आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211264SW000000DCD7

स्पीड पोस्ट

/5363 To 5367

क फाइल संख्या : File No : GAPPL/COM/STP/96/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-49/2021-22**
दिनाँक Date : **27.12.2021** जारी करने की तारीख Date of Issue : **27.12.2021**

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

ग Arising out of Order-in-Original Nos. **22/ADC/2020-21/MLM dated 21.10.2020**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Sai Consulting Engineers Pvt. Ltd., Block - A, Sai House, Satyam Corporate Square, B. H. Rajpath Club, Bodakdev, Ahmedabad-380059.

Respondent- Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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 :

(i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 शुख्यशीर्ष 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 अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गत:–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(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 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

1. This order arises out of an appeal filed by M/s. Sai Consulting Engineers Pvt. Ltd., Block-A, Sai House, Satyam Corporate Square, Behind Rajpath Club, Bodakdev, Ahmedabad-380059 (hereinafter referred to as '*appellant*') against Order in Original No. 22/ADC/2020-21/MLM dated 21.10.2020 (hereinafter referred to as '*the impugned order*') passed by the Additional Commissioner, CGST& Central Excise, Commissionerate: Ahmedabad-North (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant was holding Service Tax Registration No. AADCS0481PST001 for providing taxable services as defined under Section 65B(44) of the Finance Act, 1994 and were also availing Cenvat Credit of duty paid on capital goods, inputs and input services as provided under the Cenvat Credit Rules, 2004.

2.1 Audit of the financial records of the appellant was undertaken by the departmental audit officers for the period from April, 2014 to June, 2017 and Final Audit Report No. 2311/2019-20 dated 23.08.2019 has been issued from F.No. CTA/04-80/Circle-VII/AP-48/2017-18 dated 23.08.2019. Based on the audit observations, a Show Cause Notice vide F.No. VI/1(b)/CTA/Tech-34/SCN-Sai Consulting/2019-20 dated 20.01.2020 was issued to the said appellant for demand and recovery of the Service Tax not paid/short paid as well as wrong availment of Cenvat Credit by them, on account of different points as discussed therein.

2.2 The show cause notice issued from F.No. VI/1(b)/CTA/Tech-34/SCN-Sai Consulting/2019-20 dated 20.01.2020 has been adjudicated by the adjudicating authority vide the impugned order, as briefly reproduced below:

(i) He confirmed the demand of Service Tax amounting to Rs. 3,63,334/-against the appellant [as per Revenue Para-1: Short payment of service tax by incorrect application of rate of service tax as per Point of Taxation Rules, 2011] and ordered to recover the same from them under the proviso to Section 73 (1) of the Finance Act, 1994, alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994.

(ii) He disallowed the Cenvat Credit amounting to Rs. 77,69,963/- wrongly availed and utilised by the appellant [as per Revenue Para-2: Wrong availment of cenvat credit on input services, i.e. rent-a-cab services] and ordered to recover the same from them

under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004, alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004.

(iii) He also disallowed the Cenvat Credit amounting to Rs. 18,15,663/- wrongly availed and utilised by the appellant [as per Revenue Para-5: Inadmissible Cenvat Credit taken on input service invoices after one year of issuance of such invoices] and ordered to recover the same from them under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004,alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004.

(iv) He also disallowed the Cenvat Credit amounting to Rs. 40,602/- wrongly availed and utilised by the appellant [as per Revenue Para-8: Inadmissible Cenvat Credit taken of Education Cess on CVD and SHE Cess on CVD] and ordered to recover the same from them under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004,alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004.

(v) Penalty of Rs. 3,63,334/- has been imposed on the appellant under the provisions of Section 78(1) of the Finance Act, 1994.

(vi) Penalty of Rs. 96,26,228/- has been imposed on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

3. Being aggrieved with the impugned order, the appellant preferred this appeal. The grounds of appeal are reproduced in following paragraphs.

3.1 The adjudicating authority has erred in confirming the recovery of Service Tax amount of Rs. 3,63,334/- by invoking extended period of limitation for the project management consultancy service and structural design service for the Sabarmati River Front Project. The appellant had raised two invoices both dated 31.03.2015 for the Project Management Consulting Services and Structural Design Services rendered by them, for Sabarmati River Front Project. These services were admittedly rendered by the appellant during the financial year 2004-05, but there were some differences between the appellant and the client, which were settled a long

time after the services were rendered and upon such settlement in financial year 2014-15, they raised the said invoices on 31.03.2015 and had charged Service Tax @ 8% (prevailing in F.Y. 2004-05). The Service Tax confirmed by the adjudicating authority at higher rate i.e. @ 12.36% (prevailing in March, 2015) in respect of the service rendered during F.Y. 2004-05, is not in accordance with the charging provision of Section 66 of the Finance Act, 1994.

3.1.1 Actually, the dispute and the claims were referred to arbitration, and ultimately, the award in arbitration was declared in the appellants favour. Therefore, after the arbitration award was rendered, the appellant have issued to invoices on 31.03.2015, for the services rendered in 2004-05.

3.1.2 The charge of service tax attracted at the time of providing a taxable service at the rate applicable when the service was rendered. The stage of payment of service tax i.e. the time when the liability of service tax is discharged, may be differed; but the charge of service tax is attracted the moment a taxable service is provided, and accordingly the liability to pay service tax in accordance with the rate applicable at the time of providing such service arises when taxable service was completely rendered.

3.1.3 The provisions of Rule 4(a)(i) of the Determination of the Point of Taxation Rules which is relied upon by the adjudicating authority is not applicable in the present case. In the present case, the appellant has raised invoices on 31.3.2015 for the services provided in year 2004-05 and thus, this is not a case where the invoices for the taxable service had been issued when the service was rendered but the payment was received after the change in the effective rate of tax.

3.1.4 It is clarified vide proviso to Rule 3(a) of this rules that where the invoice was not issued within the time period specified in Rule 4(a) of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provisions of the service. Under Rule 4(a) of the Service Tax Rules, 1994, a person providing taxable service was required to issue an invoice, a bill or a challan within 30 days from the date of completion of the taxable service. In the present case, the taxable service was completely rendered in the year 2004-05 and thus the provision for the taxable service was completed in F.Y. 2004-05 itself. The rate of service tax on the date of completion of provisions of service i.e. F.Y. 2004-05 was @ 8% and therefore the appellant was legally required to pay service tax accordingly.

3.1.5 The appellant has relied upon following judgments underwhich it was held that "*the date of rendition of taxable service is relevant for purpose*

of applying rate of tax".

- *Hon'ble High Court in the case of Commissioner of Service Tax Vs. Consulting Engineering Services (I) P. Ltd. [2013 (30) STR 586 (Del.)]*
- *Hon'ble CESTAT in case of Epic India Pvt. Ltd. [2014 (35) STR 948 (Tri. Del.)*
- *Hon'ble High Court in case of Vistar Construction Pvt. Ltd. [2013 (31) STR 129]*

3.1.6 Further, the appellant has also relied upon the following judgments underwhich it was held that "*the taxable event is the rendering of taxable service and the raising invoices and/or making payment cannot be considered a taxable event*".

- CCE & C, Vadodara-II Vs. Schott Glass India Pvt. Ltd. [2009 (14) STR 146 (Guj.)]
- Reliance Industries Ltd. Vs. CCE, Rajkot [2008 (10) STR 243 (Tri. Ahmd.)]

3.2 The adjudicating authority has also erred in confirming the recovery of Rs. 77,69,963/- being Cenvat Credit availed by the appellant of Rent-a-Cab Service used by the appellant as input service. The adjudicating authority held that Rent-a-Cab Service is not considered as input service in terms of the provisions of Rule 2(l) of the Cenvat Credit Rules, 2004.

3.2.1 The reference to the provisions of Rule 2(l) in a manner to suggest that exclusion Clause (B) of Rule 2(l) categorically excludes services provided by way of renting of a motor vehicle from the definition of input services in so far as they relate to a motor vehicle which is not capital goods and therefore all service providers who are not qualified to avail credit on motor vehicles as capital goods are not entitled to avail input service credit on renting of motor vehicle is incorrect.

3.2.2 The appellant has utilized taxis/cabs taken on hire for sending and transporting the appellant's employees, engineers and executives to various sites where taxable services were provided by the appellant. In the appellant's case, Rent-a-Cab service is provided by the Operators by using their vehicles. Thus, the services provided by the operators using their own vehicles do no relate to a motor vehicle which was not a capital goods; but the services provided by the operators are input services used by the appellant for execution of the projects and related works by the appellant, which is the appellants output service. Therefore, Rent-a-Cab service in such cases is undoubtedly an input service used by a provider of output service for providing an output service as specifically referred to in Rule 2(l)(i) of the Cenvat Credit Rules, 2004.

3.2.3 In the present case, we are admittedly a service recipient and the Motor Vehicles provided as Cabs are definitely capital goods for the Cab Operators within the meaning of Rule 2(a) of the Cenvat Credit Rules, 2004. Therefore, Rent-a-Cab Service provided by Cab Operators and used by the appellant is not covered under the exclusion clause "B" provided under Rule 2(l) of the Cenvat Credit Rules, 2004. As such the expression- "which is not a capital goods" appearing in the said exclusion clause would require examination vis-à-vis the service provider and not vis-à-vis the service recipient. As such the interpretation placed by the revenue on the exclusion clause to suggest that when motor vehicle are not capital goods, the credit of the same would not be inadmissible, is totally incorrect in as much as motor vehicles are admittedly capital goods in terms of the Rule 2(A) of the Cenvat Credit Rules for the service provider i.e. Cab Operator. In view of the decision rendered by the Hon'ble Tribunal in case of **Marvel Vinyls Ltd. reported in [2017 (49) STR 424 (Tri. Del.)]**, the proposal to deny the credit is absolutely without the authority of law.

3.2.4 When the main part of the definition says that any input service used for providing output service should be deemed as input service, any further interpretation restricting credit so as to nullify the main part of the definition thereby making provision of output service impossible appears to be not based on sound reasoning. The availment of credit is not confined or restricted to mere manufacture of goods, and therefore, all the activities in relation to business of manufacture were covered under Rule 2(l) which was of wider import in the context of the cenvat scheme as held by the Hon'ble High Court of Bombay in case of Dynamic Industries reported in [2014 (35) STR 674 (Guj.)].

3.2.5 It is recorded in the Show Cause Notice that the details of Cenvat Credit on Rent-a-Cab Service were noticed during the course of audit, on verification of Cenvat Register. Thus, there is no dispute on the fact that all transactions of Cenvat Credit on Rent-a-Cab Service were duly recorded and disclosed in the Cenvat register maintained by the appellant, and therefore, such transations were also reflected in the appellants ST-3 Returns. Accordingly, there would be no justification in seeking to reopen such concluded transactions of Cenvat Credit, when all such transactions were well within the knowledge of the proper Central Excise and Service Tax Officers during the entire period. The invocation of the extended period of limitation for recovery of credit is therefore an unauthorized action.

3.3 The adjudicating authority has erred in confirming the recovery of Cenvat Credit of Rs. 18,15,663/- on the ground that the Cenvat Credit of

Service Tax was taken on the basis of invoices after a period of more than one year from the date of issuance of such invoices; that as per the third proviso to sub-rule (1) of Rule 4 and the sixth proviso in sub-rule (7) of Rule 4 of Cenvat Credit Rules, the manufacturer or the provider of output service was not allowed to take Cenvat Credit after one year of the date of issue of any of the documents specified in sub-rule (1) of Rule 9 of the Cenvat Credit Rules; that the Cenvat Credit was wrongly availed and utilized by the appellant.

3.3.1 Prior to 1.9.2014, there was no time limit laid down under the Cenvat Credit Rules for taking Cenvat Credit within a particular period to be computed form the date of issue of the duty paying documents. Such restriction of six months was issued vide Notification No. 21/2014-CE (NT) dated 11.07.2014 (effective from 01.09.2014). But it is a settled legal position that any onerous condition or a restriction on a beneficial provision cannot be applied retrospectively unless it was specifically provided by the legislature that such restriction or onerous condition was applicable for past cases also. In the present case, however, there is no such intention or objective on part of the Government.

3.3.2 In Rule 57G of the erstwhile Cenvat Credit Rules, 1944, the time limit for taking Modvat Credit was laid down by virtue of Notification No. 16/94-CE(NT), but the Hon'ble Gujarat High Court has held in case of Baroda Rayon Corporation Ltd., [2014(306)ELT 551(Guj)] that such provision could not be applied to the transactions that took place during the prior period as otherwise it would amount to taking away a substantive right of credit. On this basis, the Notification to the extent it provided that credit under Rule 57G of the Rules had to be taken on or before 30th June, 1994 was quashed and set aside by the Hon'ble High Court. This principle is applicable in the present case also, because applying time limit of 1 year for the documents issued prior to 01.03.2015 would be in excess of the powers conferred upon the Central Government under the Cenvat Credit Rules, and any such interpretation would take away a substantive right vested in the assesses for the documents issued prior to 1.3.2015. From this angle also, the denial of credit for the reason of time limitation of 1 year for the documents issued prior to 01.03.2015 is unauthorized.

3.3.3 The cases where credit is not taken immediately upon receiving invoice of the supplier are listed at Annexure-B to the Show Cause Notice; but the delay in taking credit in these cases is only for the reason that the appellant had been following the practice of taking Cenvat Credit on any invoice only when the payment was made by the appellant for such invoice.

Further, most of the invoices were issued prior to 1.9.2014 and 1.3.2015, and therefore the time limit of 6 months, or 1 year as the case may be, from the date of invoice of taking credit is not applicable for such invoices. Many of the invoices are for capital goods, and in case of capital goods, 50% of the credit had to be taken in the subsequent year, and not in the year in which capital goods were received by the service provider. When all these facts are considered, it is clear that the figure of Rs. 18,15,663/- is excessive, because all the transactions at said Annexure-B are not affected by the amendments made in Rule 4(7) of the Cenvat Credit Rules, 2004.

3.3.4 The adjudicating authority has failed to appreciate while issuing the impugned order that the only question here is whether non-compliance of procedural condition while availing Cenvat Credit extinguishes the substantive right of availment of credit, if substantive right of availment of credit, if substantive conditions are fulfilled. In the landmark judgment of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others [1992 AIR 152 91 SSCR (3) 336], the Hon'ble Supreme Court has taken a view that "there are conditions some conditions may be substantive, mandatory and based on considerations of policy and some others may belong to the area of procedure. It may be erroneous to attach equal importance to the non-observation of all conditions irrespective of the purposes they were intended to serve". In the present case, there is no dispute on the fact that the appellant has received the duty paid inputs and the final product has been cleared on payment of duty. Therefore, the availment of credit by the appellant is legal and proper.

3.3.5 The transactions of Cenvat Credit shown at Annexure-B to the SCN were fully and truly recorded in the appellants Credit register, and utilization of such credit has also been reflected in the ST-3 Returns filed for the period in question. No objection has been raised from the jurisdictional office and consequently, the transactions stand concluded in the eye of law. The reopening of such transactions after such a long time is also not justified nor in the interest of justice.

3.4 The adjudicating authority has also erred in denying the Cenvat Credit of Rs. 27,068/- and Rs. 13,534/- being Education Cess as well as SHE Cess respectively on the tax invoices issued by M/s. Dell International Services India Pvt. Ltd. It is observed by the adjudicating authority that the said Cesses were no longer leviable by virtue of Notification No. 13/2012-Cus. and Notification No. 14/2002-Cus., both dated 17.3.2012 and consequently the Cenvat Credit of the same was inadmissible.

3.4.1 There is no dispute that notwithstanding exemption to such Cesses, the payment of Rs. 27,068/- and Rs. 13,534/- have been made towards Education Cess and SHE Cess respectively and the amounts so paid towards Cesses have not been returned or refunded by the Central Government. There have been cases where Central Excise duty or Service Tax was not payable on a transaction, or such liability was discharged by a person who was not actually liable to pay tax or duty. But when the tax was assessed and collected by the officers on such transactions, Cenvat Credit of such amount is always held to be admissible.

3.5 The decisions relied upon have not been considered by the adjudicating authority on a specious finding that such decisions have been accepted by the department because of the monetary limits fixed under the statute for filing an appeal. Hon'ble High Court in case of Lubi Industries LLP [2016 (337) ELT 179 (Guj)] held that adjudicating authority has no authority to ignore the binding judgment of superior Court especially when it is rendered in case of the same assessee. It was also held that even if decision of superior authority was not carried further in appeal on account of law tax effect, it is not open for the adjudicating authority to ignore the ratio of such decision. Hon'ble High Court of Karnataka in case of M/s. Mangalore Refinery [2016 (42) STR 6] also held similar views. It was also held in the following judgments that the lower authorities cannot ignore the decisions passed by appellate authorities or Courts and such practice is not appreciated and is contrary to law.

- M/s. Claris life sciences Ltd. reported at [2014 (305) ELT 282]
- M/s. Claris life sciences Ltd. reported at [2013 (298) ELT 45]
- M/s. E.I. Dupont India Pvt. Ltd. reported at [2014 (305) ELT 282]
- M/s. Claris life sciences Ltd. reported at [2016 (336) ELT 612]
- M/s. Kamalakshi Finance Corporation reported at [1991 (55) ELT 433 (SC)]
- M/s. Dharampal Satyapal Ltd. reported at [2018 (360) ELT 718 (Gau.)]

3.6 The invocation of extended period of limitation is also without jurisdiction in the facts of the present case, wherein all the transactions were fully and truly recorded in the appellant's statutory records and registers, and also in Returns filed with Range and Divisions offices, who has accepted all such transactions at the relevant time. Even in cases where certain information was not disclosed as the assessee was under a bona fide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court

in the case of Padmini Products and Chemphar Drugs & Liniments reported in [1989 (43) ELT 195 (SC)] and [1989 (40) ELT 276 (SC)] respectively. Hon'ble Supreme Court in case of Continental Foundation Jt. Venture Vs. CCE, Chandigarh reported in [2007 (216) ELT 177 (SC] also held that mere omission to give correct information was not suppression of facts unless it was deliberate and to stop the payment of duty.

3.6.1 In the present case, all the facts discussed in the SCN issued to the appellant were within the knowledge of the department right from day one and under this circumstances, the SCN issued to the appellant was barred by limitation and the adjudicating authority has erred in confirming the proposals of the SCN by invoking the larger period of limitation.

3.7 The imposition of penalty under the provisions of Section 78 of the Finance Act, 1994 also deserved to be set aside as there is no justification in demand of service tax leveled against the appellant in the present case. Penalty is quasi-criminal in nature and therefore, it cannot be imposed on mere assumptions and presumption or hearsay. Neither the facts of the case justify imposition of any penalty nor a specific allegation made in the Show Cause Notice for imposition of penalty on the appellant. Hon'ble Supreme Court in case of M/s. Hindustan Steel Limited reported in [1978 ELT (J159)] held that "penalty should not be imposed merely because it was lawful to do so. Only in cases where it is proved that the assessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not bona-fide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed.

4. The appellant was granted opportunity for personal hearing on 13.10.2021 through video conferencing. Shri Amal P. Dave, Advocate, and Shri Sudhanshu Bissa, Advocate, appeared for personal hearing as authorised representatives of the appellant. They re-iterated the submissions made in Appeal Memorandum. They also relied upon various case laws in support of their contentions, which were submitted as part of submissions during hearing.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in the Appeal Memorandum, oral submissions made by the appellant at the time of hearing and the case laws relied upon by the appellant in support of their contentions. The issues to be decided in the present appeal are as under:

(i) Whether the demand of Service Tax amounting to Rs. 3,63,334/- confirmed against the appellant towards "Short payment of service tax by incorrect application of rate of service tax as per Point of Taxation Rules, 2011", invoking the extended period of limitation under the proviso to Section 73 (1) of the Finance Act, 1994, is legally correct or otherwise?

(ii) Whether the Cenvat Credit availed and utilised by the appellant amounting to Rs. 77,69,963/- which was disallowed towards "Wrong availment of cenvat credit on input services, i.e. rent-a-cab services" and ordered to recover from them under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004, is legally correct or otherwise?.

(iii) Whether the Cenvat Credit availed and utilised by the appellant amounting to Rs. 18,15,663/-, which was disallowed towards "Inadmissible Cenvat Credit taken on strength of input service invoices after one year of issuance of such invoices" and ordered to recover from them under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004, is legally correct or otherwise?.

(iv) Whether the Cenvat Credit availed and utilised by the appellant amounting to Rs. 40,602/- which was disallowed towards "Inadmissible Cenvat Credit taken of Education Cess on CVD and SHE Cess on CVD" and ordered to recover the same from them under the proviso to Section 73 (1) of the Finance Act, 1994, read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004, is legally correct or otherwise?

(v) Whether the Penalty of Rs. 3,63,334/- imposed on the appellant under the provisions of Section 78(1) of the Finance Act, 1994, is legally correct or otherwise?

(vi) Whether the Penalty of Rs. 96,26,228/- imposed on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004, is legally correct or otherwise?.

6. I first take up the issue of demand of Service Tax amounting to Rs. 3,63,334/- confirmed against the appellant towards "Short payment of service tax by incorrect application of rate of service tax as per Point of Taxation Rules, 2011". As per the facts mentioned at Para-69 of the

impugned order, the taxable service on this issue were provided in F.Y. 2004-05, while the invoices for such services have been issued on 21.03.2015 and the payments against the said invoices have been made on 25/26.6.2015 i.e. after issuance of the invoices on 31.03.2015. In the meanwhile, the applicable rate of Service Tax had changed from 8% to 12.36% w.e.f. 1.4.2012 and the same rate remained applicable till 31.5.2015. These are not disputed by the appellant.

6.1 It is further observed that the adjudicating authority held that the point of taxation of taxable services provided by the appellant i.e. the point in time when a service shall be deemed to have been provided, was the date of issuance of invoices, in terms of the provisions of Rule 4(a)(i) of the Point of Taxation Rules, 2011. Since there was a change in the effective rate of tax and, accordingly, the appellant was liable to pay Service Tax at the rate of 12.36% i.e. the rate prevailing on the date of issuance of invoices.

6.2 Tthe provisions of Rule 4(a)(i) of the Point of Taxation Rules, 2011 are reproduced as under:

> "***4. Determination of point of taxation in case of change of rate of tax.***- *Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a change of rate of tax in respect of a service, shall be determined in the following manner, namely:-*
>
> *(a) in case a taxable service has been provided before the change of rate,-*
>
> *(i) where the invoice for the same has been issued and the payment received after the change of rate, the point of taxation shall be date of payment or issuing of invoice, whichever is earlier; or"*

6.3 I find that as per the contention of the appellant, the provisions of Rule 4(a)(i) of the Determination of the Point of Taxation Rules, 2011 is not applicable in the present case, in as much as, the appellant has raised invoices on 31.3.2015 for the services provided in year 2004-05 and thus, this is not a case where the invoices for the taxable service had been issued when the service was rendered but the payment was received after the change in the effective rate of tax. Further, the appellant has also contended that "It is clarified vide proviso to Rule 3(a) of the said rules that where the invoice was not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provisions of the service. Under Rule 4A of the Service Tax Rules, 1994, a person providing taxable service was required to issue an

invoice, a bill or a challan within 30 days from the date of completion of the taxable service. In the present case, the taxable service was completely rendered in the year 2004-05 and thus the provision for the taxable service was completed in F.Y. 2004-05 itself. Therefore, the appellant was legally required to pay service tax @ 8% which was applicable on the date of completion of provisions of service i.e. F.Y. 2004-05.

6.4 The provisions of Rule 3(a) of the Point of Taxation Rules, 2011 and Rule 4(a) of the Service Tax Rules, 1994 are reproduced as under:

> *"**3. Determination of point of taxation**.- For the purposes of these rules, unless otherwise provided, "point of taxation" shall be-*
>
> *(a) the time when the invoice for the service provided or agreed to be provided is issued:*
>
> *Provided that where the invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service;"*
>
> *"**4A. Taxable service to be provided or credit to be distributed on Invoice, bill or challan. (1)** Every person providing taxable service, not later than thirty days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, shall issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided and....."*

6.5 Further it is observed that the appellant has relied upon various judgments as mentioned in Para-3.1.5 above, under which it was held that "*the date of rendition of taxable service is relevant for purpose of applying rate of tax*". I have gone through the said judgments and find that:

- The Hon'ble High Court in the case of Commissioner of Service Tax Vs. Consulting Engineering Services (I) P. Ltd. [2013 (30) STR 586 (Del.)] held as reproduced below:

> *"**5.** The learned counsel for the appellant submitted that the view taken by the Gujarat High Court is not binding on this Court and based upon this submission he sought to place reliance on Rule 5B of the Service Tax Rules, 1994. He also placed reliance on Rule 4(a)(i) of the Point of Taxation Rules, 2011 as also Section 67A of the Finance Act, 1994.*
>
> ***6.** However, we find that none of these provisions are applicable in the facts and circumstances of the present case as Rule 5B of the Service Tax Rules, 1994 came into effect on 1-4-2011 and was out of the statute books on 1-7-*

2012. Section 67A of the Finance Act, 1994, was inserted in the said Act by virtue of the Finance Act, 2012 w.e.f. 28-5-2012. In the present case, the relevant period is April, 2003 to September, 2003. Therefore, none of the above provisions apply. Moreover, even Rule 4(a)(i) of the Point of Taxation Rules 2011 is not applicable because those Rules came into effect on 1-3-2011.

***7.** In the absence of any Rules, we will have to examine as to what is the taxable event. The taxable event as per the Finance Act, 1994 is the providing of the taxable service. In the present case, we find that not only were the services admittedly provided prior of 14-5-2003 but also the bills have been raised prior to 14-5-2003. The only thing that happened after 14-5-2003 was that the payments were received after that date. That, in our view would not change the date on which the taxable event had taken place. Since the taxable event in the present case took place prior to 14-5-2003, the rate of tax applicable prior to that date would be the one that would apply. In the present case, the rate of 5% would be applicable and not the rate of 8%. Consequently, we answer the question in favour of the respondent and against the appellant."*

The Hon'ble High Court in case of Vistar Construction Pvt. Ltd. [2013 (31) STR 129] held as reproduced below:

***"7.** On going through the said instruction and particularly para 3 thereof it appears that the view of the respondents is that service tax becomes chargeable on receipt of payment for the service whether or not the services are performed. This view is clearly wrong. We say so because the Supreme Court in the case of Association of Leasing & Financial Service Companies v. UOI :2010 (20) S.T.R. 417 (S.C.) has categorically held as under :*

"Thus, the impugned tax is levied on these services as taxable services. It is not a tax on material or sale. The taxable event is rendition of service."

***8.** Therefore, the taxable event, in so far as service tax is concerned, is the rendition of the service. That being the position, the taxable events in the present writ petition had admittedly occurred prior to 1-3-2008. At that point of time the rate of service tax applicable in respect of the services in question was 2% and not 4%, which came into effect only on or after 1-3-2008. In both the writ petitions the date of receipt of payments was subsequent to 1-3-2008 but that would not make any difference because it is not receipt of payment which is the taxable event but the rendition of service. In WP (C) 5636/2010 the relevant period is March, 2008 and in WP (C) 3632/2012 the relevant period is April, May and July, 2008.*

***9.** It should also be mentioned that at that point of time neither was Rule 5B of the Service Tax Rules, 1994 in effect nor was Section 67A of the Finance Act, 1994 inasmuch as the latter provision was inserted in 2012 which came in effect from 28-2-2012. Furthermore, even Rule 4(a)(i) of the Point of Taxation Rules, 2011 was not applicable to the facts of the present case inasmuch as those rules also came into effect much later in 2011. Recently, we had to consider a similar issue in Commissioner of Service Tax v. Consulting Engineering Services (I) Pvt. Ltd. in ST. Appl. 76/2012, decided on 14-1-2013 [2013 (30) S.T.R. 586 (Del.)] wherein we held that in the absence of any rules, we would have to examine as to what is the taxable event. In that context we had held that the taxable event as per the Finance Act, 1994 was the providing or rendition of the taxable services. This is exactly what the Supreme Court had held in Association of Leasing & Financial Service Companies (supra)".*

Hon'ble CESTAT in case of Epic India Pvt. Ltd. [2014 (35) STR 948 (Tri.

Del.)] also held that the date of rendition of taxable service is relevant for the purpose of applying rate of tax.

6.6 In the present case, I find that as per the facts recorded at Para-69 of the impugned order, the taxable service in the present case were provided in 2004-05 and the differential duty has been confirmed by the adjudicating authority vide the impugned order in terms of the provisions of Rule 4(a)(i) of the Determination of the Point of Taxation Rules, 2011. Accordingly, I find that the service rendered in the present case in 2004-05 which is prior to the date 01.03.2011 on which the Point of Taxation Rules, 2011 came into effect and hence, the provisions of Rule 4(a)(i) of the Point of Taxation Rules, 2011 would not be applicable.

6.7 Accordingly, respectfully following the decisions of the Hon'ble High Court and Hon'ble CESTAT as discussed in Para-6.5 above, I find that the date of rendition of taxable service will only be relevant for the purpose of applying rate of tax and hence, the demand of Service Tax amounting to Rs. 3,63,334/- confirmed by the adjudicating authority vide impugned order against the appellant towards "Short payment of service tax by incorrect application of rate of service tax as per Point of Taxation Rules, 2011" is not legally sustainable. Further, when the duty confirmed is set aside, there is no question of demand interest and imposition of penalty to that extent and accordingly they are also liable to be set aside.

7. As regards the issue of Cenvat Credit amounting to Rs. 77,69,963/- disallowed towards wrong availment of cenvat credit on input services, i.e. rent-a-cab services, I find as per the findings of the adjudicating authority, *"the Exclusion (B) under the definition of Rule 2(l) of Cenvat Credit Rules, 2004 categorically excludes services related to renting of a motor vehicle, from the definition of 'input services' in so far as they relate to a motor vehicle which is not a capital goods. Therefore, that all service providers who are not qualified to avail credit on motor vehicle as capital goods, are not entitled to avail input service credit on 'renting of motor vehicle'."*

7.1 It would be pertinent to examine the provision of Rule 2(l) of Cenvat Credit Rules, 2004 which is reproduced as under:

"Rule 2(l) "input service" means any service, -

(i) used by a provider of [output service] for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to modernisation, ..., inward transportation of inputs or capital goods and outward transportation upto the place of removal;

*[**but excludes**], -*

[(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or]

***(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods**; or"*

7.2 I find as per the contention of the appellant that "the Rent-a-Cab Service provided by Cab Operators and used by the appellant is not covered under the exclusion clause "B" provided under Rule 2(l) of the Cenvat Credit Rules, 2004. As such the expression- "which is not a capital goods" appearing in the said exclusion clause would require examination vis-à-vis the service provider and not vis-à-vis the service recipient. As such the interpretation placed by the revenue on the exclusion clause to suggest that when motor vehicle are not capital goods, the credit of the same would not be inadmissible, is totally incorrect in as much as motor vehicles are admittedly capital goods in terms of the Rule 2(A) of the Cenvat Credit Rules for the service provider i.e. Cab Operator". Further, the appellant has also relied upon the decision rendered by the Hon'ble tribunal in case of Marvel Vinyls Ltd. reported in [2017 (49) STR 424 (Tri. Del.)].

7.3 I have gone through the said judgment in case of Marvel Vinyls Ltd. reported in [2017 (49) STR 424 (Tri. Del.)], underwhich Hon'ble Tribunal held as under:

*"**6.** However, I find flaw in the above interpretation of appellate authority. He has rightly observed that the exclusion is only in respect of that motor vehicle which is not a capital goods. However, he has not extended the benefit to the assessee by observing that the same is not a capital goods for the appellant. A person who is receiving the input services of renting of immovable property, can never avail Cenvat credit of duty paid on the motor vehicles and as such motor vehicle can never be a capital good to the recipient of the said services. The motor vehicle will always be a capital goods or otherwise for the person who is providing the services. For service provider falling under the category of renting of motor vehicle the motor vehicle would always be a capital goods. As such the expression - "which is not a capital goods appearing in the said exclusion clause would require examination vis-à-vis the service provider and not vis-à-vis the services recipient." As such the interpretation of the lower authorities that motor vehicle are not capital goods for the services recipient cannot be appreciated inasmuch as motor vehicles are admittedly capital goods in terms of the Rule 2(A) of Cenvat Credit Rules."*

7.3.1 Further, I have also gone through the judgment of Hon'ble CESTAT in case of Aban Offshore Ltd. Vs. Commissioner, CGST, Mumbai West [2020 (43) GSTL 213 (Tri. Mumbai), relied upon by the appellant and find that the Hon'ble Tribunal in the said case also held as under:

*"**5.**The issue before this Tribunal is whether the appellant has correctly availed Cenvat credit on Short-term accommodation in hotels, Rent-a-cab and Outdoor catering services for the period from April, 2015 to March, 2016.*

***Short-term accommodation in hotels**:*

In respect of the said service, the appellant submitted that .....is in relation to the output service being provided by the appellant.

On perusal of the records, I find that ..... and therefore, Cenvat credit availed on the same is admissible.

Rent-a-cab service:

The appellant submitted that they have registered themselves in mining services for charter hire of rig to ONGC. As an operational requirement, they are required to send surveyors, naval officers for surveys and naval security clearance on their rigs. In this regard, they are required to hire vehicles for transporting such officers. Further, the appellant is also required to provide conveyance for inspection agencies for various inspections such as fire safety, underwater inspection, tubular inspection; thickness gauging inspection, etc. Therefore, the appellant has availed Cenvat credit on the said input service.

I find that the Tribunal in Marvel Vinyls Ltd. v. CCE, Indore as reported in 2017 (49) S.T.R. 424 (Tri.-Del.), while considering the amended definition of input service has already decided the matter in favour of the assessee and held that the definition does not provide for total exclusion, but only restricts those cases where the vehicles do not qualify as capital goods. From the recipient's point of view, motor vehicle can never be capital goods and would never be eligible for credit, if a narrow interpretation is given. I do not find any justification to take a contrary view and therefore, following the ratio of the aforesaid decision, Cenvat credit on 'rent-a-cab' is allowed."

7.3.2 Further, I also find that the Hon'ble Tribunal, Ahmedabad in a similar case of M/s. Schott Kaisha Pvt. Ltd. Versus CCE & ST, Vadodara-II, vide Final Order No. A/11416/2019 dated 26.07.2019 also held that:

> *"4. Heard both the sides and perused the records. I find that the lower authority have denied the cenvat credit only on the ground that the rent-a-cab service was excluded from 01.04.2011. The exclusion entry under Clause (B) is reproduced below:*
>
> > *"(B) Services 'provided by way of renting of a motor vehicle, insofar as they relate to a motor vehicle which is not a capital goods; or"*
>
> *5. From the above exclusion clause in respect of rent-a-cab it is clear that not all the rent-a-cab service is excluded however whether the rent-a-cab service is provided by the service provider by a motor vehicle which is a capital goods for the service provider such rent-a- cab service is an admissible input service and same was not excluded. On perusal of the order, I find that there is no discussion and finding on interpretation of the aforesaid complete entry of rent-a-cab provided under exclusion clause, therefore, the matter needs to be remanded. Accordingly, I set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order within a period of three months from the date of this order."*

7.4 In view of the aforementioned judgments of Hon'ble Tribunal, I also find that the expression "which is not a capital goods" appearing in the said exclusion clause would require examination vis-à-vis the service provider and not vis-à-vis the services recipient. Whereas, in the present case, it is observed that the adjudicating authority, while disallowing Cenvat Credit of Rs. 77,69,963/-, contended that "*the Exclusion (B) under the definition of Rule 2(l) of Cenvat Credit Rules, 2004 categorically excludes services related to renting of a motor vehicle, from the definition of 'input services' in so far as they relate to a motor vehicle which is not a capital goods. Therefore, that all service providers who are not qualified to avail credit on motor vehicle as capital goods, are not entitled to avail input service credit on 'renting of motor vehicle'.*" Accordingly, the said contention of the adjudicating authority, while passing the impugned order, is legally not sustainable on merit.

7.5 Further, it is observed that the appellant has also relied upon the judgment of Hon'ble Tribunal passed in case of Marvel Vinyls Ltd. reported in [2017 (49) STR 424 (Tri. Del.)] in support of their contention, during the adjudication proceedings. However, I find that the adjudicating authority has neither recorded any findings nor discussed the same in the impugned order. Further, it is also observed that the appellant has not produced their

submission and relevant documentary evidence, at any point of time, before the adjudicating authority so as to examine the expression 'which is not a capital goods' in the exclusion clause vis-à-vis the service provider.

7.6 In view of the above discussion, I find that there is no discussion and finding recorded by the adjudicating authority in the impugned order, on interpretation of the complete entry of rent-a-cab provided under exclusion clause and hence, it would be proper to remand the matter to the extent of Cenvat Credit of Rs. 77,69,963/- disallowed vide impugned order towards wrong availment of cenvat credit on input services, i.e. rent-a-cab services, to the adjudicating authority to examine the issue in its totality and decide it afresh, following the principle of natural justice.

8. Further, as regards the issue of Cenvat Credit amount of Rs. 18,15,663/-, disallowed towards "Inadmissible Cenvat Credit taken on strength of input service invoices after one year of issuance of such invoices", I find that as per the contention of the adjudicating authority, the appellant has taken cenvat credit of service tax paid on invoices (received during the period from 2014-15 to June-2017) after a period of more than one year of the date of issuance of such invoice, which is not correct in term of the third proviso to sub-rule (1) of Rule 4 and the sixth proviso in sub-rule (7) of Rule 4 of Cenvat Credit Rules, 2004. Further, it is also mentioned that during the period 1.9.2014 to 1.03.2015, the prescribed period was 'six months' instead of 'one year'.

8.1 I have gone through the provisions of Cenvat Credit Rules, 2004 and find that the third proviso to sub-rule (1) of Rule 4 of CCR, 2004 as well as the sixth proviso in sub-rule (7) of Rule 4 of Cenvat Credit Rules, 2004 have been inserted (w.e.f. 1.09.2014) by Notification No. 21/2014-CE (NT) dated 11.07.2014. Subsequently, the prescribed period of 'sixth months' have been substituted by 'one year' vide Notification No. 6/2015-CE (NT) dated 1.03.2015. Further, I find that there is no dispute raised by the adjudicating authority as regards the fact submitted by the appellant that prior to 01.09.2014, there was no specific time limit laid down under Cenvat Credit Rules for taking Cenvat Credit from the date of issue of the duty paying documents.

8.2 Further, I find as per the contention of the appellant that there was no time limit laid down under the Cenvat Credit Rules during the period prior to

1.9.2014 for taking Cenvat Credit from the date of issue of the duty paying documents. It is a settled legal position that any onerous condition or a restriction on a beneficial provision cannot be applied retrospectively unless it was specifically provided by the legislature that such restriction or onerous condition was applicable for past cases also. In the present case, there appears to be no such intention or objective on part of the Government. Accordingly, the appellant contended that the denial of credit for the reason of time limitation of 1 year for the documents issued prior to 01.03.2015 is unauthorized.

8.3 The appellant has also relied upon judgment of Hon'ble Gujarat High Court issued in case of Baroda Rayon Corporation Ltd. [2014 (306) ELT 551(Guj)], involving a similar issue of Modvat Credit under the provisions of Rule 57G of Central Excise Rules, 1944 wherein the time limit for taking Modvat Credit was laid down by virtue of Notification No. 16/94-CE(NT). In the said decision, Hon'ble High Court has held that such provision could not be applied to the transactions that took place during the prior period as otherwise it would amount to taking away a substantive right of credit.

8.3.1 It is observed that the appellant has also made the said submission as mentioned in above para, before the adjudicating authority during the adjudication proceedings, relying upon the said judgment of Hon'ble Gujarat High Court. However, I find that the adjudicating authority has neither discussed nor recorded any findings in the impugned order as regards the applicability of the principles laid down by the Hon'ble High Court to the facts of the present case.

8.3.2 Further, I also find that Hon'ble CESTAT, Ahmedabad in a similar case of M/s. N R Agarwal Industries Ltd. Versus C.C.E. & S.T. Vapi, vide Final Order No. A/12609/2021 issued on date 14.12.2021 also held as under:

> *5. I find that there is no dispute that the appellant have availed the cenvat credit after one year from the date of issue of invoices. However, the dates of issue of invoices are undisputedly prior to the amended Rule 4(1) whereby the time limit of six months/ one year from the date of issue of invoices was fixed for availing the cenvat credit. In various judgments, it has been held that when on the date of issue of invoices, the time limit for taking credit was not prescribed, therefore, in respect of those invoices, the subsequent amendment stipulating the time limit for availing the credit shall not apply. The relevant judgment is cited below:*

• *Vijay Kumar Srivastaw Vs CCE & ST Daman (Final Order No. 11657-11658/2021)*

"4. I have heard both the sides and perused the records. I find that the major issue to be decided is that the cenvat credit was availed after 01.09.2014, in respect of invoices issue prior to 01.09.2014. In the light of the amendment notification no 21/2014-CE(N.T.) whether the claim of cenvat credit is time barred. I find that though there are various decision on the issue however, the Division Bench in the case of BHARAT ALUMINIUM COMPANY LTD. V/S. JOINT COMMISSIONER OF CENTRAL EXCISE, CENTRAL TAX GOODS AND SERVICE TAX. held that the limitation of 6 months provided as per notification no 21/2014-CE(N.T.) is not applicable in cases where the invoices were issued before the notification came into effect i.e. 01.09.2014. the Delhi bench in said case has relied upon the judgment of Delhi High Court in the case of GLOBAL CERAMICS PRIVATE LIMITED AND ORS.-2019-TIOL-1129-HC-DEL-CUS. The relevant para of said judgment of BHARAT ALUMINIUM COMPANY LTD. (Supra) is reproduced below.

5. Having expressed our anguish, we note that the issue is no more res Integra. Reliance can be placed to the following decisions; (i) Indian Potash Ltd. vs Commissioner of Central GST, Meerut [2018 (10) TMI 1367-CESTAT Allahabad] (ii) Hindustan Coca Cola Beverages Pvt. Ltd. vs. Commissioner of Central Tax [2018 (10) TMI 1366- CESTAT Bangalore] (iii) Industrial Filters & Fabrics Pvt. Ltd. vs. CGST & CE, Indore[2019 (1) TMI 1426- CESTAT New Delhi] (iv) Suryadev Alloys and Power Pvt Ltd. vs. Commissioner of GST & Central Excise, Chennai [2018 (11) TMI 1019-CESTAT Chennai] 4 E/53851- 53852/2018-[DB] (v) Umesh Engineering Works vs. Commissioner of Central Tax, Bengaluru West [2019 (1) TMI 1158- CESTAT Bangalore] (vi) Sarda Energy and Minerals Ltd. vs. CCE & ST, Raipur [2019 (4) TMI 473- CESTAT New Delhi] Wherein it was clearly held that the six month limitation provided with effect from 01/09/2014 would not apply to the cenvatable invoices issued prior to said date. The other decisions relied upon by the Ld. Advocate are also to the same effect but multiplying the precedent decisions would not make a difference as it is a settled law. Further, not only various Tribunals' decisions but Hon'ble Delhi High Court also in case of Global Ceramics Private Limited and Ors. Vs. The Principal Commissioner of Central Excise and Ors. W.P. (C) 6706/2016 and W.P. (C) 9152/2016 has also observed to the same effect in paragraph 11.4 of their decisions.

6. As such, we find that the issue is no more res Integra and stands settled in favour of the assessee. However, the fact that the invoices in question were prior to 01/09/2014 is required to be verified. The Original Adjudicating Authority is directed to do so, with the association of appellant to whom an opportunity would be given.

4.1 In view of the above decision which is based in Delhi High Court judgment of GLOBAL CERAMICS PRIVATE LIMITED AND ORS (supra), I am of the view that the appellant is entitled for the Cenvat Credit since all the invoices on which cenvat credit was claimed were issued prior to 01.09.2014."

6. From the above judgement it can be seen that the identical issue has been considered by this Tribunal and held that in respect of invoices issued prior to the amendment, the time limit prescribed in the amended Rule 4(1) and 4(7) shall not apply. Accordingly, the appellant are entitled for the cenvat credit. The impugned order is set aside. Appeal is allowed."

8.4 It is further observed that the appellant has also raised their contention that many of the invoices are for capital goods, and in case of capital goods, 50% of the credit had to be taken in the subsequent year, and not in the year in which capital goods were received by the service provider. The appellant has also relied upon the judgment in case of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others [1992 AIR 152 91 SSCR (3) 336], underwhich the Hon'ble Supreme Court has taken a view that "there are conditions some conditions may be substantive, mandatory and based on considerations of policy and some others may belong to the area of procedure. It may be erroneous to attach equal importance to the non-observation of all conditions irrespective of the purposes they were intended to serve". Accordingly, in the present case, when there is no dispute on the fact that the appellant has received the duty paid inputs and the final product has been cleared on payment of duty, the availment of credit by the appellant is legal and proper.

8.4.1 I find that the contentions as mentioned in Para-8.4 above were also raised by the appellant before the adjudicating authority during adjudication proceedings. However, the adjudicating authority has neither discussed nor recorded any findings in the impugned order, in respect of the said facts produced by the appellant as well as regarding the applicability of the ratio of the said judgment of the Hon'ble Supreme Court to the facts of the present case.

8.5 In view of the above discussion, I find that while deciding the issue of Cenvat Credit of Rs. 18,15,663/- taken on input service invoices after one year of issuance of such invoices by the appellant, all the facts and relevant aspects have not been examined in totality by the adjudicating authority. Accordingly, it would be proper to remand back the matter to the extent Cenvat Credit Rs. 18,15,663/-, disallowed vide impugned order towards "Inadmissible Cenvat Credit taken on input service invoices after one year of issuance of such invoices", to the adjudicating authority to decide it afresh, following the principles of natural justice.

9. Further, as regards the issue of Cenvat Credit of Rs. 40,602/- disallowed vide the impugned order towards "Inadmissible Cenvat Credit taken of Education Cess on CVD and SHE Cess on CVD", I find that the adjudicating authority has disallowed Cenvat Credit of Education Cess of Rs. 27,068/- & Secondary and Higher Secondary Education Cess (SHEC) on CVD of Rs. 13,534/- [amounting to total Rs. 40,602/-] taken by the appellant in respect of Tax Invoices issued by M/s. Dell International Services India Pvt. Ltd., a SEZ Unit, M-4, SIPCOT Industrial Park, Tamilnadu during F.Y. 2014-15.

9.1 On going through the relevant provisions, I find that any goods removed from a SEZ Unit to the Domestic Tariff Area are chargeable to duties of Customs under Customs Tariff Act, 1975, as leviable on such goods when imported. Further, the Education Cess on imported goods is leviable under Section 91 read with Section 94 of the Finance (No. 2) Act, 2004 (23 of 2004) and the SHE Cess on imported goods is leviable under Section 136 read with Section 139 of the Finance Act, 2007 (22 of 2007).

9.2 Further, I have gone through the provisions of Rule 3 of the Cenvat Credit Rules, 2004 and find that Cenvat Credit in respect of Education Cess leviable under Section 91 read with Section 94 of the Finance (No. 2) Act, 2004 (23 of 2004) and SHE Cess leviable under Section 136 read with Section 139 of the Finance Act, 2007 (22 of 2007) is not admissible.

9.3 Accordingly, I find that the appellant has wrongly availed and utilised CENVAT credit of Rs. 40,602/- of Edu. Cess and SHE Cess, which is not admissible in terms of the provisions of Rule 3(1) of the Cenvat Credit Rules, 2004. Further, it is observed that the appellant at no point of time disclosed the fact of wrong availment and utilisation of Cenvat Credit to the department and this fact was detected only during audit. Accordingly, I find that the appellant has taken the inadmissible credit, in contravention of the provisions of Cenvat Credit Rules, 2004 by resorting to suppression and misrepresentation and hence, the same is correctly held liable to be recovered under Rule 14(1)(ii) of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994, by the adjudicating authority vide impugned order the invoking extended period, alongwith interest thereon under the provision of Section 75 of the Finance Act, 1994. Further, it is observed that all the above-mentioned acts of contravention of the provisions of the Finance Act and Rules made

thereunder have been committed by the appellant with intent to wrongly avail the Cenvat Credit and thereby they have rendered themselves liable for penalty under Section 78 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

10. On careful consideration of the relevant legal provisions and submission made by the appellant, I pass the Order as per details given below:

(i) As regards the demand of Service Tax amounting to Rs. 3,63,334/- against the appellant towards "Short payment of service tax by incorrect application of rate of service tax as per Point of Taxation Rules, 2011", which has been confirmed by the adjudicating authority alongwith interest and penalty, is not sustainable on merits, as discussed in Para-6.1 to Para-6.7 above. Accordingly, the impugned order is set aside and appeal allowed to that extent. Further, when the duty confirmed is set aside, there is no question of penalty to that extent.

(ii) As regards the issue of Cenvat Credit of Rs. 77,69,963/- availed by the appellant on input services, i.e. rent-a-cab services, which has been disallowed and ordered to recover the same with interest thereon and also imposed penalty on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 by the adjudicating authority, I set aside the impugned order to that extent and remand back the matter to the adjudicating authority to examine the said issue on merits as discussed in Para-7.1 to Para-7.6 above and decide it afresh, following the principles of natural justice.

(iii) As regards the issue of Cenvat Credit of Rs. 18,15,663/- taken on input service invoices after one year of issuance of such invoices, which has been disallowed and ordered to recover the same with interest thereon and also imposed penalty on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 by the adjudicating authority, I set aside the impugned order to that extent and remand back the matter to the adjudicating authority to examine the said issue on merits as discussed in Para-8.1 to Para-8.5 above and decide it afresh, following the principles of natural justice.

(iv) As regards the issue of Cenvat Credit of Rs. 40,602/- taken by the appellant of Education Cess on CVD and SHE Cess on CVD, which has been disallowed and ordered to recover the same with interest thereon and also imposed penalty on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 by the adjudicating authority, as discussed in Para-9.1 to Para-9.3 above, I do not find any merit in the contention of the appellant and impugned order to that extent is held to be as per law. Accordingly, the impugned order is upheld to that extent and appeal filed by the appellant is rejected.

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

27th December, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 27th December, 2021

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D

To,
M/s. Sai Consulting Engineers Pvt. Ltd.,
Block-A, Sai House,
Satyam Corporate Square,
Behind Rajpath Club, Bodakdev,
Ahmedabad-380059

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Commissionerate:Ahmedabad-North.
3. The Deputy /Asstt. Commissioner, Central GST, Division-VI, Commissionerate:Ahmedabad-North.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Commissionerate:Ahmedabad-North.
5. Guard file
6. PA File