed in the previous OIO.

8.6 I find that the Commissioner (Appeals) had vide OIA dated 21.09.2020 remanded the proceedings to the adjudicating authority to pass a order after due verification of the documents. It has been very categorically directed therein point wise, however, in view of the above discussion, I find that the adjudicating authority has acted in utter disregard to the directions of the Commissioner (Appeals) given in the remand order dated 21.09.2020. It is very apparent that the adjudicating authority has failed to understand the scope of remand proceedings order and has decided the case without any application of mind and proper appreciation of the facts in the case in it's right perspective. The impugned order is clearly against the basic tenets of law and it has caused serious injustice to the appellant for having dragging them into litigation again on the same very issue. Such acts on the part of authorities definitely undermine the efficacy of the appellant remedy available in the judicial system. In view thereof, the impugned order passed by the adjudicating authority in the case is bad in law, being passed in violations of directions contained in the remand proceeding.

9. In order to appreciate the legal position, I hereby reproduce the relevant portion of Rule 6 of the Cenvat Credit Rules, 2004 as stood at the material time, which is as under:

"RULE 6. Obligation of a manufacturer or producer of final products and a [provider of output service. —

(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2);

Provided that ... .

(2) Where a manufacturer or provider of output service avails of CENVAT Credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or exempted services, then the manufacturer or provider of output service shall maintain separate accounts for –

(a) the receipt, consumption and inventory of inputs used –

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output service excluding exempted services; and

(b) the receipt and use of input services –

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods and their clearance upto the place of removal

(iii) for the provision of exempted services; and

(iv) for the provision of output service excluding exempted services;

and shall take CENVAT credit only on inputs under sub clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b)

(3) Notwithstanding anything in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as 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; or [* - w.e.f. 01.06.2015 as per Notification No. 14/2015-CE(NT) dated 19.05.2015]*

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipts, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clause (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

***Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :*

***Provided** further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be*

seven per cent. of the value so exempted : [* - w.e.f. 01.06.2015 as per Notification No. 14/2015-CE(NT) dated 19.05.2015]*

Explanation I. *- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.*

Explanation II. *- For the removal of doubts, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.*

Explanation III. *- No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services."*

10. I find that as per the legal provisions of Rule 6 of the Cenvat Credit Rules, 2004, as the appellant had not maintained the separate records for input services used in manufacture of dutiable as well as in exempted service i.e. trading of goods, there was three options with the appellant (a) reverse / pay an amount @ 6% / 7% of value of exempted services as per Rule 6(3)(i) of the Cenvat Credit Rules, 2004; (b) pay an amount as determined under sub-rule (3A) and (c) to exercise the option (iii) of Rule 6(3) of the Cenvat Credit Rules, 2004 & pay an amount as determined under sub-rule (3A) of Rule 6 of the Cenvat Credit Rules, 2004 for the input services. However, the appellant did not follow any of the option at the material time. However, now, the appellant decided to avail option (iii) of Rule 6(3) of CCR, 2004, and the provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall apply for such payment in the present case. The appellant has also submitted the calculation for the same. The moot question to be decided in the present appeal is also the same, whether the appellant was required to be extended the option 6(3)(iii) of reversing the CENVAT credit proportionate to the input services used in the exempted output services i.e. Trading of goods, which was denied by the adjudicating authority.

11. It is further observed that while clarifying the objective of Rule 6, the Joint Secretary (TRU), CBEC has issued a letter No. 334/8/2016-TRU dated 29.02.2016 which states that:

> *(a) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services,* ***is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.***

12. I find that this amendment reflects the interpretation and intent of the Government and it has been clearly mentioned in the said letter that the rules are being redrafted with the objective of simplifying and rationalizing the Cenvat Credit Rules without altering the established principles of reversal of such credit. Even otherwise, to demand an amount under Rule 6, which is more than the CENVAT credit availed, would clearly be against the spirit of reversal. Though

the above referred amendment has been made as a clarification and not specified any retrospective effect, the intent of Government on the issue is very clear.

13. It is further observed that when re-drafting the Rule 6 of the Cenvat Credit Rules, 2004, a new sub-rule (3AA) has been inserted, which provides that if a manufacture has failed to exercise the option under sub-rule (3) and follow the procedure provided under sub-rule (3A), the Central Excise Officer competent to adjudicate a case, based on amount of Cenvat credit involved, may allow such manufacture or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule(3). Thus, I also find that the object of the legislature is also not that if a manufacturer had failed to exercise the option, they have to / must required to pay an amount as per option (i) of the Rule 6(3) of the Cenvat Credit Rules, 2004. The sub-rule (3AA) of the Rule 6 of the Cenvat Credit Rules, 2004 reads as under:

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

14. I also find that the contention of the appellant is correct that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the appellant does not opt any of the option at a particular time, then option of payment of 6% or 7% as per Rule 6(3)(i) of the Cenvat Credit Rules, 2004 will automatically be applied. I also find that the similar stand was also taken by the Hon'ble Tribunal in the case of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)]. The relevant portion of the Honorable Tribunal's decision in the case of Mercedes Benz (India) Pvt. Ltd. [cited at 2015 (40) STR 0381 (Tri.Mum)] is reproduced as under:-

> *"5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule*

6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.

5.4 We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of CENVAT Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to. Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the CENVAT Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the CENVAT Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than CENVAT Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 As discussed above and in the facts of the case that actual CENVAT credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs. 4,06,785/- whereas adjudicating authority demanded an amount of Rs. 24,71,93,529/-. In our view, any amount, over and above Rs. 4,06,785/- is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee."

14.1 It is also observed that the above decision of the Honorable Tribunal has been affirmed by Honorable Mumbai High Court as reported in 2016 (41) STR 0577 (Bom), which has also been followed by the Ahmedabad Tribunal Bench in the case of Alembic Limited 2019 (28) GSTL 71 (Tri-Ahmd) and 2016 (44) STR 061 (Bom.).

I also find that the main objective of the Rule 6 is to ensure that an assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the

manufacture of the exempted goods or for exempted services and looking to the above objective, I find that at the most, the amount, which is to be recovered, shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods.

16. In view of the above discussion, I am of the considered view that the appellant is eligible for exercise the option under Rule 6(3)(iii) of the Cenvat Credit Rules, 2004 of reversing the CENVAT credit proportionate to the input services used in the exempted output services. Now, the question of the verification of the calculation given by the appellant. In this regard, I find that verification of the basic evidences and documents cannot be undertaken at the appellate stage and it is the duty of the adjudicating authority to do so. Therefore, I am constrained to again remand the case back to the adjudicating authority for limited purpose of verification of the calculation provided by the appellant and for re-quantification of demand. Needless to mention that the penalty imposed should also be in line with re-quantification of demand and principles of natural justice be adhered to in remand proceedings. The Appellant is, therefore, also directed to produce the relevant documents before the adjudicating authority for verification within 15 days of receipt of this order.

17. As regards the demand of Rs.47,740/- availed on inputs which later on expired and could not be used in the manufacture of finished goods, which was required to be reversed as prescribed under the Cenvat Credit Rules, 2004, the main contention of the appellants are that the inputs which could not be used in manufacturing and had expired during the past period, they have already reversed the Cenvat credit and also other arguments made by the appellant in their appeal memorandum. I find that, since the directions contained in remand proceedings ordered in the case vide OIA dated 21.09.2020 is not complied with by the adjudicating authority, as mentioned in Para **8.5.1** above, I find it proper that the this matter also should go back to adjudicating authority again to decide the same, strictly in terms of the directions given by the Commissioner (Appeals) in OIA dated 21.09.2020.

18. As regard the contention of the appellant that entire demand is time barred for the reason that the appellants have not suppressed any fact from the department; I find that the appellant never declared to the department regarding availing and utilizing the Cenvat credit of the input services used in manufacturing of goods as well as in exempted services i.e. trading of goods and from the FY 2012-13 to FY 2016-17, till the investigation initiated by the department. The non payment of an amount / non reversal of the appropriate Cenvat credit and not following procedure as per any of the three option as laid down under Rule 6(3) of the Cenvat Credit Rules, 2004 is also suppression of the facts and it clearly transpires that the appellant has intentionally suppressed the same by deliberately withholding of essential information from the department with an intent to evade taxes. Also, the appellant has never informed the department about the same and the said fact could be unearthed only at the time of investigation by the department. Therefore, I find that all these acts of willful mis-statement and suppression of facts on the part of the appellant, with an intent to evade payment of an amount / reversal of Cenvat credit are the essential ingredients exist in the present case which makes them liable to raise the demand

against them invoking the extended period of limitation under proviso to Section 11A(4) of the Central Excise Act, 1944. When the demand sustains, there is no escape from the liability of interest, hence the same is, therefore, recoverable under Section 11AA of the Central Excise Act, 1944.

19. As regard the contention of the appellant that the penalty under Section 11AC(1) of the Central Excise Act, 1944 can not be imposed on them, I find that after introduction of measures like self assessment etc., it is duty of a Central Excise registered manufacturer to follow the procedure and pay the legitimate due to the departments. All these operates on the basis of the trust placed on the assessee and, therefore, the governing provisions create an absolute liability when any provision is contravened, as there is a breach of the trust placed on them. It is the responsibility of the appellant to correctly follow the procedure laid down under Rule 6(3) of the Cenvat Credit Rules, 2004, when they have availed and utilized the Cenvat credit on input services for manufacturing of goods as well as for exempted services i.e. Trading of goods and pay the appropriate amount / reverse the appropriate credit, as per the Rule 6(3) of the Cenvat Credit Rules, 2004. I also find that to exercise option under Rule 6(3) is a procedural lapse, however, I find that from the FY 2012-13 to FY 2016-17, till the investigation initiated by the department, non payment of an amount / non reversal of the appropriate Cenvat credit and not following procedure as per any of the three option as laid down under Rule 6(3) of the Cenvat Credit Rules, 2004 can not be considered a mere procedural lapse and the same tantamounts to evasion and, therefore, imposition of penalty under Section 11AC(1) of the Central Excise Act, 1944 is also sustainable. I also find that imposition of penalty under Section 11AC(1) of the Central Excise Act, 1944 is also sustainable, as the demands were raised based on detection noticed during the initiation of inquiry by the department. I have already upheld invocation of extended period of limitation on the grounds of suppression of facts as per discussion in para *supra.* Hence, penalty under Section 11AC(1) of the Central Excise Act, 1944 is mandatory, as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, hold that the Appellant was liable to penalty under Section 11AC(1) of the Central Excise Act, 1944.

20. I find that the adjudicating authority vide impugned order has also imposed penalty under Rule 26 of the Central Excise Rules, 2002 on Shri Mahendrasinh F. Rana, Director of the appellant, and he did not file any appeal against the impugned order.

21. In view of above discussion, I remand the case back to the adjudicating authority to decide the case as per the direction contained here-in-above in Para 16 & Para 17. The appeal filed by the appellant stand disposed off in above term.

22. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है|

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

30th December, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

Date : 30.12.2022

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

By RPAD / SPEED POST

To,

M/s. Astra Life Care (India) Pvt. Ltd., (100% EOU), — Appellant

Plot No. 57/P, Sarkhej Bavla Highway,

Taluka: Bavla, Ahmedabad

The Joint Commissioner, — Respondent

CGST & C. Excise, Ahmedabad North

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Joint Commissioner, CGST & C. Excise, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North (for uploading the OIA)
5) Guard File
6) PA file