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

रजिस्टर्ड डाक ए.डी. द्वारा DIN- 20201164SH0000AK5414

क फाइल संख्या : File No : V2(ST)181/Ahd-South/2019-20 /16211 TO 16216

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP- 52/2020-21

दिनाँक Date : 20-10-2020 जारी करने की तारीख Date of Issue 02/11/2020

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No CGST-VI/Ref-43/MK/AC/Relcon/19-20 dated 31.10.2019 issued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South.

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

M/s Relcon Infraprojects Limited, 305, Atma House, Near Paradise Hotel, Opp. RBI, Ashram Road, Navrangpura, Ahmedabad-380009.

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 issued under the Central Excise Act 1944,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 पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

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

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

(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 ऐसें आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 मे 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) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गत:-

Under Section 112 of CGST act 2017 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 नियत्रण 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.

(16) 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)

(17)

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

(i) *(Section)* खंड (11) 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:

(xvi) amount determined under Section 11 D;
(xvii) amount of erroneous Cenvat Credit taken;
(xviii) 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।

6(I) 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."

II. Any person aggrieved by an Order-In-Appeal issued under the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

1. This order arises out of an appeal filed by M/s. Relcon Infraprojects Ltd., having office at 305, Atma House, Near Paradise Hotel, Opp. RBI, Ashram Road, Navrangpura, Ahmedabad-380009 [New Address of communication: A-01/101, Krishna Appt., Opposite Mahavir Jain Vidyalaya, Juhu Lane, Andheri West, Mumbai-400058](hereinafter referred to as '*appellant*') against Order in Original No. CGST-VI/Ref-43/MK/AC/Relcon/2019-20 dated 31.10.2019 [hereinafter referred to as '*the impugned order*') passed by the Assistant Commissioner of Central Tax, Division VI, Ahmedabad South (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant is engaged in providing taxable servicesunder the category of "Works Contract Services" as defined under erstwhile Section 65 (105) (zzzza) of the Finance Act, 1994 and holding Service Tax Registration Number AADCR4459EST002.They had filed refund application on 01.06.2019 for an amount of Rs. 35,53,811/- in terms of the OIA No. AHM-EXCUS-001-APP-0170-2018-19 dated 25.03.2019 passed by the Commissioner (Appeals), Central Tax, Ahmedabad.

2.1 The appellant has initially filed claim for an amount of Rs. 35,53,811/- on 29.06.2018 for refund of Cenvat Credit balance as per the ST-3 return for the period from April-2017 to June-2017, on the grounds that Central GST Act, 2017 came into effect from 01.07.2017 and the transitional provisions under Section 142 (3) of the Act, provides the refund of Cenvat Credit under existing law. The details of Cenvat credit for which refund has been claimed is as under:-

Sr. No.	Particulars	Amount of Cenvat Credit for which refund is claimed (in Rs.)		
		Service Tax	KKC	Total
1	Balance as on 30.06.2017 as per ST-3 return	1998634	74149	2072783
2	Amount re-credit after 30.06.2017 in terms of Rule 4(7) of Cenvat Credit Rules, 2004	1391012	0	1391012
3	Amount not availed for invoices No. RA-4 dated 30.06.2017 was not availed in the service tax return	86912	3104	90016
	TOTAL	3476558	77253	3553811

2.2 The abovementioned refund claim was decided vide OIO NO. CGST-VI/Ref-112/SKC/Relcon/2018-19 dated 30.11.2018 passed by the Assistant Commissioner, Central GST, Division-VI, Ahmedabad-South, wherein the refund claim was rejected on the grounds that the Cenvat Credit Rules, 2004 does not allow the refund of accumulated balance of Cenvat Credit lying on 30.06.2017 as new levy of GST came into force w.e.f. 01.07.2017, and therefore the refund claim is not eligible to the said claimant.

2.3 Being aggrieved with the said OIO NO. CGST-VI/Ref-112/SKC/Relcon/2018-19 dated 30.11.2018; the appellant had filed appeal before the then Commissioner (Appeals), Ahmedabad who vide OIA No. AHM-EXCUS-001-APP-0170-2018-19 dated 25.03.2019 remanded the case to the adjudicating authority to pass a fresh order after giving an opportunity of personal hearing to the said appellant.

2.4 In de-novo adjudication proceedings, the *adjudicating authority* has again rejected the refund claim on the following grounds:

(i) The Cenvat Credit Rules, 2004 does not allow the refund of balance lying in the Cenvat account

(ii) Further the claim for refund of re-credit of Cenvat Account after 30.06.2017 and non availment of Cenvat Credit in the ST-3 return is also in contravention of the provision, as due to implementation of the GST w.e.f. 01.07.2017, there is no existence of the Cenvat Credit Rules, 2004 after 30.06.2017 and there is no provision of refund of such adjustment on or after the appointed date of GST is made either in the Cenvat Credit Rules, 2004 or in the CGST Act, 2017.

(iii) The said claimant has filed the refund claim on 29.06.2018 and as per the provisions of Section 142 (3) of the Act, every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of Cenvat credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944.

(iv) As the said appellant was already registered under Service Tax having Service Tax Registration No. AADCR4459EST002, he was automatically migrated into the GST law w.e.f. 01.07.2017 in terms of Section 139 of the CGST Act, 2017. Further, the appellant was continuously filing their regular GST returns as per CGST Act, 2017. Besides that he has not filed any application for cancellation of certificate of registration issued to them under sub-section (1) of Section 139 of the CGST Act, 2017 and hence their business was live on after the enactment of GST Act, 2017.

(v) There is a clear provision to carry forward the Cenvat Credit into GST regime by filing GST TRAN-1 under Section 140 of CGST ACT, 2017 and there is no other way to avail the benefit of Cenvat Credit lying in balance just prior to the appointed day i.e. 01.07.2017.The appellant had failed to file their TRAN-1 and instead, filed the refund claim under Section 142(3) of CGST Act, 2017.Hence, the case had to be adjudicated as per the provisions of existing law i.e. Service Tax Act, Chapter V of the Finance Act, 1994. While as per Cenvat Credit Rules, 2004 and Section 11 B of Central Excise Act, 1944 [made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994], the refund of Cenvat Credit accumulated in the Cenvat Account is not admissible.

(vi) The appellant has also relied on the decision of the Hon'ble High Court of Gujarat in the R/SCA No. 5758, 5759,5760& 5762 of 2019. The Hon'ble High Court has in the said matter directed the department to permit the writ-applicants to allow filing of declaration in form of GST TRAN-1 and GST TRAN-2 so as to enable them to claim transitional credit of eligible duties in respect of the inputs held in stock on the appointed day in terms of Section 140 (3) of the Act. Hence, the order is for allowing the Cenvat Credit by filing GST TRAN-1 and GST TRAN-2, and does not allow refund to the applicant.

4. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds that:

(i) The Appellants, being mainly government contractor, was depended on work to be awarded by government only. At the time of Transition i.e.30.06.2017, there was no new contract available from the Government or otherwise awarded to the Appellant.

They were mandatorily migrated into GST Regime in view of

Section 139 of CGST Act, 2017 and continued to file regular returns required to be filed under GST. As regard to why GSTR-Form Trans-1 was not filed in terms of Section 140(1) of CGST Act,2017, the contention of the Appellant is to state that the same was not mandatory. The Section 140 (1) is just "entitling" the assessee to avail the benefit of transferring the credits into the GST regime. The CGST law empowers the entitlement to transfer the credit under the GST era but to exercise the entitlement or not was never restricted nor intended.

There are various beneficial provisions which were already available under different laws from time to time, against which there is always a consistence view of Honorable Judiciary that the same are totally optional and are at the discretion of the assesse to avail the benefit or not to avail the benefit else follow the regular process otherwise available and to seek other alternative remedy. They relied upon following case laws:

- Judgment of Hon'ble High Court in case of Naffar Chandra Jute Mills Ltd. reported at 1993(66)ELT574(Cal) which held that "*where there are two contrary interpretations by the Excise Authorities of the same notification the one which accords with the principle of beneficial construction recognized, in Parle's case must prevail*".
- Order of Tribunal in case of Commissioner of Central Excise, Ahmedabad Vs. Surya International reported as 2010(262)ELT 968 (Tri.Ahd) which held that "*No manufacturer to be compelled to clear goods under rebate and manufacturer free to choose out of various options given under law*".
- Judgment of Hon'ble High Court of Karnataka in case of Commissioner of Service Tax, Banglore Vs. Motor World reported as 2012(27) STR 225 (Kar.) which held that "*If two views are possible, view beneficial to assessee is to be preferred.*"

Therefore, if the analogy/ratio derived from the above case that can be applied to the present case and filing of TRAN-1, the same was not mandatory under the GST Law. While the Appellant do not have any new business on hand, they had unutilized Cenvat Credit as on 30-06-2017 [as is evident in St-3 return filed on 14-10-2017]. Therefore, instead of choosing option to file TRAN-1 under Section 140 (1), they chose to file refund claim of unutilized Cenvat Credit under Section 142 (3) of the said.

Rule 5 of CCR, 2004 grants refund to manufacturer for export without payment of duty or to service provider who provides output

service which is exported without payment of service tax. However, with respect of export, separate provision is prescribed under CGST Act, namely sub-section (4) of Section 142 which is meant for one class of person namely exporter. Once a specific provision is provided for one class of persons, the other provision [in the present case section 142 (3)] will apply to other class of persons. The provisions of sub-section (3) is bifurcated in four parts as under:

- Every claim for refund filed before, on or after the appointed day, for refund of CENVAT credit shall be disposed of in accordance with the provisions of existing law;
- Any amount eventually accruing shall be paid in cash;
- Notwithstanding anything to the contrary contained under the provisions of existing law
- Other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944

The provision contained in first part states any amount of Cenvat Credit including closing balance as on 30.06.2017 can be claimed as refund in accordance with the provisions of existing law. This means a manufacturer or a provider of output service shall be allowed to claim Cenvat Credit of levies...., stipulated in Rule 3(1) of CCR, 2004. This means if inputs or input service is not entitled for Cenvat Credit as per CCR, 2004, registered person shall not be entitled to claim refund of the same. In other words Cenvat Credit shall be claimed in accordance with the existing law.

The second part of the provision states "any amount eventually accruing to him shall be paid in cash". It means Cenvat claimed but not utilized shall be refunded to him in cash.

The third part is non-obstante provision which overrides the existing provision restricting the refund of Cenvat credit in cash to assessee other than exporters.

The fourth part puts condition that in order to claim the refund of Cenvat Credit registered person has to satisfy the provisions of sub-section (2) of section 11 B of Central Excise Act.

(iv) Sub-section (2) of section 11 B of the said act is re-produced herebelow:

"If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the [duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided *that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(e) the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;"

On reading the above provisions contained in sub-section (2), the appropriate clause to claim the refund of excise duty and service tax shall be clause (c) and in respect of education cess and S.H.E. Cess, the appropriate clause shall be clause (e). The condition prescribed in clause (c) provides that the applicant claiming refund of inputs and/or input service is used in manufacture of final products and/or provision of output service. In the premises, registered person shall be entitled to claim refund under sub-section (3) of section 142 of the CGST Act, 2017.

(v) It is also submitted that in respect of Invoice no. AIPL/15-16/67UG dated 10.10.2015, since the payment was not made within a period of three months from the date of issue of invoice, they had reversed the Cenvat Credit of Rs. 13,91,012/- in terms of Rule 4 (7) of Cenvat Credit Rules, 2004. Subsequently, they made the payment of invoice on 11.07.2017 and therefore re-credited the amount in their CenvatCredit register in terms of saving clause provided under clause (c) of section 174 (2) of the CGST Act. This being so, they prayed that either refund should be granted or in the alternatively they should be allowed to claim Input Tax Credit of said amount under GST in terms of provisions of contained section 140 (9) of CGST Act, 2017.

(vi) An amount of Rs. 90,016/- could not be availed as credit for the Invoice No. RA-4 dated 30-06-2017 relating to services availed by the appellant prior to 30-06-2017 however the invoice for the same was received by them after the appointed day and also after filing the revised ST-3 returns for the period April, 2017 to June, 2017 filed on 14-10-2017. There is no provision under CGST Act, 2017 to

deal with the situation. Critical examination of Section 140 (5) of CGST Act, 2017 reveals that the said provisions deals with the situation where the services are received after the appointed date for which tax is paid under the existing law, which is not the case of the appellant. In other words, the transitional provisions under CGST Act, 2017 is deficient to deal with the situation arises in the case of appellant.

Therefore, to obviate the aforesaid three situations, the appellant has taken recourse to the option available under Section 142 (3) of CGST Act, 2017 and filed the refund claim.

(vii) The arguments advanced by the Adjudicating Authority that there is no provision in the existing law to refund the un-utilised Cenvat Credit is also not correct in light of the following case laws being relied upon by the appellant:

- *Union of India Vs. Slovak India Trading Co. Pvt. Ltd. Reported as 2006(201) ELT 559(Kar) CEA No. 5/2006 decided on 07-07-2006.*
- *Gauri Plasticulture P. Ltd. Vs. Commissioner of Central Excise reported as 2018(360) ELT 967(BOM) in CEA No. 28 of 2008 & 257 of 2007 decided on 23-04-2018.*
- *Shalu Synthetics Pvt. Ltd. Vs. Commissioner of Central Excise & ST, Vapi reported as 2017(346) ELT 413 (Tri. Ahmd) Final Order No. A/11053/2014-WZB/AHD dated 10-06-2014 in Appeal No. E/1167/2009-SM*
- *Commissioner of C.Ex. &Cus. (Appeals), Tirupati Vs. Kores (India) Ltd. Reported as 2009 (245) ELT 411 (Tri. Bang)*

(viii) The adjudicating authority has mis-read the decision of Hon'ble High Court of Gujarat in the R/SCA No. 5758, 5759,5760 & 5762 of 2019 [In the case of Siddharth Enterprise vs. Nodal Officer reported as 2019(29) GSTL664(Guj)] in as much as that the said decisions were related to allowing writ applicant to file TRAN-1 and TRAN-2 return.

5. The appellant was granted opportunity for personal hearing on 18.09.2020. Shri Pravin Dhandharia, Chartered Accountant, appeared for personal hearing. He re-iterated the submissions made in Appeal Memorandum.

5.1 The appellant vide e-mail dated 18.09.2020 also submitted copies of following judgements and requested to consider the same as part of their submissions.

(i) *CESTAT, West Zonal Bench, Mumbai Order in case of Century Rayon-Twisting Unit Vs. Commissioner of C.Ex. Thane-I reported at*

2015(325)ELT205 (Tri. Mumbai)

(ii) CESTAT, South Zonal Bench, Bangalore Order in case of Bangalore Cables P. Ltd. Vs. Commissioner of C.Ex. Bangalore-III reported at 2017(347)ELT100 (Tri. Bangalore)

6. I have carefully gone through the facts of the case available on record, grounds of appeal and oral submissions made by the appellant at the time of hearing.I find that the issue to be decided in this case is whether the appellant is eligible for refund in respect of unutilized Cenvat Credit, as detailed in Table at Para 2.1 above, as well as of Krishi Kalyan Cess (KKC) lying in balance as per Service Tax returns for the period from April 2017 to June 2017.

6.1 In order to analyze the issue in proper perspective, it is relevant to go through the legal provisions.The provisions contained under Section 140 of the CGST Act, 2017 and Rule 117 of the CGST Rules, 2017 are re-produced below:

> ***"Section-140: Transitional arrangements for input tax credit.—*** *(1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit [of eligible duties] carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law [within such time and]in such manner as may be prescribed:*
>
> *Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—"*
>
> ***Rule-117:****"Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of input tax creditof eligible duties and taxes, as defined in Explanation 2 to section 140, to which he is entitled under the provisions of the said section:"*

I find that in the present case, it is undisputed that the appellant has not submitted the declaration in FORM *GST TRAN-1* to avail the benefit of transferring the credits [un-utilised cenvat credit as on 30-06-2017] into the GST regime. Instead, as per their submission, as mentioned in para-4 (ii) above, they have preferred and filed refund claim of such unutilized Cenvat Credit claiming them to be eligible under the provisions of Section 142 (3) of the CGST Act.

6.2 It is an admitted fact that the appellant has continued to operate under GST regime and had filed returns.Under the circumstances, the appellant had to necessarily carry forward the CENVAT balance as per Section 140 of the CGST Act, 2017. The word used in the said section is "shall" and hence there was no option to the appellant but to carry forward the CENVAT balance and make a declaration under GST Tran-1 electronically. I am not in agreement with the contention of the appellant that the CGST law did not intend or restrict to exercise the option of transfer of CENVAT balance. Hence, the reliance on case laws of Naffar Chandra Jute Mills Ltd. etc. by the appellant is misplaced in as much as there is no ambiguity in fiscal statute and that there was also no alternate option available to the assessee. The contention of the appellant that they had no business and hence did not file TRAN-1 lacks legal support in as much as they had never surrendered the registration granted to them and had continued to file GST returns. Hence, they have continued to operate under GST regime.

6.2.1 Further, the provisions of Section 142 (3) of CGST Act, 2017 are re-produced below:

"Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act."

In terms of the said provision, the claim for refund had to be disposed of in accordance with the provisions of existing law. Further, in terms of Section 2 (48) of CGST Act, "existing law" is defined as under:

"existing law" means any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of this Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation;"

Hence, the existing law in the present case is the Service Tax, contained under Chapter V of the Finance Act, 1994, and Section 11B of the Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994.Further, I find that Section 11B of the Central Excise Act, 1944 and the Cenvat Credit Rules, 2004, do not contain any provision which allows refund of such accumulated Cenvat Credit in the Cenvat Account.

6.2.2 It is also observed that the appellant has in para no. 4 (iii) above tried to interpret the provisions of Section 142 (3) of the CGST Act after dividingit into four parts. It has been contended that "The second part of the provision states that any amount eventually accruing to him shall be paid in cash means Cenvat claimed but not utilized shall be refunded to him in cash". In this regard, I find that when we bifurcate the provision in parts which is connected with the term "and", the second part should be read in consonance with the initial part and in any case, the second part of the provisions will be applicable only to the situation which qualifies the first one. Further, it is a settled legal provision that the financial statutes should be read in totality and not in parts. Hence, I find that Section 142 (3) of the CGST Act is grossly mis-interpreted by the appellant. Accordingly, the contention made by appellant is rejected being devoid of merit.

6.3 As regards the refund claim on component of service tax as mentioned at Sr. No. (2) of the said table under the head *"Amount re-credit after 30.06.2017 in terms of Rule 4(7) of the Cenvat Credit Rules, 2004"*, it is observed as under:-

(i) The appellant had reversed Cenvat Credit amount of Rs. 13,91,012/- pertaining to Invoice No. AIPL/15-16/67UG dated 10.10.2015 in terms of Rule 4(7) of the Cenvat Credit Rules, 2004, as the payment was not made within a period of three months from the date of issue of invoice. Thereafter, they made payment for the said invoice on 11.07.2017 and re-credited the said amount in their Cenvat Credit register.

(ii) I find that the appellant has grossly misinterpreted the legal provisions in as much as that the sixth proviso to Rule 4(7) of the Cenvat Credit Rules, 2004, as amended vide Notification No. 6/2015-Central Excise (N.T) dated 01.03.2015 provides as under:

"Provided also that the manufacturer or the service provider of output service shall not take CENVAT credit after one year of the date of issue of any of the documents specified in sub-rule (1) of rule 9."

Further, in terms of provisions of Section 142 (3) of the CGST Act, *"every claim for refund filed....., for refund of any amount of CENVAT credit.....paid under the existing law, shall be disposed of in accordance with the provisions of existing law....."*.

(iii) Hence, the CENVAT credit in respect of Invoice dated 10.10.2015 was not available to the appellant on 11.07.2017, being document of more than one year, under proviso to Rule 4(7). Accordingly, I find that the re-credit taken by the appellant after making payment on 11.07.2017 is not legally correct in terms of the said proviso to Rule 4(7) of Cenvat Credit Rules, 2004 and the contention of the appellant is not legally sustainable and is accordingly rejected.

6.4 As regards the refund claim for an amount of Rs. 90,016/- forInvoice No. RA-4 dated 30.06.2017, the appellant has contended that there is no such provision exist under Section 140 of the CGST Act, 2017 which allows credit involved therein.In respect of the question of entitlement of such credit, the appellant should have approached the competent jurisdictional authority. As the CENVAT was not availed for the said amount, any question of its refund does not arise. I find that the adjudicating authority in Para 18 of the impugned order has come to conclusion that the appellant can reclaim the amount in form of credit and not in form of refund. I am in agreement with his finding.

6.5 Further, I also find any "cess" is not covered under the category of "eligible duties" as per the Explaination-3 to the Section 140 of the CGST Act which provides transitional arrangement for input tax credit. Further, there is no provision exist in the Cenvat Credit Rules 2004 or the CGST Act, 2017 allowing cash refund of cess lying in balance in the Cenvat Credit Account as on 30.06.2017. Hence, the appellant is not eligible for refund for any amount paid as cess.

7. Further I find that the appellant has placed reliance on the following Judgements:

- *Union of India Vs. Slovak India Trading Co. Pvt. Ltd. reported as 2006(201) ELT 559 (Kar) CEA No. 5/2006 decided on 07-07-2006.*
- *Gauri Plasticulture P. Ltd. Vs. Commissioner of Central Excise reported as 2018(360) ELT 967 (BOM) in CEA No. 28 of 2008 & 257 of 2007 decided on 23-04-2018.*
- *Shalu Synthetics Pvt. Ltd. Vs. Commissioner of Central Excise & ST, Vapi reported as 2017(346) ELT 413 (Tri. Ahmd) Final Order No. A/11053/2014-WZB/AHD dated 10-06-2014 in Appeal No. E/1167/2009-*

SM

- *Commissioner of C.Ex. &Cus. (Appeals), Tirupati Vs. Kores (India) Ltd. Reported as 2009 (245) ELT 411 (Tri. Bang)*
- *CESTAT, West Zonal bench, Mumbai in case of Century Rayon-Twisting Unit Vs. Commissioner of C.Ex. Thane-I reported as 2015(325) ELT 205 (Tri. Mumbai)*
- *CESTAT, South Zonal bench, Bangalore in case of Bangalore Cables P. Ltd. Vs. Commissioner of C.Ex. Bangalore-III reported as 2017(347) ELT 100 (Tri. Bangalore)*

7.1. I find that in all the above cases, the issue involved is refund of unutilised input tax credit on closure of the operation and surrender of registration by the respective party. Whereas, in the present case, the appellant was already registered under Service Tax having the Service Tax registration No. AADCR4459EST002 and had automatically migrated in to the GST Law w.e.f. 01.07.2017 in terms of Section 139 of CGST Act, 2017 which is re-produced as hereunder:

> *"(1) On and from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number shall be issued a certificate of registration on provisional basis, subject to such conditions and in such form and manner as may be prescribed, which unless replaced by a final certificate of registration under sub-section (2), shall be liable to be cancelled if the conditionsso prescribed are not complied with.*
>
> *(2) The final certificate of registration shall be granted in such form and manner and subject to such conditions as may be prescribed.*
>
> *(3) The certificate of registration issued to a person under sub-section (1) shall be deemed to have not been issued if the said registration is cancelled in pursuance of an application filed by such person that he was not liable to registration under section 22 or section 24".*

Further, I also find that the appellant has not filed any application for cancellation of certificate of registration issued to them under sub-section (1) the section 139 of the said act and the appellant was continuously filing their regular GST returns as per CGST Act, 2017. Hence, the status of the appellant cannot be considered as a "closed unit". Accordingly, the said judgements would not be squarely applicable in the present case.

8. It is further observed that the Larger Bench of the Hon'ble High Court of Bombay has considered the issue of refund of accumulated cenvat credit in case of Gouri Plasticulture Pvt. Ltd. Vs. CCE Indore [2019-TIOL-1248-HC-Mum-CX-LB] when the Division Bench of the Hon'ble High Court at Bombay had referred the matter to it after framing the questions of law as under:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B (2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

8.1. After analysing the entire issue in detail, the Hon'ble High Court have answered the questions of law as under:

"40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India."

8.2. Further, I find that the CESTAT, Regional Bench at Hyderabad in case of M/s. Mylan Laboratories Ltd. Vs. Commissioner of C.Excise& Customs, Guntur in Central Excise Appeal No. 30591 of 2019 also relied upon the above mentioned judgement while considering the identical issue and text of the Final Order No. 30689/2020 dated 25.02.2020 issued is re-produced as below:

"Respectfully following the ratio of the judgement of the larger bench of Hon'ble High Court of Mumbai, this Bench had, on an identical matter, in Final Order No. A/31159/2019 dated 23/12/2019 in service tax appeal No. 30525/2019 in case of BHEL has held that there is no legal provision under which the said refund could be given. I find no reason to take a different view in this case. Accordingly, following the judgement of the Hon'ble High Court of Bombay (Larger Bench), I find that the appeal filed by the appellant cannot be allowed and the impugned order is correct and calls for no interference."

9. On careful consideration of the relevant legal provisions and the judicial pronouncements of the Hon'ble High Court, I find that the appeal filed by the appellant is not legally maintainable on merits and is liable to be rejected.

10. In view of the above, I do not find any merit in the contention of the appellant so as to interfere in the order issued by the adjudicating authority. Accordingly, I uphold the impugned Order-in-Originaland the appeal is accordingly rejected.

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

29 October, 2019

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

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

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2. The Commissioner CGST and Central Excise, Ahmedabad-South.
3. The Deputy /Asstt. Commissioner, Central Excise, Division-VI, Ahmedabad-South.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. Guard file
6. PA File