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 टेलेफेक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

3317 to 3321

क फाइल संख्या (File No.) : V2(STC)66 /North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP-420-17-18**

दिनांक (Date): 31/03/2018 जारी करने की तारीख (Date of issue): 29/5/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

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

Arising out of Order-In-Original No **06/ADC/2017/RMG Dated: 31/10/2017**
issued by: Additional Commissioner Central Excise (Div-VII), Ahmedabad North

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

M/s Nirma University

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

(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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(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.

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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, 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 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 subject appeal is filed by M/s Nirma University ,S.G.Highway, Ahmedabad ,Dist.Ahmedabd.(hereinafter as the Appellant)against OIO No. 06/ADC/2017/RMG (hereinafter referred to as 'the impugned order) Passed by The Addll. Commissioner,CGST ,Ahmedabad-North (hereinafter referred to as 'the adjudicating authority') are engaged in the providing the taxable services, having S.T.Regn. No. AAATT6829NSD001.

2. Briefly stated facts of the case are that, the During the audit of the records for the F.Y 2010-11 to 2014-15, it was noticed that the appellant was providing the exempted services under 'Commercial Training & Coaching', and also providing the taxable services of 'Management Consultant', 'Technical Testing & Analysis' and 'Management & Repairs'. Therefore, they are required to maintain separate records. However, they have not maintained separate records and availed Cenvat credit in exempted services. Thus, they have violated the provisions of Rule 6(1) & Rule 6(2) of the CENVAT Credit Rules, 2004 (CCR, 2004) .They stated that the registration was obtained in Oct, 2011. They submitted calculation of the CENVAT credit wrongly availed totaling to Rs.12753638/-, they have reversed CENVAT amount Rs.68,57,740/- on dtd. 14.10.2015, and paid cenvat amount Rs.23,49,294/- vide challans along with interest Rs.5,49,904/-.it was noticed that the appellant had failed to calculate correct interest liability. The correct interest worked out to be Rs.50,71,395/. The appellant intentionally availed CENVAT credit on input services used in exempted services which is not admissible. They failed to file correct ST-3 returns for the period 2010-11 and never disclosed the above practice in the ST-3 returns. The fact came to the knowledge of the department only during the audit. Thus, the appellant was liable to penalty under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 76 of the Finance Act, 1994. ,under Section 77(2) of the Finance Act, 1994, under 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.SCN was issued for interest recovery, and decided vide above order.

3. Being aggrieved the Appellant has filed this appeal on the main grounds stated herein below;

i. That they were under the bona fide belief that CENVAT credit accumulated will not lapse and since they were also providing taxable service, they continued to avail & utilize the Cenvat credit of input services used in exempted services.

ii. During the period from 01.04.08 to 31.03.11, full credit was allowed on certain services under Rule 6(5) of the CCR, 2004, even if the services were partly used in exempted output services. The credit availed in the year 2009-10 to 2011-12 amounting to Rs.75,24,051/-, out of which eligible credit is Rs.33,63,673/- and during the same period they have utilized only Rs.23,44,708/- which is eligible for the said period. Further it is settled law that Cenvat credit prior to registration is allowed. In support they relied on following decisions;1. Metric Solution Pvt. Ltd.-2012(286) ELT 58 (T-Ahmd) 2. Well Known Polyester Ltd-2011-(267) ELT 221 3. M Portal India Wireless Solutions -2012(27) STR 134 (Kar.)

iii. Interest was paid on the amount of credit which was utilized from the date of utilization till the date of the payment. The interest is not payable on the amount which was never utilized till the reversal. Once the payment is made along with interest, the proceedings should be concluded. They placed reliance on citations: 2007(214) ELT A050, 2014(310) ELT 509 (Mad.), ELT 391 (Tri-Del), 1996(88) ELT 12 (SC). For the period after 16.3.2012, interest was paid on the credit taken and utilized For the year 2010-11 to 2011- 12, They have also reversed un-utilized Cenvat credit of Rs.69,94,657/-

iv. As in ST-3 return filed for the year 2011-12, the credit carried forward from earlier period was shown, suppression cannot be alleged. They relied on citations 2014(302) ELT 333 (Kar), 2013(294) ELT 260 (Tri-Ahmd), 2013(291) ELT 377 (Tri-Kokata).

v. Regarding limitation period, they contended that the demand for the period 2010-11 to 2014-15, SCN issued on 23.10.15 is time barred as suppression with intent to evade duty was not proved .Reliance is placed on decisions 1. 2007 (216) ELT 177 (SC); 2. 2009(14) STR 359 (Tri-Ahmd);

vi. Penalty under Rule 15(1) cannot be imposed as the Cenvat is not utilized and the entire Cenvat wrongly taken has been reversed. Reliance is placed on 1. 2015(323) ELT 273; 2. 2015(317) ELT 767 (Tr-.Del); 3. 2009(240) ELT 661(SC).

4. Personal hearing in this case was accorded on 02-02-2018, wherein Shri Vikramsinh Jhala, representive, appeared on behalf of the appellant and reiterated the submissions made in their appeal memorandum. He submitted few copies of the relevant case laws. He has filed additional written submission on 05-2-18.

5. I have carefully gone through the case records, facts of the case, OIO, copies of various case laws, and written submission made by the appellant at the time of personal hearing, and also additional written submission. Under the memorandum of appeal, the appellants have raised 3 issues as listed under:

a) Whether confirmation of the demand beyond a period of limitation is sustainable in law or otherwise
b) Whether recovery of interest on unutilized balance credit demanded from the date of taking the credit is justifiable or otherwise
c) Whether imposition of 100% penalty under Section 78 of the Finance Act, 1994 is justifiable or otherwise

I will take up the matter issue-wise.

6. <u>Limitation</u>

It is an admitted fact that the appellants were engaged in providing both taxable as well as exempted services and had taken cenvat credit on common input services. Thus, the provisions of Rule 6 of the Cenvat Credit Rules, 2004 come into play. The appellant's are nowhere contending that the credit amounting to Rs. 92,07,034/- is wrongly alleged as inadmissible in terms of the provisions of Rule 6 of the Cenvat Credit Rules, 2004. The demand is purely being contested on limitation on the count that the credit taken by them had been reflected in their ST-3 returns. In this regard, the onus of taking correct

credit has been cast upon the assessee by virtue of Rule 9(6) of the Cenvat Credit Rules, 2004 and the same reads as under:

> *"The manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit."*

In the instant case, I find that the appellants are no novice to the laws and procedures governing cenvat credit. They were taking cenvat credit on common input services, which was not in the knowledge of the department, and it was incumbent upon them to follow the procedure laid down under Rule 6 of the Cenvat Credit Rules, 2004 in such a situation. Under the self-assessment regime, the department had the right to trust the amnesty of the appellant and believe that they had been taking only the credit of input services used for providing taxable output services. It is only at the time of audit that it was noticed that they had taken cenvat credit on common input services which was the genesis of the present case. Thus, I find that the appellants have suppressed the vital facts that they were taking cenvat credit on the common input services and have also failed to discharge the onus cast upon them in terms of Rule 9(6) of the Cenvat Credit Rules, 2004 and as such the extended period is rightly invocable.

Reliance has been placed by the appellants on the case laws of M/s Swastik Engineering reported at 2014 (302) ELT 333 (Kar), M/s Gayatrishakti Paper & Boards Ltd, reported at 2013 (294) ELT 260 (T), M/s ITC Ltd reported at 2013 (291) ELT 377 (T), M/s Dynamic Ind Ltd reported at 2014 (35) STR 674 (Guj), M/s Ultra Cement Ltd. reported at 2016 (339) ELT 127 (T) and M/s Rajasthan Spg. & Wvg. Mills reported at 2009 (238) ELT 3 (SC). The sum and substance of all the said judgments revolves around the fact that the cenvat credit taken had been shown in the periodical returns. However, the present case is not regarding inadmissible cenvat credit but deals with a situation where the appellants failed to fulfil the obligation cast upon them under Rule 6 of the Cenvat Credit Rules, 2004 in circumstances where they had admittedly taken cenvat credit on common input services used both in exempted as well as taxable services. Thus, the case laws relied upon by the appellants are on a different footing and not applicable to the facts of the present case.

7. Interest on unutilized cenvat credit

It is the contention of the appellant that interest would be recoverable only on that portion of wrongly taken cenvat credit which has been utilized and no interest would be chargeable on the credit which was lying unutilized in balance. They have relied on the case laws of M/s Marutin Udyog Ltd. reported at 2007 (214) ELT A050 (SC), M/s Strategic Engineering P Ltd. reported at 2014 (310) ELT 509 (Mad), M/s Bill Forge P Ltd. reported at 2012 (26) STR 204 (Kar), M/s Gary Pharmaceuticals P Ltd. reported at

2013 (297) ELT 391 (Del), M/s Pearl Insulation Ltd. reported at 2012 (27) STR 337 (Kar), M/s Golaldas Images P Ltd. reported at 2012 (28) STR 214 (Kar), M/s Dynaflex P Ltd. reported at 2011 (266) ELT 41 (Guj), M/s Ashoka Metal Décor P Ltd. reported at 2010 (256) ELT 524 (All) and M/s Rana Sugar Ltd. reported at 2010 (253) ELT 366 (All)

The period involved in the present case is from 2010-11 to 2014-15. During the said period the provisions of Rule 14 of the Cenvat Credit Rules, 2004 were amended. I would like to reproduce the relevant text pertaining to the interest provisions:

Period from 1.4.10 to 16.3.2012

"Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries"

Period from 17.3.2012 to 28.2.2015

Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.

The above changes clearly indicate that for the period upto 16.3.2012, interest was chargeable if the cenvat credit was wrongly taken even though the same had not been utilized. With the amendment to the said rule w.e.f. 17.3.2012, interest was chargeable only if the wrongly taken cenvat credit had been utilized. The implications of the word 'OR' and 'AND' have been amply discussed by the Apex Court in the judgment of M/s Indo Swift Laboratories Ltd. reported at 2011 (265) ELT 003 (SC) of which the relevant text is reproduced under:

"15. *In order to appreciate the findings recorded by the High Court by way of reading down the provision of Rule 14, we deem it appropriate to extract the said Rule at this stage which is as follows :*

*"**Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded :-** Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."*

16. *A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.*

17. *We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that there*

CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest."

In view of the clear interpretation of the provisions of Rule 14 *ibid,* by the Apex Court, I find that for the period upto 16.3.2012, interest is chargeable even if the wrongly taken cenvat credit has not been utilized. Further, w.e.f. 17.3.2012, interest would be chargeable only if the wrongly taken cenvat credit has been utilized.

In the instant case, I find that out of the total amount of wrongly taken cenvat credit to the tune of Rs. 94,07,034/-, it is on record that the appellant's have reversed the cenvat credit of Rs. 68,57,740/- and the balance amount of Rs. 23,49,294/- was paid through GAR challan as mentioned at para 8 of the show cause notice. Thus, there is no doubt about the fact that the entire credit was not utilized and as such the interest is required to be re-computed as mentioned in the foregoing para.

In the instant case, the worksheet showing the interest calculation for the years 2010-11 and 2011-12 indicate that interest has been calculated from the date of taking credit till the date of payment. However, if such credit has not been utilized, interest would be chargeable only till 16.3.2012 i.e. prior to the amendment of Rule 14 of the Cenvat Credit Rules, 2004. There would be no interest liability on the same after 17.3.2012 if the same is lying unutilized in balance. Likewise, in respect of the wrongly taken credit pertaining to 2012-13, 2013-14 and 2014-15, interest is chargeable only on that portion of the wrongly taken cenvat credit which has been utilized. In this regard appellant have submitted following table.

	Show Cause Notice (SCN)		Our Calculation			
	Interest Base Amount	Interest	Ineligible credit utilized	Interest	Excess int as per SCN	Reason of Difference
2010-11	1308713	1317584	0	0	1317584	1) In SCN interest is calculated from the date of cenvat credit availed. Also interest rate is considered at 30% from 01/10/2014 onwards. We have not utilized a single penny out of ineligible credit during the said period, so liability to pay interest doesnt arise. 2) for the month of Oct'10 detay days for 18% int is calculated at 1456 days instead of 1426 days.
2011-12	2851677	2366374	0	0	2366374	
2012-13	1056687	674035	11612	5274	668761	We have utilised only Rs. 11,612/- out of ineligible credit and in SCN interest is calculated considering total utilized credit i.e. eligible+ineligible.
2013-14	1043413	483883	1043413	352874	131009	In SCN from 01/10/2014 onward rate of interest is taken at 30%.
2014-15	1314169	228519	1294265	191755	36764	1) We have utilised only Rs. 12,94,265/- out of ineligible credit and in SCN interest is calculated considering total utilized credit i.e. eligible+ineligible. 2) In SCN from 01/10/2014 onward rate of interest is taken at 30%.
Total		5070395		549904	4520491	

The appellant have submitted that, the adjudicating authority for FY 12-13 onwards calculated the interest only on the utilized amount. However, he has considered the balance of Credit available to the appellant legitimately, which was not required to be reversed, needs to be verified and if true no interest or penalty will be attracted. Therefore, Interest is to be paid on the ineligible amount utilized by them. The above submission needs to be verified and interest calculated as per my discussion above.

8. Penalty under Sec. 78

The appellant's have contended that equivalent penalty under Section 78 was not justified since there was no *malafide* on their part. In this regard, I have already found above that the appellants had suppressed the vital facts that they were taking cenvat credit on the common input services and have also failed to discharge the onus cast upon them in terms of Rule 9(6) of the Cenvat Credit Rules, 2004 and as such penalty under Rule 15(3) of Cenvat Credit Rules, 2004 read with Sec. 78 of the Finance Act, 1994 is imposable.

As regards the quantum of penalty imposable, I find that the Finance Act, 2015 was enacted on 14.5.2015 wherein Section 78B was inserted which reads as under:

"(1) Where, in any case,–

(a) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and no notice has been served under sub-section (1) of section 73 or under the proviso thereto, before the date on which the Finance Bill, 2015 receives the assent of the President; or

(b) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and a notice has been served under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under

sub-section (2) of section 73, before the date on which the Finance Bill, 2015 receives the assent of the President,

then, in respect of such cases, the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable."

In view of the above, I find that the provisions of amended Section 78 would be applicable. The proviso to amended Sec. 78 reads as under:

"Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined"

In the instant case, the details relating to the transactions have been recorded in the records and such cenvat credit has also been shown in the periodical returns and therefore, I find that the proviso will be applicable to the facts of the current case in respect of the credit taken during the period from 8.4.11 to 14.5.15.

9. In view of the above findings, I remand the case back to the adjudicating authority for the purpose of computing interest as specified hereinabove and recalculate the penalty under Rule 15(3) of Cenvat Credit Rules, 2004 read with Sec. 78 of the Finance Act, 1994.

10. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stand disposed off in above terms.

(उमा शंकर)
आयुक्त (अपील्स]

Attested

(K.K.Parmar)
Superintendent (Appeals)
Central tax, Ahmedabad.

date- /3/18

By Regd. Post Ad.

M/s. Nirma University ,
S.G.High Way,
Ahmedabad ,
Dist. Ahmedabd

Copy to :

1. The Chief Commissioner, CGST , Ahmedabad zone.
2. The Commissioner, CGST , Ahmedabad-North.
3. The Asstt.Commissioner,CGST ,Div-VII,Ahmedabad-North.
4. The Asstt.Commissioner(Systems),CGST, Ahmedabad-North.
5. Guard File.
6. PA file.