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

DIN: 20230764SW000000D2C6

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/109/2023-APPEAL/ 7781 -85

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-42/2023-24**
दिनाँक Date : **28-06-2023** जारी करने की तारीख Date of Issue 04.07.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **12/AC/DEM/NA/2022-23** दिनाँक: **31.10.2022**, issued by Deputy/Assistant Commissioner, CGST, Division-V, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s CPL Biologicals (P) Ltd.,
   "Cadila Corporate Campus', Sarkhej Dhokla Road,
   Village- Bhat, Ahmedabad-382210

2. Respondent
   The Deputy/ Assistant Commissioner, CGST, Division-V, Ahmedabad North ,2nd Floor, Shahjanand Arcade, Memnagar, Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति 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 notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

ORDER IN APPEAL

M/s. CPL Biologicals (P) Ltd., "Cadila Corporate Campus", Sarkhej Dhokla Road, Village-Bhat, Ahmedabad – 382210 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 12/AC/DEM/NA/2022-23 dated 31.10.2022, (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-V, Ahmedabad North Commissionerate (hereinafter referred to as '*the adjudicating authority*'). The appellant were engaged in providing Intellectual Property Right Service other than Copyright, Manpower Recruitment / Supply Agency Service. They are holding Service Tax Registration No. AADCC6095MST001.

2. The facts of the case in brief are that during the course of audit conducted by the officers of Central CGST, Audit, Ahmedabad, covering period April, 2016 to June, 2017, five revenue paras were raised vide FAR No. ST-82/2020-21 dated 24.08.2021, out of which Revenue Para-01 & 02 remained unsettled. The relevant paras are discussed as under:-

Revenue Para-01: Wrong availment of Cenvat credit:-

On verification of financial records of the appellant it was noticed that as per their ST-3 Returns filed for the period April,2017 to June, 2017, the appellant had availed the CENVAT Credit of Rs.17,49,887/-. However, on going through their Cenvat credit Register, Invoices & Ledgers, it was observed that the appellant had invoices of Input Tax Credit pertaining to amount of Rs. 4,50,407/- only. On being pointed out the appellant could not give proper justification and agreed to reverse the excess credit of **Rs. 12,99,480/-** (Rs. 17,49,887/- minus Rs. 4,50,407/-). They paid the Cenvat credit alongwith penalty of Rs. 1,94,922/-. At the time of audit the amount of ITC available with the appellant was far less than the balance of ITC at the time of availing hence interest shall accrue on such Cenvat credit which was wrongly availed and utilized till the date of reversal. Interest of Rs. 12,47,501/- was worked out which the appellant was required to pay.

Revenue Para-02: Wrong availment of Cenvat credit on ineligible input services in terms of Rule 2(l) of the CCR, 2004 :-

From the financial records it was noticed that the appellant have availed the Cenvat credit of input services such as warehouse rent, repair & maintenance work, development of promotional film etc which are exclusively related to the exempted services. The credit of Rs. 1,15,338/- and Rs. 18,060/- was used in the F.Y. 2016-17 & F.Y. 2017-18 (April to June) respectively. On being pointed out they reversed the Cenvat credit of **Rs. 1,33,398/-** alongwith penalty of Rs. 20,009/- (totalling to amount of Rs. 1,53,407/-) but refused to pay interest stating that though they wrongly availed the said Cenvat credit but the said credit was never utilized. As the balance available at the time audit was much less than the ITC balance available at the time of availing the credit, it appeared that the above view of appellant was not correct. Hence, the appellant was required to pay the applicable interest of Rs. 1,51,130/- also.

2.1 Accordingly, a Show Cause Notice (SCN) No. 50/2021-22 dated 15.09.2021 was issued vide F. No. CTA/04-200/C-VII/AP-48/2019-20 to the appellant proposing;

a) recovery of excess Cenvat credit availed to the tune of **Rs. 14,32,878/-** (Rs. 12,99,480/- + Rs. 1,33,398/-) under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 (1)(ii) of the Cenvat Credit Rules (CCR), 2004 and also proposing appropriation of amount already paid against the above demand;
b) recovery of interest under Section 75 of the Finance Act, 1994 read with Rule 14 (1)(ii) of the Cenvat Credit Rules (CCR), 2004 on the above demand;
c) imposition of penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules (CCR), 2004 was also proposed. As the payment of penalty was already made appropriation of penalty paid against the proposed recovery was also made;
d) imposition of penalty under Section 77(2) of the F.A, 1994 for failure to avail correct input tax credit in the service tax return and for filing incorrect return in contravention of Section 70 of the F.A., 1994 read with Rule 7 of the Service Tax Rules, 1994 was also proposed.

3. The said SCN was adjudicated vide the impugned order wherein the Cenvat credit recovery of Rs. 14,32,878/- proposed in the SCN was confirmed and the amount paid the appellant was appropriated against the said demand. Interest of above demand was also confirmed. Penalty of Rs. 14,32,878/- under Section 78 was imposed and amount of Rs. 1,94,922/- paid by the appellant towards penalty was appropriated against the same. Penalty of Rs. 7,000/- was also imposed under Section 77(1).

4. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below:-

- Though the credit has been taken wrongly in the CENVAT accounts, the same was never utilized and was lying unutilized in the CENVAT accounts. Hence, no interest is required to be paid on such credit. The CCR, 2004 was amended by virtue of Notification No. 18/2012-CE (NT) dated 17.03.2012 wherein Rule 14 was amended by substituting the word **"or"** with the word **"and"** therefore no interest is required to be paid on wrongly availed credit if the credit taken in the books of accounts is not utilized and lying in balance till the date of reversal. This amendment came into effect from 17.03.2012 while the appellant reversed the entire credit on 22.06.2021. The credit balance was always in excess of the amount required to be paid hence the disputed credit was never utilized during 01.04.2016 till 36.06.2021. Even Section 50 of the CGST Act was amended with retrospective effect vide Notification No. 16/2021-CT dated 01.06.2021, wherein recovery of interest accrues only on the Net Cash tax liability with effect from 01.07.2017. Copy of self certified CENVAT Register showing month-wise balance for entire period is submitted as evidence. They also placed reliance on following case-laws:
  - Bill Forge - 2012 (279) ELT 209
  - Strategic Engineering (P) Ltd- 2014(310) ELT 509 (H.C)
  - Chandrapur Magnet Wire- 1996 (81) ELT 3 (SC)

- On the second issue they contended that only Central Excise Officer is empowered to issue SCN under Section 73 of the F.A., 1994. The officers of Audit Commissionerate are not Central Excise Officers hence are not empowered to issue notice. The appellant is not registered under Audit Commissionerate and has not filed returns with Audit Commissionerate therefore the notice issued by Audit Commissionerate is without any jurisdiction. They placed reliance on following case laws:-
  - ITC Ltd- 2019 (368) ELT 216 (SC)
  - Sayed Ali- 2011 (265) ELT 17 (SC)
  - Cannon India (P) Ltd.- 2021 VIL 34 SC CIJ
- Reversal of credit before utilization has effect as if no credit availed. They further placed reliance on decisions passed in the case of M/s. Bombay Dyeing & Mfg. Co. Ltd- 2007 (215) ELT (3)-SC;
- No interest when reversal before utilizing the credit - M/s. Dynamic Pvt. Ltd. – 2011 (266) ELT (41) Guj.
- Once credit reversed before issuance of SCN there is no question of penalty- L'Oreal India Pvt Ltd- 2022 (11) TMI 1041-CESTA Mumbai.
- They requested to set-aside the impugned order confirming the demand, interest and penalty.

5. Personal hearing in the matter was held on 27.06.2023. Shri Ashwin Ramesh, Assistant General Manager, appeared for personal hearing online in virtual mode on behalf of the appellant. He submitted that the appellant had availed credit, but did not utilize it. Appellant had always maintained a credit balance more than the disputed amount. The appellant has *suo moto* reversed credit which was availed but not utilized by filing DRC-03. The appellant has submitted a copy of electronic credit ledger which proves non-utilization of the credit. Since, the credit was not utilized, no interest is payable by the appellant. In this regard he referred to Madras High Court judgment. He also submitted that the show cause notice was issued by Audit Commissionerate and not by proper officer having jurisdiction over the matter. Therefore, he requested to set-aside the order in original.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum as well as those made during personal hearing. The appellant are contending the demand basically on two issues;

a) Whether the interest liability accrues on the CENVAT credit taken but not utilized ?

b) Whether the impugned notice issued by the Audit Commissionerate is legally sustainable?

7. On the first issue the appellant are not contesting the recovery of CENVAT credit of Rs.17,49,887/- proposed under Revenue Para-6 supra. They paid the amount

alongwith penalty however, they are contesting the recovery of interest on the argument that though the credit has been taken wrongly in the CENVAT accounts the same was never utilized and was lying unutilized in the CENVAT accounts till the date of reversal, hence no interest is required to be paid on such credit.

7.1 It is observed that prior to March, 2012, in terms of Rule 14 of the CCR, 2004 recovery could be initiated if CENVAT credit was wrongly availed **or** utilized. However, amendment was made in Rule 14 of the CCR, 2004, vide Finance Bill, 2012 read with Notification No. 18/2012-CE dated 17.03.2012 wherein for the words "*taken or utilised wrongly*", the words "*taken and utilised wrongly*" was substituted and for the word, figures and letters "*and 11AB*", the word, figures and letters "*and 11AA*" was substituted. The amended Rule 14 is reproduced below;

> ***[RULE 14 Recovery of CENVAT credit wrongly taken or erroneously refunded*** *— (1) (i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;*
>
> *(ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries.*

7.2 From the above provisions it is clear that the interest liability accrues only when the CENVAT credit has been taken and utilized wrongly. The SCN alleges that at the time of audit, the amount of ITC available with the appellant was far less than the balance of ITC available at the time of availing. Hence, interest shall accrue on such wrongly availed Cenvat credit. On going through the self certified CENVAT Register (showing month-wise balance for the period from 01.04.2017 to 30.06.2017), submitted by the appellant as evidence, it is observed that they had sufficient balance. The same is evident from the table below;

As on	**Opening Balance**	**Credit taken during 01.04.2017 to 30.06.2017**	**Credit Utilized during 01.04.2017 to 30.06.2017**	**Closing Balance**
01.04.2017	1,44,70,570/-	17,49,887/-	1,83,496/-	1,44,70,570/-
30.06.2017	1,61,64,231/-			1,60,36,961/-

7.3 During each month, the CENVAT Credit balance was certainly not less than the amount of Rupees One Crore. So, the above argument of the department does not appear justifying. Further, as per the Electronic Credit Ledger, the appellant had the credit balance of Rs. 1,63,09,129/- in July, 2017-18 which they transferred and reflected in their TRAN-1 so it is clear that during the disputed period they had sufficient balance.

Hence, it cannot be alleged that the credit utilized during the disputed period was from the credit which was wrongly availed.

7.4 It is observed that Hon'ble High Court of Judicature at Madras in the case of Commissioner of C. Ex., Madurai V/s Strategic Engineering (P) Ltd- **2014 (310) E.L.T. 509 (Mad.)** held that;

> *"11. It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". **Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent amendment has given befitting answer to all doubts existed earlier. S**ince, the subsequent amendment has cleared all doubts existed earlier in respect of Rule 14 of the said Rules, it is needless to say that the argument advanced by the learned counsel appearing for the appellant/Department is erroneous, whereas the argument advanced on the side of the respondent is really having merit and the substantial questions of law settled in the present Civil Miscellaneous Appeal are not having substance and altogether the present Civil Miscellaneous Appeal deserves to be dismissed"*

[Emphasis supplied]

7.5 In light of above judgment, I do not find merit in the allegation made in the SCN. Further, I find that the adjudicating authority has not put forth any findings as to why interest shall accrue in the present case. Thus, the contentions raised by the appellant that mere availment of Cenvat credit without its utilisation will not attract interest at appropriate rate under Rule 14 of Cenvat Credit Rules, 2004, as was in force during the relevant time, is legally sustainable. I, therefore, find that the demand of **Rs. 12,99,480/-** covered in Revenue Para-01 is not sustainable on merits.

8. In respect of Revenue para-02, the appellant has admitted the audit observation and reversed the inadmissible credit prior to utilization. However, they are contesting the demand on the grounds that the impugned notice issued by the Audit Commissionerate is legally not sustainable as they are not the proper Central Excise Officer empowered to issue SCN under Section 73 of the F.A., 1994.

8.1 Board vide Circular No. 985/9/2014-CX., dated 22-9-2014 had issued certain guidelines regarding Structure, Administrative set up and Functions of Audit Commissionerates, wherein at Para 5.3 it is stated that;

> *"**5.3** Audit Commissionerate shall issue the show cause notice, wherever necessary, after the audit objections are confirmed in the MCMs. The show cause notice shall be answerable to and adjudicated by the Executive Commissioner or the subordinate officers of the Executive Commissionerate as per the adjudication limits prescribed the Board. Audit function will end with the issuance of show cause notice and further action including adjudication and follow-up shall be the responsibility of Executive Commissioner."*

Under Rule 3 of the Service Tax Rules, 1994, the Board can appoint any other officer to exercise power within the "local limits". The Circles of Audit Commissionerate has been

assigned the geographical jurisdiction of either an entire Commissionerate or some Divisions of an Executive Commissionerate. Since, the definition of "Central Excise Officer" in Section 2(b) of the Central Excise Act, 1944 was made applicable for Section 73 of Chapter V of the Finance Act, 1994 which prescribes a machinery for recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. It was in light of these above guidelines that the SCN was issued by the Audit Commissionerate and made answerable to jurisdictional D.C/A.C. I, therefore, find that the SCN issued by Audit Commissionerate is tenable.

8.1.1 On the above argument, the appellant have relied on various case laws which I find are not applicable to the present appeal as pertains to different issues hence are distinguishable. The judgment passed in the case of ITC Ltd- 2019 (368) ELT 216 (SC), Sayed Ali - 2011 (265) E.L.T. 17 (S.C.) and Canon India Pvt. Ltd. v. Commissioner, 2021 (376) E.L.T. 3 (S.C.) deals with the provisions of Section 28 of the Customs Act, 1962, hence, the reasoning of the Hon'ble Supreme Court in the above cases cannot be imported in the context of the Central Excise Act, 1944 and/or the Finance Act, 1994.

8.2 Coming to the issue on merit, I find that the appellant has not put forth any argument contesting the allegation made in the impugned SCN regarding availing the inadmissible CENVAT credit. I, therefore, do not interfere in the findings of the adjudicating authority and uphold the recovery of CENVAT amount of **Rs. 1,33,398/-.**

8.3 As regards the recovery of interest, I find that the in terms of Rule 14 of the CCR, 2004, interest is to be recovered only if the wrongly availed credit has been utilized. The provision has categorised two separate situations where the Cenvat credit is taken but not utilised and where the credit has been taken and utilised, Section 11AA of Central Excise Act which talks about imposition of interest on the delayed payments is applicable only to a situation where Cenvat credit is taken and utilised. Admittedly, in the present case, the cenvat credit was not utilized as the appellant at all time has maintained sufficient balance which was over and above the amount of credit availed. Apparently, the present case is not a fit case to recover interest especially when the appellant has only availed a wrong credit in their books of accounts and on pointing out the mistake has immediately reversed the entry. It is clear that no benefit of wrong entry in account books was taken. Interest in the given circumstances is not payable.

9. Another argument putforth by the appellant is that when the credit was reversed before issuance of SCN there is no question of penalty. They placed reliance on L'Oreal India Pvt Ltd- 2022 (11) TMI 1041-CESTA Mumbai. The notice proposes penalty under Section 78 (1) of the Finance Act, 1994 readwith the provision of Rule 15 (3) of the CCR, 2004. Relevant text of Rule 15(3) of CCR, 2004 is reproduced below;-

Rule 15

(3) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay [penalty in terms of the provisions of sub-section (1) of section 78] of the Finance Act.

The appellant have taken a plea that the credit was reversed before issuance of SCN however it is noticed that the credit was reversed after being pointed out by the auditors. Hence, the appellant cannot take a plea of suo moto reversal. The SCN alleges that the appellant have contravened the provisions of Rule 2(l) (i) of the CCR, 2004 read with Rule 2(l) (C) of the CCR, 2004 as they have wrongly availed the CENVAT credit on invoices relating to exempted services. The warehouse rent, repair & maintenance work, development of promotional film etc which were exclusively related to the trading of goods are in the nature of exempted services in terms of Rule 2(l) of the CCR, 2004. Moreover, the appellant could not establish anything on record to establish that the credit availed was under some bonfide belief. I, therefore, do not interfere with the findings of the adjudicating authority and uphold the penalty considering that the credit was wrongly availed by suppressing the facts from the department. Hence, the appellant is liable for penalty under Section 11AC of the Central Excise Act read with Rule 15(3) of the CCR, 2004. I therefore uphold the penalty of Rs. 1,33,398/-.

11. As regards the penalty under Section 77 (2), the SCN alleges that the appellant has failed to avail correct input tax credit in their ST-3 Returns and also failed to file correct input tax credit as required under Section 70 of the Finance Act read with Rule 7 of the Service tax Rules, 1994. The appellant however have not come up with any contention negating the above allegation, I, therefore, uphold the penalty of Rs.7,000/- imposed under Section 77 of the Finance Act, 1994.

12. In light of above discussion, I uphold the demand and recovery of Rs. 1,33,398/- alongwith penalties.

13. 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.

28-6-23
(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: 26.06.2023

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

By RPAD/SPEED POST

To,
M/s. CPL Biologicals (P) Ltd., - **Appellant**
"Cadila Corporate Campus",
Sarkhej Dhokla Road, Village-Bhat,
Ahmedabad – 382210

The Assistant Commissioner
CGST, Division-V,
Ahmedabad North

- **Respondent**

Copy to:

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