केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

☎: 079-26305065 टेलफैक्स: 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : **V2(84)107 /Ahd-II/Appeals-II/ 2016-17**/2030 to 2034

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 116-17-18**

दिनांक (Date): **27.09.2017** जारी करने की तारीख (Date of issue): 26-10-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद- II, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक _----------से सृजित

Arising out of Order-In-Original No ._**35-36/ADC/2016/RMG__Dated: 15.12.2016** issued by: Additional Commissioner Central Excise (Div-II), Ahmedabad-II

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Lubi Industries LLP

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 an 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) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए |

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, 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 हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो |

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

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

Cont...2

(c) 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।

(d) 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) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) 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 ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से

रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय 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.

(6) 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. 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 सन्दर्भ में 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

M/s Lubi Industries LLP, Near Kalyan Mills, Naroda Road, Ahmedabad - 380 025 (hereinafter referred to as 'the appellant') is engaged in the manufacture of excisable products namely P.D. Submersible Pumps & parts, Submersible Electric Motors & parts thereof falling under Chapter 84 & 85 of the first schedule to the Central Excise Tariff Act, 1985 (CETA, 1985). The appellant was also engaged in trading activity which is an exempted service under Notification No. 3/2011-CE (NT) dated 01/03/2011 (w.e.f. 01/04/2011). The appellant had manufactured and cleared submersible pumps by availing benefit under Sl. No. 235 of Notification No. 12/2012-CE dated 17/03/2012 and spare parts & motors of submersible pumps on full rate of duty. Even though the appellant had availed CENVAT credit of inputs and input services like Security, C.A., Bank Commissions, Telephone services etc in dutiable and exempted clearances, it had neither maintained separate records of inputs & input services used in exempted trading service nor reversed 5% / 6% of value as stipulated under Rule 6 of Cenvat Credit Rules, 2004 (CCR, 2004). The appellant had never disclosed the fact that it was engaged in trading activities and it had never mentioned such details in its ER-1 returns. Therefore, it appeared that extended period was to be invoked for demanding the reversal of CENVAT credit at the rate of 5% / 6% of the value. Accordingly, two Show Cause Notices (SCNs) were issued to the appellant, the details of which are submitted as follows:

Sl. No.	SCN No. & Date	Demand Amount	Period covered in SCN	Demand details
1.	F.No.V.84/15-29/OA/16 dated 18/04/2016	Rs.79,15,648/-	April-2011 to March-2015	Demand invoking extended period under Rule 14 of CCR, 2004 read with Section 11A(5) / 11A(4) of CEA, 1944, along with interest under Rule 14 of CCR, 2004 read with Section 11AB / 11AA of CEA, 1944 and proposing penalty under Rule 15(2) of CCR, 2004 read with Section 11AC of CEA, 1944.
2.	F.No.V.84/15-55/OA/16 dated 28/04/2016	Rs.24,60,403/-	April-2015 to March-2016	Demand within one year under Rule 14 of CCR, 2004 read with Section 11A(1) of CEA, 1944, along with interest under Rule 14 of CCR, 2004 read with Section 11AA of CEA, 1944 and proposing penalty under Rule 15(1) of CCR, 2004.
	TOTAL DEMAND AMOUNT	**Rs.1,03,76,051/-**		

The above SCNs were adjudicated by the Additional Commissioner, Central Excise, Ahmedabad-II (hereinafter referred to as 'the adjudicating authority') *vide* O.I.O. No.35/36/ADC/2016/RMG dated 15/12/2016 (hereinafter referred to as the 'impugned order'). The demand of **Rs.79,15,648/- for the period of April-2011 to March-2015** has been confirmed invoking extended period along with interest and penalty of Rs.39,57,824/- in the matter of SCN F.No.V.84/15-29/OA/16 dated 18/04/2016. In the matter of SCN F.No.V.84/15-55/OA/16 dated 28/04/2016, the demand of **Rs.24,60,403/-**

for the period of April-2015 to March-2016 has been confirmed along with interest and penalty of Rs.2,46,040/- has been imposed on the appellant.

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

1) There are glaring and grave errors committed by the adjudicating authority while deciding this case and confirming demand of Rs.1,03,76,051/- under Rule 6(3)(i) of CCR, 2004. When it is an admitted fact of this case that CENVAT credit of common input services attributable to trading business was only to the tune of Rs.10,38,191/- which was paid back by the appellant at the instance of departmental Auditors, Rule 6(3)(i) of CCR, 2004 was not applicable in as much as this Rule is attracted only when the appellant had taken CENVAT credit attributable to exempted transaction and such credit was retained and not paid back by the appellant. Once the appellant had paid back the amount of such CENVAT credit, no undue benefit or gain was retained and therefore demand under Rule 6(3)(i) of CCR, 2004 could not be raised. There is also a grave factual error in believing that separate records were not maintained by the appellant for exempted transactions, because it is undisputable fact that the appellant had kept records and registers for input services attributable to trading business and CENVAT credit of such transactions was not taken and it was on the basis of such records only that the departmental Auditors had arrived at the CENVAT credit of Rs. 10,38,191/- that still remained to be reversed / paid back by the appellant. When SCN dated 18/04/2016 was issued , it was specifically submitted by the appellant in adjudication that CENVAT credit of a few input services attributable to trading business that the appellant had erroneously taken for the period April-2011 to Mar-2015 was rs.10,38,191/- and the same was paid back on being pointed out by the Auditors. The appellant had also submitted that for the subsequent period of April, 2015 to March-2016 for which the second SCN was issued, there was no availment of any CENVAT credit attributable to trading business. The adjudicating authority had not raised any dispute about the quantum of CENVAT credit of exempted transactions for the period of Aptil-2011 to March-2015 and regarding its submission no CENVAT was availed in respect of exempted goods during the subsequent period of April, 2015 to March, 2016. The adjudicating authority has observed that amount of credit for April, 2011 to March, 2015 that was reversed was miniscule but the appellant could not claim that the act was unintentional. The appellant's submission has all along been that separate record for trading business have been maintained and the trading business is also conducted from a premises located at a distance from the factory, which is not disputed in the impugned order. The impugned order passed on the basis that reversal of amount by the appellant at the instance of Audit could not be accepted as reversal in law and that the appellant had no option but to pay amount at 5% or 6% of the value of trading business since the appellant never opted for Rule 6(3)(ii) of CCR, 2002 is not only contrary to the binding precedents but it results I violation of constitutional guarantee enshrined under Article 265 of the Constitution of India and the demand of Rs.1,03,76,051/- ordered by the adjudicating authority is in the nature of extracting illegal amount from the appellant under Rule 6 of CCR, 2004 and therefore such an order is liable to be set aside in the interest of justice. Hon'ble Supreme Court in the case of Chandrapur Magnet Wires Pvt. Ltd. – 1995 (81) ELT 3 (SC) have held that amount equal to credit reversed by the assessee for exempted inputs meant as if the credit was not taken by the assessee. Hon'ble Allahabad High Court in the case of Hello Mineral Water (P) Ltd. – 2004 (174) ELT 422 (All) and Hon'ble Gujarat High court in the case of Maize Products – 2008 (89) RLT 211 have held that even for cases under the Modvat scheme, paying back amount equal to credit of exempted transactions resulted in a situation as if no credit was taken and even belated reversal or paying back of such amount was acceptable in law. The Larger Bench of the Appellate Tribunal has followed the same principle in the case of Franco Italian Co. – 2000 (12) ELT 792 (Tribunal-LB) and it is in view of all these judgments and decisions in respect of the credit scheme that the

Appellate Tribunal has now applied the same principle for the CENVAT Rules also in the case of Mercedes Benz India Pvt. Ltd. But this principle about credit scheme is disregarded in the impugned order on the specious ground that the case law relied upon by the appellant related to Modvat Credit Rules and not Cenvat Credit Rules.

2) The demand raised under the show cause notice dated 18/04/2016 was ex-facie barred by limitation, but still the adjudicating authority has upheld such illegal and time-barred demand. It is an admitted fact that none of the show cause notices carried any details or list of specific input services which were attributable to trading business and still the appellant had availed CENVAT credit thereof. No details of common inputs services used for trading business like quantum, amount etc. had been given in any of the two SCNs and the only reference to common input services in both SCNs had been like 'Security. C.A. service, Bank Commission, Telephone etc.' but without a complete list of such common services and also without the amount of CENVAT credit of such common services that was allegedly taken by the appellant. The trading business was clearly disclosed by the appellant to the Central Excise authorities while filing ER-4 returns and thus there was no suppression of facts about the trading activity. In the ER-1 return, no column or space for declaring trading business has been specified and the appellant had not option or obligation to declare trading business in ER-1 return. It is also on record that trading business was examined and scrutinized by Revenue's Audit officers in past also and therefore also the Excise authorities were well within the knowledge of trading business conducted by the appellant. The law about invocation of extended period of limitation is well settled. Only in a case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts. The appellant relies on Hon'ble Supreme Court orders in the landmark cases of Padmini Products- 1989 (43) ELT 195 (SC) and Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC). What is 'suppression' is once again considered by Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture vs CCE, Chandigarh – 2007 (216) ELT 177 (SC), where it has been held with regard to proviso to Section 11A of CEA, 1944 that mere omission to give correct information was not suppression of facts unless it was deliberate and to stop the payment of duty. In the case of M/s Jaiprakash Industires Ltd. – 2002 (146) ELT 481 (SC), it has been held that that a *bona fide* doubt as to non-dutiability of goods was sufficient for the assessee to challenge the demand on the point of limitation. The action of the adjudicating authority in imposing penalty under Rule 15(1) of the CCR, 2004 read with Section 11AC(1)(a) of CEA, 1944 is unreasonable, arbitrary and high-handed in the facts of the present case, when all transactions were clearly recorded in the CENVAT register. Penalty is quasi-judicial in nature and could be resorted to only in cases where *mala fide* intention or guilty conscious of an assessee was established. The matter of penalty is governed by the principles as laid down by Hon'ble Supreme Court in the land mark cases of Hindustan Steel Limited – 1978 ELT (J159) where it has been held that penalty should not be imposed merely because it was lawful to do so. The order for interest under Section 11AA of CEA, 1944 read with Rule 14 of CCR, 2004 is also without authority in law as the provision of Section 11AA is not attracted. Section 11AA provides for interest in addition to the duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment of duty. In the instant case, there is no short levy or short payment or non-levy or non-payment of excise duty so the order to charge interest under Section 11AA is not maintainable. The impugned order may be set aside with consequential benefits.

4. Personal hearing in the case was held on 14/09/2017. Smt. Shilpa Dave, Advocate appeared for personal hearing and reiterated the grounds of appeal. The

learned Advocated pointed out that proportionate credit of Rs.10,38,191/- was reversed as reflected in paragraph 7 of the impugned order, which has not been disputed.

5. I have carefully gone through the impugned order as well as the grounds of appeal. The dispute relates to CENVAT credit availed in respect of inputs and input services in the business of trading carried out by the appellant, which is an exempted activity. The appellant claims that separate accounts were maintained in accordance with Rule 6(2) of CCR, 2002. However, in the impugned order it has been brought out in paragraph 12 that the evidence regarding separate records submitted by the appellant was not sufficient to expunge the charge that no separate accounts were maintained and that despite enough opportunity being granted by CERA audit and by the adjudicating authority, the appellant had failed to submit separate records of exempted products / services used in respect of trading activity. As far as the reversal of Rs,10,38,191/- made by the appellant during the time of audit is concerned, it has been held in paragraph 16 of the impugned order that the appellant had not availed the option provided under Rule6(3)(ii) of CCR, 2004 as they had not intimated in writing to the jurisdictional Range Superintendent and the said reversal has been held to be done on the insistence of Audit and not in terms of Rule 6(3A) of CCR, 2004. Thus, the disputed issue in the instant appeal is whether the reversal of proportionate credit by the appellant is valid in terms of Rule 6(3)(ii) of CCR, 2004 in view of the fact that the appellant had failed to intimate in writing to the Superintendent of Central Excise giving the full particulars as stipulated in Rule 6(3A)(a)(i) to (v) of CCR, 2004 or whether the only option available to the appellant was to reverse 5% / 6% of the clearance value under Rule 6(3)(i), ibid.

6. In support of its claim that the reversal was valid, the appellant has relied on the case law Mercedes Benz India (P) Ltd. vs CCE, Pune-I – 2015 (40) STR 381 (Tri-Mum), where it has been held as follows:

> "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."

In the instant case the option under Rule 6(3)(ii) is sought to be denied to the appellant on the ground that no intimation was filed with the jurisdictional Superintendent under Rule 6(3A)(a) of CCR, 2004. This does not appear to be legally sustainable on the basis of precedent decisions. In the case of ASTER PVT. LTD. vs CC&CE, HYDERABAD-III – 2016 (43) S.T.R. 411 (Tri.-Hyd.), relying on .Mercedes Benz India (P) Ltd. v. CCE, Pune-I – 2015 (40) S.T.R. 381 (Tribunal); Rathi Daga v. CCE, Nashik - 2015 (38)

S.T.R. 213 (Tri.-Mum.) and Foods, Fats & Fertilisers Ltd. v. CCE, Guntur - 2009 (247) E.L.T. 209 (Tri.-Bang.), it has been decided as follows:

> "The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. **The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3).** Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. **The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee.** In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application.
>
> 7. In support of their arguments, the appellants have placed reliance on the judgment passed by Co-ordinate Bench of CESTAT in *Mercedes Benz India (P) Ltd.* v. *CCE, Pune-I* [2015-TIOL-1550-CESTAT-MUM = 2015 (40) S.T.R. 381 (Tribunal)]. The issue under consideration is squarely covered by the said judgment. In *Rathi Daga* v. *CCE, Nashik* [2015 (38) S.T.R. 213 (Tri.-Mum.)] and *Foods, Fats & Fertilisers Ltd.* v. *CCE, Guntur* [2009 (247) E.L.T. 209 (Tri.-Bang.) = 2011 (22) S.T.R. 484 (Tribunal)], it has been held that **the condition in Rule 6(3A) to intimate the department is only a procedural one and that such procedural lapse is condonable and denial of substantive right for such procedural failure is unjustified.** Taking into account the facts, evidence and following the precedents cited above, I am of the view that the demand raised is not legal and proper.

The above ratio is directly applicable to the facts of the present case in as much as in the present case also the option for proportionate reversal of credit has been denied to the appellant only on the ground that no intimation was filed with the jurisdictional Superintendent of Central Excise. Following the above ratio, the failure to file the requisite intimation is to be considered as a procedural lapse that is condonable so that the substantive benefit cannot be denied. Therefore, once the amount of proportionate reversal of credit under Rule 3(ii) of CCR, 2004 is determined and finalized, the confirmation of demand of 5% / 6% of the value of clearance value is not sustainable. As regards interest, the same is very much leviable on the delayed reversal of proportionate credit under Rule 6(3)(ii). The appellant had clearly failed to intimate the jurisdictional Superintendent as required under Rule 6(3A) of CCR, 2004. Therefore, extended period is applicable for the reversal of any shortfall pointed out by department and penalty is also attracted. The quantum of penalty imposed under Rule 15(1) of CCR, 2004 read with Section 11A(1) of CEA, 1944 is to be re-quantified in accordance with the final reversal verified and confirmed by the adjudicating authority in terms of Rule 6(3)(ii) of CCR, 2004. As regards the payment of proportionate credit, the appellant has submitted in the grounds of appeal that the reversal of Rs.10,38.191/- made was attributable to the erroneous credit on trading business during the period

from April, 2011 to March, 2015. It is not clear if any interest has been paid by the appellant on this proportional amount reversed. The appellant has also asserted that for the subsequent period of April-2015 to March-2016 covered in the second SCN, there was no availment of any CENVAT credit attributable to trading business. There is no discussion in the impugned order regarding the veracity of the facts and figures claimed by the appellant. The proportionate reversal of credit under Rule 6(3)(ii) is admissible subject to condition that the quantum of reversal made by the appellant is held to be adequate on the basis of verification of facts and figures at the jurisdictional Range / Division level and interest and penalty are liable to be paid on the quantum of proportionate credit thus finally determined . In this regard if there is any short fall then the appellant is directed to reverse the balance amount as pointed out in such a verification report along with interest and penalty. There is no scope to evade such short payment on the question of limitation. Accordingly, I order that the proportionate credit finally verified and affirmed by department for the entire period of demand is liable to be reversed by the appellant under Rule 6(3)(ii) of CCR, 2004 read with Rule 6(3A)(a) of CCR, 2004 along with interest. In view of the above discussion, I remand the case back to the original authority to pass a fresh order in accordance with the above findings after giving the appellant reasonable opportunity to furnish all the details and present their case.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date: 27/9/2017

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.

1) To
M/s Lubi Industries LLP,
Nr. Kalyan Mills, Naroda Road,
Ahmedabad-380025.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: II, Ahmedabad (North).
5. Guard File.
6. P.A.