सत्यमेव जयते

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
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DIN-20220664SW0000919069

स्पीड पोस्ट

1762 To 1766

क फाइल संख्या : File No : GAPPL/COM/CEXP/578/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-09/2022-23**
दिनाँक Date : **15.06.2022** जारी करने की तारीख Date of Issue : **17.06.2022**

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

ग Arising out of Order-in-Original Nos. **05/ADC/MLM/2021-22 dated 31.05.2021**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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

Appellant- M/s. Aculife Healthcare Pvt. Ltd., Survey No. 538 to 369, 383 to 399, 401 and 402, Village-Sachana, Viramgam, Ahmedabad-382150.

Respondent- The 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 :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

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

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

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

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner 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

M/s. Aculife Healthcare Pvt. Ltd., Survey No. 358 to 369, 383 to 399, 401 and 402, Village-Sachana, Viramgam, Ahmedabad-382150 (hereinafter referred to as '*the appellant*') have filed the instant appeal against the OIO No.05/ADC/MLM/2021-22 dated 31.05.2021 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that in pursuance of Hon'ble Gujarat High Court Order dated 20.04.2015, the Healthcare Division of M/s. Nirma Ltd had demerged from M/s. Nirma Ltd and started functioning under the name M/s. Aculife Healthcare Pvt. Ltd. During EA-2000 of the records of M/s. Nirma Ltd (Healthcare Division) for the period April 2014 to June, 2015, and of M/s. Aculife Healthcare Pvt. Ltd for the period July, 2015 to March 2016, together conducted by erstwhile Audit Commissionerate-II, Ahmedabad, certain discrepancies were noticed. FAR No.1084/2016-17 dated 14.06.2017 was issued wherein nine audit paras were raised and based on the audit observation, SCN No.VI/1(d)-CTA/05/Cir-VI/Nirma-SCN/17-18 dated 29.09.2017, was issued by the Commissioner CGST (Audit), Ahmedabad. The appellant, thereafter, opted for SVLDRS Scheme-2019 and accordingly, a Discharge Certificate was issued to the appellant after payment of the applicable dues.

2.1 For the subsequent period from F.Y. 2016-17 and F.Y. 2017-18, information was called by the audit officers and the appellant vide letters dated 08.06.2018 & 03.07.2018, submitted the required information. On scrutiny of the information provided, it was noticed that the appellant had continued with certain discrepancies, pointed out in the earlier Audit report vide FAR No.1084/2016-17. Audit Commissionerate, therefore, issued subsequent Final Audit Report dated 14.06.2017, mentioning following discrepancies:-

Para 2: The appellant, engaged in manufacture of both non-exempted and exempted goods, in the F.Y. 2016-17 has exercised the option under Rule 6(3) for payment /reversal of proportionate amount of cenvat credit of input/input services used in non-exempted and exempted goods. However, it appeared that the appellant, during April, 2016 to March, 2017, has taken and utilized the credit of **Rs.64,12,601/-** used exclusively in manufacture of exempted goods, which is not admissible in terms of Rule 6(1) of the CCR, 2004.

Para 3: During April 2017 to June 2017, the appellant, even after exercising the option under Rule 6(3) (i) of the CCR, 2004, took cenvat credit of input services used in the manufacture of dutiable/ exempted goods and trading activity and failed to pay an amount of Rs.97,640/- @ 6% of the value of traded goods.

Para 9: CERA audit was conducted in the month of August, 2017 and the CERA officers raised an objection that in F.Y. 2016-17 and F.Y. 2017-18, the appellant had recovered certain amount from their employees under the head "Notice Salary Recover/ Indemnity Bond Recovery" on which they failed to pay service tax amount of Rs.5,13,524/- and Rs.1,32,757/- respectively. The JAC, vide letter dated 27.06.2017, asked the appellant to pay the service tax alongwith interest. Accordingly, the appellant paid Rs.5,13,524/- under protest, but interest on said amount and remaining tax liability alongwith interest was contested and not paid.

3. Based on the above revenue paras, a periodical Show Cause Notice (SCN) No.VI/1(d)-CTA/05/Cir-VI/Nirma-SCN/17-18 dated 29.09.2017, was issued proposing recovery of cenvat credit amount of Rs.64,12,601/- alongwith interest under Section 11A and 11AA and penalty under Section 11AC, on account of para-2; recovery of amount Rs.97,640/- and appropriation of said amount already paid was proposed, alongwith interest of Rs.14,761/- and penalty under Section 11AC on account of para-3. Service tax amount of Rs.6,46,281/- alongwith interest and imposition of penalty under Section 78(1) of the F.A., 1994, on account of para-9 was also proposed. The said SCN was adjudicated vide the impugned order, wherein the demand was confirmed and appropriation of amount already paid was ordered; interest was ordered and appropriated wherever paid. Penalty u/s 11AC on account of para-2 & para-3 was imposed and penalty of Rs.64,628/- was also imposed under Section 76 of the Finance Act, 1994, on account of para-9 of audit observations.

4. Aggrieved by the impugned order, the appellant had preferred the present appeal against the confirmed demand, primarily on following grounds:-

- The credit of Rs.59,60,955/- pertains to exempted goods, which are exported and domestically cleared. However, the clearances made for export, SEZ/EOU or EHTP & STP or to UN agencies are zero rated goods, hence, should be treated as excisable and not exempted. So the final goods which are exempted by virtue of exemption notification issued under Section 5 of the CEA, 1944, cleared for home consumption are excisable goods and the provisions of Rule 6(1) (2) & (3) is not applicable and resultantly credit pertaining to goods which are exported are not required to be reversed as per the exclusion provided under Rule 6 (6) (v) of the CCR, 2004. They claim that in their own case they reversed the cenvat by treating turnover of export as exempted clearance but later they re-calculated the amount as per formula and reversed the excess amount. They subsequently filed refund which was granted vide OIA No.AHM-EXCUS-002-APP-16-2019-20 dated 31.05.2019. Therefore denial of credit of Rs.64,12,601/- treating the exports as exempted clearance, is not justifiable. They relied on catena of decisions some of them are mentioned below:-
  - Tamil Nadu (Madras State) Handloom Weavers Cooperative Society Ltd- 1978 ELT (J.57)
  - Wallace Flour Mills – 1998 (004) ELT (0598) (SC)
  - Repro India Ltd- 2009 (235) ELT 614 (Bom)
  - Sharp Menthol India – 2010 (252) ET 536 (T-Mum)
- With effect from 01.04.2017, they opted to pay 6% of the value of exempted goods instead of formula based reversal in terms of Rules 6(3A). However, due to changeover in the option and due to oversight and under bonafide mistake the reversal of 6% of the value of traded goods was not done. However, subsequently, amount of Rs.97,640/- was paid on 23.05.2018 before issuance of SCN, and interest of Rs.14,761/- was paid on 26.04.2019, one month from the issuance of SCN, hence penalty of Rs.9,764/- imposed u/s 11AC is not sustainable.
- The amount of notice pay is recovered from the salary of employee, who do not serve the mandatory notice period as per the employment agreement. Such activity is outside the ambit of service and outside the purview of declared service. They claim in their own case Commissioner(A) vide OIA No.VAD-EXCUS-001-APP-341/2016-17 dated 21.09.2016 has set-aside such demand and similar decision was taken in the case of GSFCL vide OIA No. VAD-EXCS-003-APP-393/16-17 dated 20.10.2016. They placed reliance on following decision:-
  - GET&D India Ltd.- 2020 (35) GSTL 89 (Mad)

- HCL Learning Ltd. – 2019 (1) TMI 558 (Tri-Allahabad)

5. Personal hearing in the matter was held on 21.04.2022, through virtual mode. Shri Vikramsingh Jhala, AGM-Indirect Taxation, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

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

a) Whether the appellant, in terms of Rule 6(1) of the CCR, 2004, are required to reverse the credit amount of Rs.64,12,601/- used exclusively in exempted goods cleared for export as well as domestic clearances?
b) Whether the appellant in terms of Rule 6(3) of the CCR, 2004, are required to reverse the credit of Rs.97,640/- on clearance of traded goods, considered as exempted service?
c) Whether they are required to pay service tax on the amount recovered from employees under the head 'Notice Salary recovery/Indemnity bond recovery'?

6.1 I take up the first issue of cenvat credit of Rs.64,12,601/- disallowed by the adjudicating authority under Rule 6 (1) of CCR 2004. Out of total credit amounting to Rs.64,12,601/-, credit of Rs.59,60,955/- pertains to inputs used in exempted goods, which were exported as well as domestically cleared and remaining credit of Rs.4,51,646/- pertains to inputs which are used in exempted goods which were exported. Credit was disallowed on the sole ground that the appellant has not furnished any proof or documentary evidence showing export of goods or clearance to SEZ/EOU. Countering the above findings, the appellant at first contended that the findings are contrary to the actual facts and beyond the charges made in the show cause notice.

6.2 I have gone through the show cause notice and find that the show cause notice proposes to disallow credit of Rs.64,12,601/- under the provisions of Rule 6 (1) of CCR 2004. As per Rule 6 (1) of CCR 2004, *the cenvat credit is not allowed on such quantity of inputs used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be.* In the instant case, the fact that credit of Rs.64,12,601/- pertains to input used in the manufacture of exempted goods is not denied by the appellant. The amount of credit so availed is taken from the details furnished by the appellant wherein they themselves had shown that the credit pertains to exempted goods, which were cleared for home consumption as well as export. Since Rule 6 (1) disallows credit on inputs/input services used exclusively in the manufacture of exempted goods or for provisions of exempted services, proposal was made in the show cause notice for disallowing such credit. In their defence submission, the appellant has taken the plea that the exempted goods are exported by them and hence in terms of Rule 6 (6) of CCR 2004, no reversal of credit under Rule 6 (1) is required. Under such circumstances, the adjudicating

authority is duty bound to confirm the veracity of appellant's submission from documents/records for extending the benefit of Rule 6 (6) of CCR 2004 sought for by the appellant, if admissible. However, on going through the reply filed to the show cause notice, I find that though the appellant has made lengthy submission substantiating their entitlement of credit pertaining to exempted goods cleared for export, neither any documents or proof showing the either export of exempted goods nor quantum of credit involved in export goods was produced before the adjudicating authority. I further find that, in principle, the adjudicating authority has not disallowed the credit involved on export of goods on merit but due to lack of documentary evidence and proof, the credit was disallowed. Therefore, I find that findings recorded in Para 12.5 of impugned order is not beyond the allegation made in SCN and very well within the scope of show cause notice and the submission made by the appellant is devoid of any merit.

6.3 Coming to the merits of the issue, the appellant has contended that out of credit of Rs.64,12,601/-, credit of Rs.59,60,955/- was availed on inputs used in exempted goods which are exported as well as domestically cleared under exemption Notification and hence this credit was considered as common credit in the formula as per Rule 6 (3A) and that they had reversed the credit to the extent exempted goods domestically cleared after availing exemption Notification, as per formula.

6.4 From the facts of the case, I find that the appellant is engaged in manufacture of exempted goods as well as dutiable goods and are availing cenvat credit on inputs/inputs services used in the manufacture of above goods and were clearing both categories of goods for home consumption as well as for export. In accordance to Rule 6 (3) of CCR 2004, the appellant has opted to pay/reverse cenvat credit, in terms of clause (b) (ii) i.e. the amount determined under sub-rule (3A). The submission of the appellant is that credit of Rs.59,60,955/- taken by them and used in manufacture of exempted goods, cleared for home consumption is considered as common credit in the formula and reversed as per Rule 3A.

6.5 The formula for reversal of credit under Rule 3A is prescribed as under:

Rule 6 (3A) (b) *: The manufacturer of final products or the provider of output service shall determine the credit required to be paid, out of this total credit of inputs and input services taken during the month, denoted as* ***T****, in the following sequential steps and provisionally pay every month, the amounts determined under sub-clauses(i) and(iv),namely:-*

(i)the amount of Cenvat credit attributable to inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services shall be called ineligible credit, denoted as ***A,*** *and* ***shall be paid****;*

(ii)the amount of cenvat credit attributable to inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services shall be calledeligible credit, denoted as ***B,*** *and* ***shall not be required to be paid****;*

(iii)credit left after attribution of credit under sub-clauses(i) and(ii)shall be called ***common credit,*** *denoted as* ***C*** *and calculated as,-* ***C = T –(A + B);***

Explanation.-Where the entire credit has been attributed under sub-clauses (i) and (ii), namely ineligible credit or eligible credit, there shall be left no common credit for further attribution.

*(iv) the amount of common credit attributable towards exempted goods removed or for provision of exempted services shall be called ineligible common credit, denoted as **D** and calculated as follows and **shall be paid**,-**D = (E/F) x C**;*

*where **E** is the sum total of (a) value of exempted services provided; and (b) value of exempted goods removed, during the preceding financial year;*
*where **F** is the sum total of (a) value of non-exempted services provided, (b) value of exempted services provided, (c) value of non-exempted goods removed, and (d) value of exempted goods removed, during the preceding financial year*
*(v) remainder of the common credit shall be called eligible common credit and denoted as **G**, where, G = C -D;*

***Explanation.**-For the removal of doubts, it is hereby declared that out of the total credit T, which is sum total of A,B,D, and G, the manufacturer or the provider of the output service shall be able to attribute provisionally and retain credit of B and G, namely, eligible credit and eligible common credit and shall provisionally pay the amount of credit of A and D, namely, ineligible credit and ineligible common credit.*

6.6 As per Rule 3A above, a manufacturer engaged in manufacture of exempted and non exempted goods (dutiable) and availing credit of input and input services used in such goods and opting to reverse/pay credit attributable to inputs/input services used in exempted goods/exempted services under Rule 3A, is required to first determine credit taken on inputs/input services exclusively used in the manufacture of exempted goods/provision of exempted services, denoted as A and then to determine the credit taken on inputs/input services exclusively used in the manufacture of non exempted goods/provision of taxable services denoted as B from the total credit availed, denoted as T. Then, deducting the total credit from the credit exclusively attributable to exempted goods/services and exclusively used in non exempted/taxable services common credit is to be arrived, denoted as C, i.e. the credit taken on input/input services which are used in the manufacture of both exempted and non exempted (dutiable) goods/provision of services. Out of `common credit' so arrived, the credit attributable to inputs/input services used in exempted goods/exempted services need to be arrived as per formula given under clause (iv), denoted as D. At the end of period specified under said Rule, the manufacturer is required to pay amount of credit which is exclusively used in manufacture of exempted goods/exempted services, denoted as A, and amount of common credit attributable to exempted goods/exempted goods, denoted as D arrived as per formula.

6.7 In the subject appeal, it is not disputed that credit of Rs.59,60,955/- was used exclusively in the manufacture of exempted goods, which was cleared for home consumption under exemption Notification as well as for export. The submission of the appellant is that they had reversed credit involved on exempted goods cleared for home consumption as per formula under Rule 6(3A), however, such claim is not supported by any data/details quantifying the credit involved on aforesaid clearances or the credit reversed by them. The term `common credit' in the formula refers to credit which is attributable

input/input services used in the manufacture of both exempted and dutiable goods and not the credit which is used in exempted goods which are cleared for home consumption and exports. In case of credit which is exclusively used in exempted goods and cleared for home consumption, the formula in clear and unambiguous terms stipulate to reverse the credit determined under head A. In this case, it is evident that inputs on which credit of Rs.59,60,955/- was taken was used exclusively in the manufacture of exempted goods and has not gone into the manufacture of any non exempted (dutiable) goods. Therefore, it can be safely be said that credit taken on inputs used exclusively in the manufacture of exempted goods which are cleared for home consumption will fall under head A and such credit so determined needs to be paid/reversed under Rule 6 (3A) (b) (i) of CCR 2004.

6.8 Regarding credit of Rs.4,51,646/- used exclusively in the manufacture of exempted goods which were to be exported, I find that as per Rule 6 (6) of CCR, 2004, an exemption is provided for certain types of exempted clearances from the operation of Rule 6 (1), 6 (2), 6 (3) and 6 (4) and export of goods is one among such clearances. This imply that export of goods is kept out of purview of aforesaid sub-rules and consequently no reversal of cenvat credit taken on inputs/input services used exclusively in the manufacture of exempted goods which are exported is required. I further find that it is a settled law by various decisions of higher Appellant Authorities and Hon'ble Courts that in case of export, the provisions of Rule 6 (1), 6 (2), 6(3) are not attracted. Therefore, I find force in the submission of appellant made in this regard and hold that reversal of credit to the extent involved on export goods is not warranted in this case. Accordingly, in case of credit of Rs.59,60,955/- also since the exempted goods are cleared for home consumption and export, the credit to the extent involved on inputs used in exempted goods which are cleared for export is admissible and not liable for reversal.

6.9 I have also gone through the OIA No.AHM-EXCUS-002-APP-16-19-20 dated 22.05.2019, passed in appellant's own case, which dealt with claim seeking refund of excess Cenvat credit reversal (Rs.1,95,17,370/-) in respect of common inputs/input services, during the F.Y. 2016-17, which was rejected on the grounds that **(i)** the appellant has not properly included the value of export clearance of exempted goods in the formula prescribe under Rule 6(3A), **(ii)** the appellant has shown clearance value of Rs.11,78,37,396/- under Notification No.12/2012-CE as exempted service and not as captive consumption and **(iii)** Total cenvat credit availed on inputs exclusively used in or in relation to manufacture of exempted goods is Rs.93,75,221/- instead of Rs.29,62,620/-. The appellant argued that the excess reversal happened as they did not consider the export turnover for both exempted and taxable and also wrongly considered value of goods captively consumed added twice as exempted service. On the clearances made under Notification No.12/2012-CE as exempted service, the appellant contended that the majority of goods i.e. plastic granules manufactured out of plastic scrap were used captively in the manufacturing process of their finished goods and only small quantity was cleared for home consumption by availing exemption under notification supra. However, due to oversight entire clearance value was shown as cleared under exemption notification. On the third issue, they contended that the credit of Rs.59,60,955/- is pertaining to both exempted goods cleared for home clearance and goods exported, hence is to be considered as common credit, not required to be deducted. Accepting the above argument, Commissioner (A) allowed the refund. For the export clearances the Commissioner (A) held that the provisions of Rule 6(1), (2), (3) of CCR, are not applicable. I find that the ratio of said OIA is not squarely applicable to the present case as the issue in the instant appeal is not of excess reversal of cenvat credit but wrong

availment and utilization of Cenvat credit on inputs exclusively used for the manufacture of exempted goods. Earlier on the issues mentioned at (iii) above, the appellant has sought refund on the grounds that both home clearance and exports were exempted clearances hence reversal of such common credit is not at all required in terms of Rule 6(3). Whereas in the present appeal on the same issue involving same amount they have taken a plea that they have already reversed the credit to the extent relating to clearance of exempted goods domestically cleared availing exemption notification, as per formula. Such conflicting stance on the same issue cannot be entertained. However, as regards the export clearances, I agree with the findings of the Commissioner (A), subject to verification of documents.

6.10 In view of above facts and discussions, I hold that out of cenvat credit amount of Rs.64,12,601/-, cenvat credit to the extent involved on inputs used in the manufacture of exempted goods which are exported is admissible and cenvat credit to the extent involved on inputs used exclusively in the manufacture of exempted goods is not admissible which is liable for reversal under Rule 6 (3A) (b) (i) of CCR 2004. Consequently, I hold that the impugned order passed by the adjudicating authority disallowing the entire credit of Rs.64,12,601/- is not legal and proper. However, in the current proceedings, the appellant has not furnished any documents/data showing quantum of credit involved on export of exempted goods, quantum of credit involved on domestic clearance of exempted goods and quantum of credit already reversed by them, so as to determine the admissible and inadmissible credit on account of export and home clearance of exempted goods. I, therefore, remand the matter to the adjudicating authority to determine the above aspects and pass order accordingly. I further direct the appellant to furnish all the documents/statistical data for the above purpose. Needless to say, the authenticity and correctness of facts and figures furnished by the appellant may be verified and confirmed with the records of the appellant, in the remand proceedings.

7. As regards the second issue, it is observed that the demand of Rs.97,640/- was raised on the grounds that the appellant has opted to pay/reverse Cenvat credit involved in exempted goods under Rule 6(3A) of the CCR, 2004, as they were availing Cenvat credit of input services, which are commonly used both for manufacturing activity and trading activity. During the period April, 2017 to June, 2017, they failed to reverse an amount of 6% of the value of traded goods. Trading activity is covered under negative list notified under Section 66D of the Finance Act, 1994 and in terms of Section 66B, services specified in negative list are not taxable. Consequently, the trading activity falls under the category of 'exempted services' in terms of Rule 2 (e) (ii) of the CCR, 2004. On being pointed out, the appellant vide letter dated 08.06.2018, informed the reversal of said amount made vide Challan dated 23.05.2018. However, as per Explanation II to Rule 6 (3D) of the CCR, 2001, the amount mentioned in sub-rule (3), (3A) & (3B) shall be paid on or before the 5th day of the following month except for the month of March, when such payment shall be made before 31st March. The appellant failed to pay the amount of Rs.97,640/- by due date, therefore, interest was also recoverable. So interest liability of Rs.14,761/- was also calculated, which was also paid vide Challan dated 26.04.2019. The adjudicating authority has later confirmed the demand alongwith interest and appropriated the above payments. He also imposed penalty of Rs.9,764/- on the appellant.

7.1 The appellant has claimed that due to changeover in the option and due to oversight they, under bonafide mistake, failed to reverse 6% of the value of traded goods. They have

claimed waiver of penalty as amount of Rs.97,640/- was paid before issuance of SCN and interest of Rs.14,761/- was paid on 26.04.2019 i.e. one month from the issuance of SCN.

7.2 I find that the demand has been raised under Section 11A (1) of the CEA and penalty has been proposed under Section 11AC. In terms of Section 11A(1), demand is raised where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty. Section 11AC(1)(a) stipulates that if the duty demanded in terms of Section 11A(1) and determined under sub-section (10) is not paid, then the person shall be liable to pay a penalty not exceeding 10% of the duty so determined or Rs.5,000/- whichever, is higher. However, the proviso to the said sub-section provides that where such duty and interest payable is paid either before issuance of SCN or within 30 days of issue of the SCN, no penalty shall be payable and all the proceedings in respect of said duty and interest shall be deemed to be concluded. Sub-clause (b) provides that if the duty and interest determined is paid within 30 days of the date of communication of the order, then the amount of penalty shall be 25% of the penalty imposed and benefit of such reduced penalty is available provided such reduced penalty is also paid within the period so specified.

7.3 The appellant has paid both duty & interest prior to determination i.e. prior to issuance of OIO but not within 30 days of the issue of the SCN, hence, they are liable to pay 25% of penalty provided this reduced penalty is also paid within 30 days. As the appellant has also failed to pay 25% of penalty within 30 days of the date of communication of the order, the benefit of such reduced penalty cannot be extended to them. I, therefore, find, that the penalty imposed in the impugned order is legally sustainable.

8. On the third issue relating to recovery of notice salary / indemnity bond recovery, the demand of Rs.6,46,281/- was confirmed considering notice pay as a consideration to the employer for "tolerating the act" of the employee to not serve the notice period, hence falls within the ambit of 'declared service' in terms of Section 66E(e) of the F.A, 1994. The appellant on the other have argued that such activity is outside the ambit of service and outside the purview of declared service and have relied on OIA No.VAD-EXCUS-001-APP-341/2016-17 dated 21.09.2016, passed in their own case and placed reliance on the decision passed in the case of (i) GET&D India Ltd.- 2020 (35) GSTL 89 (Mad) & (ii) HCL Learning Ltd. – 2019 (1) TMI 558 (Tri-Allahabad).

8.1 The appellant has offered employment on the terms and conditions mutually agreed by the employees. In case of pre-mature resignation or leaving the employment, the employee, would be required to pay pre-determined amount (notice pay) mutually agreed by them for breach of contract. Thus, the employee is under an obligation to complete the prescribed tenure in employment or pay the decided amount towards breach of the condition of contract. The intent of keeping such a clause of notice period is to safeguard the interest of the employer to provide him reasonable time to look for an alternative arrangement for the resigned employee. In case the employee does not intend to serve a notice period, the employer is entitled to recover a pre-agreed amount from the employee (i.e. notice pay recovery), which is adjusted against the full & final settlement to be made by the employer. In the present case, the amount recovered /retained by the appellant, under

head notice salary/indemnity bond, is the amounts which are recovered from the salaries of the employees who quit the job during the notice period.

8.2 It is to observed that the issue of taxability of Notice Pay income under service tax law is no more *res integra* in view of the decision of Hon'ble High Court of Madras in the case of GE T&D India Ltd. Vs. Deputy Commissioner of C.Ex., Chennai [2020 (35) G.S.T.L. 89 (Mad.)], wherein the Hon'ble High Court has held that:

> *"**7.** According to the Revenue, payment in lieu of notice constitutes payment to an employee by the employer for the notice period or vice versa where the employer/employee desires an immediate exit from the organization.*
> ***8.** This arrangement, the Revenue argues, would attract the provisions of Section 66E(e), whereby agreement by an entity to the obligation to refrain from an act or to tolerate an act or a situation, or to do not act, would constitute taxable service. According to the respondent, the petitioner has tolerated the act of immediate quitting from service, by the employees and such agreement/toleration results in the rendition of a taxable service.*
>
> ***9.** Heard Mr. Joseph Prabhakar, Learned Counsel for the petitioner and Mr. A.P. Srinivas, Learned Senior Standing Counsel for the petitioner.*
>
> ***10.** The provisions of Section 66E(e) appear to have given rise to some ambiguity, on this very issue, clarified by the Central Board of Excise and Customs (C.B.E. & C.) in C.B.E. & C.s' Guidance Notes dated 20-6-2012. At para 2.9.3 the Board states as follows:*
>
> > *2.9 Provision of service by an employee to the employer is outside the ambit of service.*
> > *2.9.3. Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to service tax?*
> > *No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would [not] be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.*
>
> ***11.** The query raised relates to a contra situation, one, where amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof. The Board has answered in the negative, pointing out that such amounts would not be related to the rendition of service. Equally, so in my view, the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. The definition in Clause (e) of Section 66E as extracted above is not attracted to the scenario before me as, in my considered view, the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon*

being compensated by the employee in this regard.

12. *Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee."*

8.3 The above decision of the Hon'ble High Court was followed by the Allahabad Regional Bench of the Hon'ble CESTAT in their decision in the case of Shriram Pistons and Rings Ltd. Vs. Commissioner of Central Tax, Ghaziabad [2020 (42) G.S.T.L. 79 (Tri.-All.)]. Prior to the above decision, the same bench in their decision in another case of M/s HCL Learning Ltd. Vs. Commissioner of CGST, Noida held similar view vide their Final Order No.71950 / 2019 dated 25.11.2019 in Service Tax Appeal No.70580 of 2018. The Hon'ble Tribunal in their decision has held as under:

"After hearing both the sides duly represented by learned advocate Shri Nishant Mishra appearing on behalf of the appellant and Shri Anupam Kumar Tiwari appearing on behalf of the Revenue, we note that in the present case the employer has been served with a show cause notice demanding service tax from that part of the amount which he recovers out of the salary paid to the employee if the employee breaches the contract of total term of employment. From the record, we note that the term of contract between the appellant and his employee are that employee shall be paid salary and the term of employment is a fixed term and if the employee leaves the job before the term is over then certain amount already paid as salary is recovered by the appellant from his employee. This part of the recovery is treated by Revenue as consideration for charging service tax.

2. We hold that the said recovery is out of the salary already paid and we also note that salary is not covered by the provisions of service tax. Therefore, we set aside the impugned order and allow the appeal."

8.4 I find that the facts of the present case is squarely covered by the above referred decisions of the Hon'ble High Court of Madras and Hon'ble Tribunal, Allahabdad, also relied by the appellant. I find merit in the contention of the appellant in this regard and, therefore, I hold that the demand of service tax on the Notice Pay income in the present case is not sustainable in law in view of the above referred decisions. Accordingly, I set aside the demand of service tax of Rs.6,46,281/- on this issue. When the demand is not sustainable, there cannot be any question of charging interest or imposing penalty in the matter.

9. In view of my above discussions, the impugned order relating (i) to reversal of credit amount of Rs.64,12,601/- is set aside and the matter is remanded to the adjudicating authority for fresh examination as directed in Para 6.10 of this Order. The impugned order passed by the adjudicating authority is set-aside, to the extent it relates to (ii) demand of service tax on the amount recovered from employees under head 'Notice Salary recovery/Indemnity bond recovery'. The impugned order is upheld to the extent it relates to imposition of penalty of Rs.9,764/- for non-payment of amount equal to 6% on the value of

traded goods. Accordingly, the appeal filed by the appellant is partly allowed and partly rejected to the extent as detailed above.

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

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

(**Akhilesh Kumar**) 2022.
Commissioner (Appeals)

Date: 06.2022

Attested

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

By RPAD/SPEED POST

To,
M/s. Aculife Healthcare Pvt. Ltd., - **Appellant**
Survey No. 358 to 369, 383 to 399, 401 and 402,
Village-Sachana, Viramgam,
Ahmedabad-382150

The Additional Commissioner - **Respondent**
CGST, Ahmedabad North
Ahmedabad

Copy to:

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