केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

सत्यमेव जयते
केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

☎: 079-26305065
टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/77/Ahd-I/2017-18 / 1757-1762
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-376-2017-18**
दिनाँक Date : **27-02-2018** जारी करने की तारीख Date of Issue 22.03.18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **SD-06/06/AC/Kintech/17-18** दिनाँक: **13/06/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent .
Kintech Synergy Private Limited
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 a 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.

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

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

... 2 ...

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

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

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

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

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

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

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

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

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

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

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

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

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

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. Kinetic Synergy Pvt. Ltd., " Kinetic House", 8-9, Shivalik Plaza, Opp. AMA, IIM Road, Ambawadi Ahmedabad- 382 015 (STR No. AAAC K8854H ST001) *(hereinafter referred to as 'appellants')* have filed the present appeals against the Order-in-Original number SD-06/06/AC/Kinetech/17-18 dated 13.06.2017 *(hereinafter referred to as 'impugned orders')* passed by the Asst. Commissioner, Ser. Tax, Div.- VI, Ambawadi, APM Mall, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

2. The facts of the case, in brief are that appellant had provided taxable service and had also undertaken trading activity (exempted service) of windmill & its parts from same premises. Appellant had availed CENVAT credit on common input services like Security service, Telephone services, GTA service, Consulting Engineer service, Professional fees etc and had utilized said credit in payment of taxable out put service. Appellant had opted not to maintain separate account u/r 6(3) of CCR, 2004 for taxable and exempted service. Appellant failed to pay amount at rate specified either under rule 6(3)(i) or 6(3)(ii) of CCR, 2004. They failed to follow procedure as laid down u/r 6(3A) of CCR, 2004. Therefore profit of Rs. 9,05, 19,558/- was worked out on trading activity for period 2010-11 & 2011-12, by revenue department and SCN dt. 15.10.2015 for recovery of Rs. 47,49,831/- & SCN was issued. Said demand was confirmed and consequent penalty of Rs. 47,49,831 u/s 78(1) and penalty of Rs. 10,000/- u/s 77(2) of FA, 1994 was imposed.

3. Being aggrieved with the impugned order, the appellants preferred an appeal on 16.08.2017 before the Commissioner (Appeals-II), Ahmadabad wherein it is contended that-

a. Inadvertently they have intimated availemnt of option 6(2) of CCR, 2004 instead of rule 6(3)(ii)
b. Appellant intend to follow the option for proportional reversal of credit as per rule 6(3)(ii) r/w Rule 6(3A) of CCR, 2004, for that matter appellant had made annual intimation to their JAC as regard compliance of said rule 6 for FY 2010-11 & 2011-12
c. as required under Rule 6(3A) of CCR, 2004, they have made annual adjustment in reversal based ratio derived on actual turnover for the year and paid the difference

d. Since the provisions to treat trading of goods as exempted service was introduced w.e.f. 01.04.2011, the appellant had not treated trading as exempted activity for year 2010-11 .

4. Personal hearing in the case was granted on 22.01.2018. Shree Tarang R. Kothari, CA, appeared before me and reiterated the grounds of appeal. He stated that in year 2010-11- No reversal because No. Cenvat was claimed; that in 2011-12- reversed proportionately Rs. 2,24,921/- for common credit of Rs. 10,12,014/- towards consumption on road and that computation of duty is wrong (para 36 of OIO).

DISUSSION AND FINDINGS

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of personal hearing and written submission dated 31.01.2018 (received on 07.02.2018)

6. First question of law is whether appellant can reverse cenvat credit u/r Rule 6(3)(ii) even if no prior intimation is given to Superintendent.

There is no dispute that the appellant is required to make payment as per rule 6 of CCR, 2004, as he is providing taxable as well as Exempted/Non-taxable service simultaneously and taking credit on all common input Services. Department was of view that appellant is not eligible for benefits of Rule 6(3)(ii) as no prior intimation is given to Superintendent and such option can not be applied retrospectively, hence appellant is compulsorily required to follow Rule 6(3)(i) & pay 6%/8% of exempted service value.

7. I find from para 36 of OIO that appellant were not maintaining separate records of common input credit used in taxable and non-taxable services and the credit used exclusively in exempted output service. Further I find that as per assessee letter dated 20.11.2015 they reversed input cenvat credit of GTA service of Rs. 10,12,014/- exclusively used in exempted ouput service of road construction[rule 6(1) r/w rule 6(2)]. But this is not the issue in SCN.

Further , they have reversed common input cenvat credit of services of Rs. 2,24,921/- used in taxable as well non-taxable services for 2011-12. [Rule 6(3)(ii) r/w 6(3A) of CCR 2004]. **Department has alleged that 6(3)(ii) r/w 6(3A) of CCR 2004 (proportional reversal method) is not**

available to appellant as no prior intimation not given, so appellant is required to follow rule 6(3)(i).

8. I find that three options are available to service provider providing taxable and exempted service.

a. Take credit of input service used only for providing taxable out service and never take credit of input services used in providing both taxable service as well as in exempted service.**[rule 6(1) r/w rule 6(2)].**

b. Take credit of common input service used in providing both taxable services as well as in exempted service but reverse 6% of value of exempted output service. **[Rule 6(3)(i)].**

c. Take credit of common input service used in providing both taxable services as well as in exempted service but reverse/pay in proportionate to turnover of Exempted service value under Rule 6(3)(ii) of CCR 2004. For availing proportional payment under Rule 6(3)(ii), prior intimation to Superintendent is required and proportional payment amount is to be calculated as per formulas prescribed in rule 6(3A) of CCR, 2004. **[Rule 6(3)(ii) of CCR 2004].**

9. Appellant have stated that-

a. that they should be allowed benefits of proportional payment prescribed rule 6(3)(ii) r/w rule 6(3A) and SCN issued are time barred.

b. they have not availed CENVAT credit on Input services entirely and specifically attributed to exempted services. Non availment of CENVAT credit on services exclusively used for exempted services and proportional reversal of CENVAT credit on common input services would amount is effective compliance as held in Chennai Perochemical Ltd [2012 (286) ELT (Commr. Appela)] and Sify Technologies Ltd [2014-TIOL-958-CESTAT-MAD].

c. that they have followed proportional reversal method prescribed u/r 6(3A) r/w rule 6(3)(ii) of CCR, 2004 for reversal of CENVAT credit on common input service. That appellant should not be forced to reverse 5%/6% of exempted service value as envisaged in rule 6(3)(i) of CCR, 2004.

d. That in calculating trading margin department had not taken stock of goods and direct expenses. Also inward carriage cost is not included in purchase price.

e. That they were not liable to reverse CENVAT attributed to trading activity to FY 2010-11 in as much as it was declared exempted w.e.f. 01.04.2011 only

10. For availing proportional payment under Rule 6(3)(ii), prior intimation to Superintendent is required and proportional payment amount is to be calculated as per formulas prescribed in rule 6(3A) of CCR, 2004. I find that as per rule prior intimation u/r 6(3A) contains details like (a) Name , address and registration No. of service provider, (b) date from which option is availed, (c) description of exempted and taxable services and (d) CENVAT credit lying on date of availing exemption. I find all this particulars are available with the department and there is no any revenue implication either directly or in-directly even if not submitted. Further appellant have submitted yearly statements wherein proportional reversal u/r 6(3)(ii) is worked out. This is sufficient to presume that department is aware of proportional reversal u/r 6(3)(ii) even though specific intimation is not given.

11. Further I am view that there is no condition provided in the rule that if a particular option out of three are not opted, then only option of payment of 6%/8% provided u/r 6(3)(i) shall be compulsorily made applicable. Therefore revenue should not insist the appellant to avail particular option. The main object of rule 6 is to ensure that the assesses should not avail the CENVAT credit in respect of input or input services which are used in relation to manufacture of exempted goods or for exempted service. I am of considered view that, though prior intimation to department for exercising option u/r 6(3)(ii) is required but such procedural lapse (i.e.non-intimation) do not disentitle the appellant`s right to follow proportional reversal as per rule 6(3)(ii). My view is supported by following decisions wherein it is held that non-submission of prior intimation as per rule 6(3)(ii) is procedural lapse-

a. Mercedes Benz India Pvt. Ltd. [2015 (40) STR 381 (Tri. Mum.)]
b. Aster Private Ltd.[2016 (43) STR 411 (Tri. Hyd.)]
c. Rathi Daga [2015 (38) STR 213 (Tri. Mum.)
d. Fats & Fertilisers Ltd. [2009 (247) ELT 209 (Tri. Bang.)]

12. I find that demand in SCN for reversal of CENVAT is worked out as per option u/r 6(3)(i) and same is confirmed in impugned OIO without disputing correctness of reversal u/r 6(3)(ii) already made by appellant which is bad in law. I hold that appellant is eligible for reversal u/r 6(3)(ii).

The case needs to remanded back original adjudicating authority to allow the benefits u/r 6(3)(ii) and to recalculate/verify/examine proportional reversal made by appellant in terms of rule 6(3)(ii).

13. Second question of law is whether or not common input service utilized for trading activity prior to 01.04.2011 is required to be reversed proportionally u/r 6(3)(ii) r/w 3(3A) in as much as said service has been notified as 'exempted' only from 01.04.2011 only vide Notification No. 03/2011-CE (NT) dated 01.03.2011.

14. I find that trading activity was incorporated in the definition of "exempted services" in rule 2(e) and accordingly rule 6 became applicable w.e.f. 01.04.2011, but prior to that, there was no provision for either denial of credit or for reversal for the same as provided u/r 6. My view is supported by decision in case of Frank Fabre India Ltd. [2017 (52) (STR) 155 (Tri.- Mum.)] and Marudhan Motors [2017 (47) STR 261 (Tri. Del)].

15. I find that explanation added to the definition of "exempted service" with effect from 01.04.2011, wherein it has been stated that the exempted service includes trading, is prospective in nature. Therefore, prior to 1.4.2011 trading was not considered as a service or a exempted service and trading activity was part of the appellant's business and since the definition of 'input service' as it is stood at the relevant time included activities relating to business, the appellant is entitled to take credit of any service used in connection with their business.

16. Since the trading was neither a service nor a exempted service at the relevant time, the appellant was not required to reverse any part of the credit on common input services taken by them. My view is supported by decision of the Supreme Court judgement in the case of **Ashok Leyland Ltd. vs. Commissioner of Income Tax reported in (1997) 1 SCC 729** and also Hon'ble Bombay High Court in the case of **Coca Cola India Pvt. Ltd. vs CCE, Pune III reported in 2009 (50) STR *657* (BOM)**. The Tribunal in the case of **Orion Appliances Ltd. vs. Commissioner of Service Tax reported in 2010 (19) S.T.R. 205 (Tri-Ahmd.)** has held that trading is not a service. In the said judgment the Tribunal held as under:-

> *"As regards the issue as to whether trading activity can be called a service, it is quite clear that since trading activity*

is nothing but purchase and sales and is covered under sales tax law, it may not be appropriate to call it a service. Therefore it has to be held that trading activity cannot be called a service and therefore it cannot be considered as an exempted service also"

17. Since input services were used by the appellant in connection with their business activity and the fact that trading was not a service before 01.04.2011, the appellant was entitled to take credit of the common input services and they were not required to reverse any part of the said credit.

18. The amendments made in 2011 are substantive amendments though the amendments have been made in the form of Explanation and the said explanation starts with "For removal of doubts". The said explanation cannot be made applicable retrospectively for the reason that the amendments are substantive in nature and is not really any clarification or explanation. **Further, the said explanation was introduced on 1.3.2011 vide Notification No. 3/11-CE (NT), but the said Notification itself states that the said provision will come into force from 1.4.2011.** In view of this position, the said explanation cannot be given retrospective effect. The Central Excise Rules are delegated legislation and these cannot be issued with retrospective effect by the Government until and unless the retrospective effect is enacted through legislative enactment.

19. The Hon'ble Tribunal in the case of **Mercedes Benz India Pvt Ltd. vs. CCE 2014-TIOL-476-CESTAT-MUM** has held that prior to 01.04.2011, trading cannot be considered either as a service or exempted service. The relevant part of the judgment is reproduced herein under:

15. We find considerable force in the arguments of Ld. Senior Advocate for the appellant that changes made by Explanation are substantive in nature. Explanations have been made in Rules by a Notification without giving it retrospective effect and though notification was issued on 1.3.2011 but came into force only 1.4.2011 and thus it cannot have retrospective effect. In our view, Revenue's act as to consider 'trading' as exempted service for the period Aug. 2010 to March, 2011 in E/1019/12-Mum and demanding 6% of the trading turnover is not correct.

16. In view of the above, we have come to the conclusion that trading was not a service and therefore, cannot be considered as an exempted service during the period prior to 1.4.2011 and the amended provision with effect from 1.4.2011 will not have retrospective effect.

20. In view of above discussion, I hold that appellant is not required to reverse CENVAT credit for common input service utilized in trading activity undertaken prior to 01.04.2011 for the purpose of rule 6 of CCR, 2004. **The case needs to remanded back original adjudicating authority to exclude the trading activity amount from exempted service value taken for 2010-11 to arrive at proportional reversal u/r 6 (3)(ii).**

21. Third question of law is regarding whether or not CENVAT credit to be reversed for the purpose of rule 6(2) & 6(3) if CENVAT taken is on common input services i.e. Consulting Engineer Service, Maintenance/repair service, Erection/ Installation service & Technical testing/analysis service listed in rule 6(5) of CCR, 2004.

I find that credit of such specified service is are eligible in terms of rule 6(5) of CCR, 2004 for period prior to 01.04.2011, to appellant, even if it is used in both taxable and exempted service provided said services are included in 6(5). **The case needs to remanded back original adjudicating authority to allow the CENVAT credit in respect of common input services eligible in terms of rule 6(5) of CCR, 2004 for period prior to 01.04.2011 and to see that no proportional reversal is required in said services specified in rule 6(5).**

22. Forth question of law is whether or not trading margin is calculated based on accounting principal and as per explanation 1(c) or rule 6(3) and rule 6(3A).

It is argued by appellant that Department has directly reduced the purchase price of goods from sale price of goods to derive the profit on which reversal is calculated. It is argued that (i)impact value of opening and closing stock is not taken and (ii) that carriage inward is not included in purchase value. From finding it is not coming out whether opening and closing stock is considered or not for arriving at profit margin of trading activity. Further it is not coming out whether inward carriage expense in included in purchase

value. **It needs to be re-ermined by adjudicating authority for recording finding as to how profit is arrived .**

23. I am of considered view that carriage inward is not to be included in purchase value. I find that explanation 1(c) or rule 6(3) and rule 6(3A) clearly debars such expenses to be included. Consequent to the above amendment in definition of "exempted service", in Rule 2(e) of Cenvat Credit Rules (Not No 3/2011(NT) dated 1.03.11), provisions of Rule 6(3) regarding reversal of credit for trading was also introduced through Cenvat Credit (Third Amendment) Rules, 2011. (Not 13/2011 dated 1.04.11)

> *"Value" for the purpose of sub-rules (3) and (3A)-*
>
> *In case of trading shall be the difference between the sale price and the purchase price of the goods traded", the words "shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles* ***without including the expenses incurred towards their purchase)*** *or ten per cent. of the cost of goods sold, whichever is more"*

In view of above I hold that carriage inward expense is not to be included in purchase value.

24. In view of facts and discussion herein above in respect of above four question of laws, the Adjudicating Authority is directed to decide the case afresh , for which case is remanded back to the Adjudicating Authority, after due compliance of the principles of natural justice and after proper appreciation of the evidences that may be put forth by the appellant before him. Adjudicating authority shall again decide regarding invocation of extended period and imposition of penalty in view of various letter and returns submitted with regards to reversal of credit in terms of rule 6. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority. These findings of mine are supported by the decision/order dated 03.04.2014 of the Hon'ble High Court, Gujarat in the Tax appeal No.276//2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. – Mumbai).

25. In view of above, appeal filed by the appellants is allowed by way of remand.

26. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता हैं।

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

उमा शंकर
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

M/s. Kinetic Synergy Pvt. Ltd.,

"Kinetic House", 8-9, Shivalik Plaza,

Opp. AMA, IIM Road, Ambawadi,

Ahmedabad- 382 015

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad South .
2) The Commissioner Central Tax, CGST,Ahmedabad South.
3) The Additional Commissioner, Central Tax , Ahmedabad
4) The Asst. Commissioner, Central Tax, Div-VI, Ahmedabad South
5) The Asst. Commissioner(System), Hq, Ahmedabad South.
6) Guard File.
7) P.A. File.l