आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- *oaahmedabad2@gmail.com*		

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. **STC/15-01/OA/2022** DIN- 20230364WT0000601280

	आदेश की तारीख़	/	Date of Order : 20.03.2023
	जारी करने की तारीख़	/	Date of Issue : 22.03.2023
द्वारा पारित/Passed by -			
	उपेन्द्र सिंह यादव	/	UPENDRA SINGH YADAV
	आयुक्त	/	COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-049/2022-23

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan, Asarwa, Near Girdharnagar Bridge, Girdharnagar, Ahmedabad, Gujarat 380004.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क)प्रतियाँ संलगन की जाएंगी म एक प्रमाणित प्रति होगी।

(The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषय:- -कारण बताओ सूचना:

Subject- Proceedings initiated vide Show Cause Notice No. GADT/TECH/SCN/ST/22/2021-TECH&LEGAL-O/OCOMMR-CGST-ADT-AHMEDABAD dated 07.02.2022 issued to M/s. Maharashtra Border Check Post Network Ltd. Sadbhav House, Opp. Law Garden Police Chowki, Ellisbrdge, Ahmedabad - 380006

ORDER-IN-ORIGINAL NO. AHM-EXCUS - 049/2022-23

M/s. Maharashtra Border Check Post Network Ltd. Sadbhav House, Opp. Law Garden Police Chowki, Ellisbrdge, Ahmedabad - 380006 were issued Show Cause Notice No. GADT/TECH/SCN/ST/22/2021-TECH and LEGAL-O/O COMMR-CGST-ADT-AHMEDABAD dated 07.02.2022 by the Commissioner, Central Tax, Audit Commissionerate, Ahmedabad.

Brief facts of the case pertaining to Show Cause Notice No. GADT/TECH/SCN/ST/22/2021-TECH and LEGAL-O/O COMMR-CGST-ADT-AHMEDABAD dated 07.02.2022 are as follows:

1. M/s. Maharashtra Border Check Post Network Ltd. Sadbhav House, Opp. Law Garden Police Chowki, Ellisbrdge, Ahmedabad – 380006 (hereinafter referred to as "Assessee" for sake of brevity) were registered with the Service Tax department bearing Registration No. AAFCM9410LSD001. The Assessee was providing taxable services viz., Rent a cab, Security /Detective service, Manpower recruitment, Cargo Handling, GTA Service, Business Support service, Works Contract service etc. They were also availing the benefit of Cenvat Credit of Service Tax paid on the input services received by them.

2. EA-2000 audit of the said Assessee was conducted by the officers of Central Tax Audit, Ahmedabad covering the period from April' 2016 to June'2017 on 16.08.2021 & 17.08.2021. Final Audit Report (FAR) No. CE/ST-152/2021-22 dated 07.10.2021 was issued to the said Assessee by the Assistant Commissioner, Central Tax Audit, Circle VII, Ahmedabad.

3. During the course of audit and on verification of CENVAT register of the Assessee it was observed that in the month of June' 2017 the Assessee had availed CENVAT amounting to Rs. 9,05,62,820/- on the inputs/input services received for the civil works done in the previous year and shown the same under building construction as "Deferred Cenvat Credit Transferred to Receivable". It appeared that the said Cenvat Credit was not eligible to the Assessee in terms of Rule 2(l) of Cenvat Credit Rules 2004. This objection was communicated to the Assessee vide letter dated 23.08.2021. In response, the Assessee vide their letter dated 26.08.2021 had submitted that the CENVAT was related to the building construction i.e. Civil Works done in the previous years. The Cenvat Credit of Rs. 9,05,62,820/- was taken by them on 30.06.2017 in the ST-3 returns of Apr-June'2017. During the filing of TRAN-1 the same was transferred by them to their business unit of Maharashtra (having same PAN) in terms of Section 140(8) of CGST Act, 2017.

4. The Input service has been defined under Rule 2(1) of the Cenvat Credit Rules, 2004 ('Cenvat Rules'). The relevant text of the definition is reproduced below:

"[(l) "input service" means any service,

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

or

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

and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal"

[but excludes], -

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

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

(b) Laying of foundation or making of structures for support of capital goods;

5. The Cenvat Credit on construction service is specifically excluded from the definition of "input services" under Rule 2(l) of Cenvat Credit Rules' 2004. It therefore, appeared that the Cenvat Credit availed by the Assessee on construction services did not fall within the ambit and coverage of the definition of 'input service', as mandated under Rule 2(1) of the Cenvat Credit Rules, 2004 and the exclusion part thereof. Accordingly, it appeared that the Cenvat Credit availed by the Assessee on construction service was inadmissible and the said Assessee had wrongly transferred the said credit to their Maharashtra office under GSTIN obtained in Maharashtra. It also appeared that since the Cenvat Credit was not

admissible to them, the Cenvat Credit availed by them for the previous years and transferred to Maharashtra was also illegal.

6. Accordingly, the Cenvat Credit amounting to **Rs.9,05,62,820/-**availed by the said Assessee in respect of the building construction i.e. civil works done in the previous year appeared to be not available to them and the same had not been reversed/paid back by the said Assessee.

7. The Assessee vide their letter dated 26.08.2021 had submitted that "The Cenvat was related to the building construction i.e. civil work done in the previous years. The Cenvat of Rs. 9,05,62,820/- was taken by them on 30.06.2017 in the ST-3 returns of Apr-June 2017. During filing of TRAN-1, the same was transferred by them to their business unit of Maharashtra (having same PAN) in terms of Section 140(8) of CGST Act, 2017. Further, they submitted that the company had already reversed the same (i.e. Rs.9,05,62,820/-(an amount of Rs.5,27,64,487/- was paid by cash and Rs.3,77,98,333/- was reversed by CENVAT) in the month of April 2018 against the GST number of Maharashtra i.e. GSTIN: 27AAFCM9410L1Z6".

8. It further appeared that since the said Assessee was registered under the jurisdiction of Ahmedabad having Centralized Registration of Service Tax (AAFCM9410LSD001), the reversal/payment of wrongly availed Cenvat Credit of input service of Rs.9,05,62,820/- by the Assessee from their GSTIN: 27AAFCM9410L1Z6 of Maharashtra was erroneous. This amount of Cenvat Credit wrongly availed was required to be reversed from GSTIN at Ahmedabad. In the GST regime, the Gujarat unit and Maharashtra unit of the said Assessee were legally distinct entities having separate GSTN. Therefore, the said Assessee had taken inadmissible Cenvat Credit on the construction services in the months of April' 2017 to June' 2017 and by way of filing TRAN-1 they had wrongly transferred their inadmissible Cenvat Credit to their Maharashtra unit having different GSTN. Therefore it appeared that such Cenvat Credit wrongly availed by Gujarat unit was required to be recovered from the unit of the said Assessee having Gujarat GSTN by invoking the provisions of Section 73(1) of the Finance Act, 1994 read with Rule 14(1) of the Cenvat Credit Rules, 2004,

9. It further appeared that the Assessee has contravened the provisions of:

- Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(1) of the Cenvat Rules as they have wrongly availed the ineligible Cenvat Credit amounting to Rs.9,05,62,820/-on construction services ;

- Rule 9(6) of the Cenvat Credit Rules, 2004 as they have failed to fulfil the burden of proof regarding the admissibility of Cenvat Credit availed by them.

10. It appeared that the said Assessee had willfully availed Cenvat Credit on Construction services which they knew were ineligible to them, as envisaged in the definition of 'input service' under Rule 2(1) of the Cenvat Rules. Further, it also appeared that the Assessee had at no point of time provided the information to the department of having availed Cenvat Credit on Construction services. It, therefore, appeared that the said Assessee had wrongly availed Cenvat Credit on Construction services in contravention of the provisions of Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(1) of the Cenvat Credit Rules. It appeared that they had not disclosed the availment of Cenvat Credit on Construction services in their returns. Accordingly, it appeared that the Assessee had suppressed the material facts with an intention to avail Cenvat Credit which was ineligible to them, as discussed above. It, therefore, appeared that the wrongly availed Cenvat Credit on construction services was to be demanded and recovered from the Assessee under the proviso to Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules 2004 by invoking the extended period of time. It also appeared that the Assessee was liable to pay interest under the provisions of Section 75 of the said Act read with Rule 14(1)(ii) of the Cenvat Credit Rules. It further appeared that the Assessee had suppressed the material facts and had wrongly availed the Cenvat Credit on Construction services and therefore, the Assessee were liable for penal action under the provisions of Section 78(1) of the said Act read with the provisions of Rule 15(3) of the Cenvat Credit Rules, 2004.

11. Full trust has been placed on the service providers and they are not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules. Considerable amount of trust is placed on their private records. From the evidences, it appeared that the said Assessee had knowingly availed the Cenvat Credit wrongly. The deliberate wrong availment of Cenvat Credit and non-reversal of Cenvat Credit is in disregard to the requirements of law and breach of trust reposed on them. This fact of wrong availment and non-reversal of Cenvat Credit would have remained unnoticed if these were not raised during the course of audit. Moreover, the burden of proof of availing the Cenvat Credit correctly is on the Assessee, as per the provisions of Rule 9(6) of the Cenvat Credit Rules, which had not been fulfilled by them.

12. As per Board's Instruction No 1080/09/DLA/MISC/15 dated 21.12.2015 and Instruction No 1080/11/DLA/CC Conference/2016 dated 8.7.2016, a pre

consultation was offered to the Assessee on 07.01.2022, which was adjourned to 25.01.2022 and thereafter to 31.01.2022 on the request of the Assessee. On 31.01.2022 Shr Kapil Bokadia, Chartered Accountant and authorized signatory of the said Assessee appeared on behalf of the said Assessee. The Assessee reiterated the submissions dated 27.08.2021 submitted to the auditors during the audit and showed his disagreement with the view of the auditors. The contentions raised by the Assessee did not appear to have any merit so as to drop the proposal of issuing the show cause notice.

13. Therefore, the Assessee (M/s. Maharashtra Border Check Post Network Ltd.) were issued a Show Cause Notice dated 07.02.2022 asking them as to why;

i. The Cenvat Credit amounting to Rs. 9,05,62,820/- (Rupees Nine Crore Five Lakh Sixty two thousand Eight hundred and twenty only), wrongly availed by the Assessee, should not be demanded from them by invoking the extended period of five years under the proviso to Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules'2004;

ii. Interest should not be charged and recovered from them under the provisions of Section 75 of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules' 2004.

iii. Penalty should not be imposed on them under the provisions of Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules' 2004, as discussed above.

DEFENCE REPLY:

14. The Assessee vide their letter dated 01.04.2022 submitted their reply to the Show Cause Notice dated 07.02.2022. The reply dated 01.04.2022 of the Assessee is reproduced hereunder –

I. Submission on facts

1. That they are a public unlisted company, having principal place of business at **602, Godrej Coliseum Phse II, Lokmanya Pan Bazar, Near Somaiya Hospital, Sion, East, Mumbai, Maharashtra 400022** having Service Tax Registration No. **AAFCM9410LSD001** and engaged in the business of Modernization and Computerization of Integrated Border Check Post's in the state of Maharastra. (sic)

2. That an E.A. 2000 audit notice was issued vide letter CTA/04-363/C-VII /AP-48 / 2019-20/2322 dated 01-July-2020 by the Supdt. AP-

48, C-VII, office of the Commissioner of Central GST,Audit, Ahmedabad for conduct of audit for the F.Y. 2016-17 and F.Y. 2017-18 (Apr-June quarter).

3. That, the audit was conducted for the aforementioned period and a letter bearing **F.No. CTA/04-363/C-VII/ AP-48 / 2019-20/ 1303 DT. 7TH Ocober-2021**, was issued detailing the observations under the said audit, by the learned Asst. Commisioner C-VII CGST Audit **Ahmedabad**.

4. That an audit report bearing **F.No. CTA/04-363/C-VII/AP-48 / 2019-20/1303 DT. 07-October-2021**, was issued summarizing the aforementioned audit objections and whether the same has been agreed and paid by the Assessee or not. Summary of the observations as prescribed in the Audit Report shared with them were as under:

Sr. No.	Particulars	Service tax	Interest	Penalty/others	Total
1	Non-payment of service tax on damage fee recovery	85,965	67,585	12,895	1,66,445
2	Credit availed upon receipt of invoice, but payment has not been made within 3 months from the date of invoice as per Rule 4(7) of the Cenvat Credit Rules, 2004	-	15,625	-	15,625
3	Short payment of service tax on reconciliation of services under RCM	20,550	16,030	3,082	39,662
4	Non-payment of interest on late payment of service tax in ST-3 returns	-	16,170	-	16,170
5	Wrong availment of Cenvat Credit of ineligible input service i.e., works contract service under civil construction.	9,05,62,820	-	-	9,05,62,820 +Interest +penalty
	Total	9,06,69,335	1,15,419	15,977	9,08,00,722

5. That it is pertinent to note that, apart from observation no. 5, the Assessee had discharged the service tax, interest and penalty/other in respect of all the observations raised in the audit letter and the same were marked as 'agreed and paid' in the audit report.

6. That with respect to observation no. 5, the Assessee had filed the detailed reply vide letter dated 25-October-2021 capturing the explanation as to why the same was not payable by them and the same was marked as 'not agreed and not paid'. It was clearly highlighted in the response submitted by the Assessee against the audit letter that the said amount of Cenvat Credit has been transferred to the Maharashtra registration of the Assessee and the

said Cenvat Credit has already been reversed by the Maharashtra registration.

7. That without considering their submissions, on 07 February 2022, based on the audit report, a show cause notice bearing **F.No. GADT/TECH/SCN/ST/22/2021-TECH and LEGAL-O/O COMMR-CST-ADT-AHMEDABAD** ('impugned SCN'), was served (which was received by the Assessee on 10 February 2022) on their Gujarat registration.

8. That in light of the above facts, they would like to submit the following points in response to the impugned SCN issued with the prayer to decide the case on merits for the following reasons and grounds each of which are without prejudice to the other and in the alternative.

II. Submission on Merits

9. That at the outset, the Assessee wish to submit that the impugned SCN issued:

(i) Is ex-facie illegal, perverse, arbitrary, and contrary to the applicable legal provisions, circulars issued and the settled law on the legal issues involved in the present case;

(ii) Is in ignorance and/or without fully appreciating the facts of the case rather on a hasty and prejudiced basis without acting in a judicious manner.

10. That it is therefore submitted that the impugned SCN is fallacious and bad in law for the various reasons set out hereunder, which are independent and without prejudice to one another.

11. That the Assessee also submits that the impugned SCN is without the weight of evidence and is totally unsustainable and against the law when seen with the facts and legislative provisions.

12. That the submissions in this reply deal with multiple grounds which have been elucidated in the forthcoming paragraphs where it can be observed that:

- **Demand cannot be made on the**

  - Incorrect superficial ground that the Assessee has availed the ineligible Cenvat Credit of the input services in Form ST-3 returns filed with an intent to evade service tax payment, and
  - Without making any verification/investigation of the Cenvat Credit on works contract proposed to be recovered by the Assessee; and
  - Without taking into consideration the detailed submissions made by the Assessee, with regards to observation no. 5 as stated in Para

8 (a) above, vide reply to audit letter bearing Ref. **F.No. CTA/04-363/C-VII/AP-48 / 2019-20/1303 DT. 07-October-2021**; and

- Issuance of impugned SCN is unwarranted and is in violation of the principle of natural justice as the same is issued without making any proper verification/ investigation in this regard.
- Provisions of Section 75 of the Finance Act, 1994 regarding the imposition of interest is not applicable in the present case.
- Provisions of Rule 15 of the Cenvat Credit Rules, 2004, read with Section 78 of the Finance Act, 1994 regarding the imposition of penalty are not applicable in the given case.

13. That the Assessee submits that the learned Commissioner is duty bound to consider the various grounds submitted by the Assessee in the reply to the audit report submitted to the learned Assistant Commissioner vide letter dated **25 October – 2021** before the issuance of impugned SCN. However, it appears that the learned Commissioner has preferred to simply reproduce, in the impugned SCN, the para from the final audit report and the submission made by the Assessee from time to time and to not consider the contentions/grounds specified therein in true spirit and the same is preferred without providing appropriate reasons for the same.

14. That in the ensuing paragraphs, the Assessee submits the various grounds, each of which are without prejudice to the other and in the alternative, and humbly request to consider the same as grounds in respect of impugned SCN to decide the case on merits.

A. Submissions with regards to the inappropriateness of demand for reversal of Cenvat Credit from the Gujarat registration where the same is already reversed by the Maharashtra registration.

15. That the Assessee submits that prior to the introduction of the GST regime, it was having centralized registration under the erstwhile service tax regime and the E.A. 2000 audit, under the erstwhile regime, has been conducted for the said central registration.

16. That further, the audit report is also issued in respect of the central registration of the Assessee. However, post introduction of GST, the Assessee has taken registration separately in the state of Gujarat and Maharashtra.

17. That it is pertinent to note, Section 140(8) of the Central Goods and Services Tax Act, 2017 (the 'CGST Act, 2017') reads as under:

Where a registered person having centralized registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of Cenvat Credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within

three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralized registration was obtained under the existing law.

18. That in light of the aforesaid, the Assessee transferred the Cenvat Credit pertaining to works contract services, which is under dispute in the impugned SCN, to the Maharashtra registration while filing Form Trans-1 in this regard.

19. That it is pertinent to note that the Assessee carried forward the Cenvat Credit in From Trans-1 as CGST as a balance of the Cenvat Credit appearing in the return filed, for the period April'17 to June'17, in accordance with the provisions of Section 140(1) of the CGST Act, 2017 and immediately transferred the same to the Maharashtra registration as CGST.

20. That it is important to note that once the CGST, as carried forward in Form Trans-1, has been transferred to Maharashtra registration, the balance of the CGST transferrable to the electronic credit ledger of the Gujarat registration stands reduced to that much amount and the same get credited as CGST in the electronic credit ledger of the Maharashtra registration.

21. That accordingly, once the Cenvat Credit is carried forward as CGST in Form Trans-1 and further transferred as CGST to the Maharashtra registration, it can be stated that the Cenvat Credit has been validly transferred under the different jurisdiction in accordance with the transitional provisions of the GST Laws and the Gujarat registration of the Assessee has not even availed the same in the electronic credit ledger as input tax credit as the amount of the Cenvat Credit gets transferred to the electronic credit ledger only after filing of the TRAN-1 form and not earlier. Accordingly, it cannot be stated that Gujarat registration of the Assessee has first availed the Cenvat Credit and then transferred the same to the Maharashtra registration of the Assessee.

22. That in light of the aforesaid, it can be stated that if any Cenvat Credit has been availed by the centralized registration under the erstwhile regime and transferred to the Maharashtra registration, at the time of introduction of the GST regime, in accordance with the provisions of Section 140(8) of the CGST Act, 2017, the reversal of the said Cenvat Credit cannot be demanded from the Gujarat registration which has never availed the same in its electronic credit ledger.

23. That said above, the Assessee wish to state that the last paragraph of the audit report as provided to the Assessee reads as under:
*"**Jurisdictional Tax Authority** is requested to take necessary action in this regard to safeguard govt. revenue & outcome of the same may please be intimated to this office"*

(Emphasis Supplied)

24. That accordingly, as the Cenvat Credit availed under the erstwhile centralized regime has been transferred to the Maharashtra registration of the Assessee through Form Trans-1 without availing the same in the electronic credit ledger of the Gujarat registration, the reversal cannot be demanded from the Gujarat registration of the Assessee or by the jurisdictional tax authority of the Gujarat registration of the Assessee.

25. That in this regard, Section 25(4) of the CGST Act, 2017 provides that *"A person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act."*

26. That in light of aforesaid, where the Cenvat Credit has been transferred to the Maharashtra registration of the Assessee, the same cannot be demanded from the Gujarat registration of the Assessee as both the registration are distinct persons for the purposes of GST Laws, and it is very clear that one person cannot be demanded a reversal of Cenvat Credit in the case where the same is validly transferred, through the filing of FORM TRAN-1, to the other person in accordance with the provisions of the GST Laws.

27. That it is pertinent to note, that even where the Gujarat registration of the Assessee was nowhere obliged to do so, it requested the Maharashtra registration to provide the details of the utilization of the said Cenvat Credit, on works contract services, which in view of your good office is wrongly availed. Basis the discussion with Maharashtra registration, the Gujarat registration of the Assessee notified your good office vide the letter dated **28 October 2021**, that the said Cenvat Credit of 9,05,62,820/- which was transferred to the Maharashtra registration was subsequently reversed by the Maharashtra registration along with the applicable interest in order to buy the peace of mind.

28. That, the Maharashtra registration of the Assessee also intimated its jurisdictional tax authority with regards to the reversal of the Cenvat Credit and also requested its jurisdictional tax authority to intimate the said reversal to your good office.

29. That however, your good office, issued the impugned SCN demanding the said reversal again by the Gujarat registration of the Assessee is not appropriate as it is the Maharashtra registration which has received the amount from the erstwhile centralized registration of Assessee which was also subsequently reversed by the Maharashtra registration of the Assessee along with Interest.

30. That the Assessee would like to state that there is no loss to the Government as the applicable Cenvat Credit in the form of CGST has already been reversed by the Maharashtra registration. This view is supported by the following judicial rulings, wherein the various Tribunals have held that, if the service recipient is able to substantiate through appropriate evidence that GTA has collected and deposited the service tax to the Government, then the service recipient may not be held liable to discharge service tax under reverse charge mechanism, as there is no loss of revenue to the Government.

1) Angiplast Pvt. Ltd. Vs Commissioner of Service Tax, Ahmedabad [2013 (32) S.T.R. 628 (Tri. - Ahmd.)]
2) Commissioner of Service Tax, Meerut-II VsGeeta Industries P. Ltd. [2011 (22) S.T.R. 293 (Tri. - Del.)]
3) Mandev Tubes Vs Commissioner of Central Excise, Vapi [2009 (16) S.T.R. 724 (Tri. - Ahmd.)]
4) Navyug Alloys Pvt. Ltd. VsCommr. of C. Ex. &Cus., Vadodara-II [2009 (13) S.T.R. 421 (Tri. - Ahmd.)]
5) Elkos Pens Limited vs CST, Kolkata-I [2019 (24) G.S.T.L. 652 (Tri. - Kolkata)]
6) Kakinada Seaports Ltd. vs C.C.E., S.T. & CUS., Visakhapatnam-II [2015 (40) S.T.R. 509 (Tri. - Bang.)]

31. That accordingly the Assessee would like to state that as the Cenvat Credit in the form of CGST has been already reversed by the Maharashtra registration along with interest and it has also been intimated to the jurisdictional tax authority of Maharashtra registration of the Assessee, the same cannot be demanded again from the Gujarat registration merely on the fact that the centralized registration of the Assessee was located in Gujarat.

B. Demand, which is issued based on provision of the repealed law, is liable to be set aside:

32. That without prejudice to anything submitted in this reply, the Assessee at the outset submits that the impugned SCN is illegal and hence liable to be quashed.

33. That the Assessee submits that the audit and the SCN issued by the revenue authorities with the enactment of GST law is illegal and liable to be quashed. The Assessee submits that as per Section 174(2)(e) of the CGST Act, 2017 only those investigation, inquiry, audit, and adjudication are saved which were instituted prior to repeal/omission of the Finance Act, 1994. In the given case, the audit was conducted and the SCN was issued post the implementation of GST law. Thus, the audit conducted by the Department was illegal and the subsequent SCN issued on the basis of such illegal audit is ultra vires Section 174(2)(e) of the CGST Act, 2017 and is liable to be quashed.

34. That the Assessee rely on following High Court rulings:

a. **M/s Sulabh International Social Service Organization, (Jharkhand State Branch) vs UOI [2019 (4) TMI 523 - Jharkhand High Court]**
b. **M/s T.R. Sawhney Motors Pvt. Ltd. vs UOI & ANR. [2019 (4) TMI 524 - Delhi High Court]**
c. **M/s OWS Warehouse Services LLP through AsadullahSiddique S/o Vasiullah Siddique vs UOI [2018 (10) TMI 1008 - Gujarat High Court]**

35. That taking into consideration the above, the Assessee submits that the audit and the SCN issued by the revenue authorities after the enactment of GST law which is illegal and hence liable to be quashed.

C. Demand, which is issued based on audit objection, is bad in law:

36. That in this context, the Assessee would like to mention that there exist a plethora of judgments wherein, it has been held that the demand cannot be made merely based on audit objections, without making further investigations, as in the present case:
    a. **Kirloskar Pneumatic Co. Ltd. vs CCE, Pune-III 2011 (22) S.T.R. 121 (Tri. - Mumbai)**
    b. **Aditya College of Commerce Exam vs. CCE 2009 (16) STR 154 (Tri-Bang.)**
    c. **Swastik Tin Works vs CCE Kanpur 1986 (25) E.L.T. 798 (Tribunal)**

37. That the Assessee respectfully would like to state that in the aforementioned judicial pronouncements, it has been held that SCN or demand cannot be based merely on the basis of audit report, there should be inquiries and investigation which is required to be conducted by the proper officer before issuing SCN. However, in the present case, the documents and explanations as placed on record by the Assessee has not been considered by your good office in true spirit and the definition of the term input service has been not considered in entirety which in effect means that the inquiries and investigation which is required to be conducted by the proper officer before issuing SCN are not conducted by your good office.

38. That also in the present case, from time and again, the Assessee has made the detailed submissions, (in response to audit letters issued prior to issuance of impugned SCN) stating that the Cenvat Credit as proposed to be recoverable under the impugned SCN by your good office is transferred to the Maharashtra registration and it was also already reversed by Maharashtra registration along with interest even when the same not reversible to buy the peace of mind. However, your good self has not considered the submissions made by the Assessee in the true-spirit and has reiterated the same provisions of law at the time of issuance of audit letters and audit report. This clearly indicates that demand in the impugned SCN have been issued merely on the basis of audit report without considering the material on records as submitted by the Assessee from time to time and therefore the said demand is not sustainable in the eyes of law as it is

merely based on audit report without conducting any inquiries and investigation.

39. That hence the Assessee submits that as in the present case impugned SCN is issued on the basis of audit report without conducting further effective inquiries and investigation and without considering, in true spirit, the documents and submissions made by the Assessee, the same is not tenable and sustainable in light of the provisions of the erstwhile service tax Laws and therefore is bad in law.

III. Submission with regards to non-applicability of extended period of limitation:

No extended period, in absence of suppression of facts or wilful misstatement or intent to evade tax:

40. That without prejudice to anything specified in the submission, the Assessee hereby submits that the impugned SCN is legally untenable and is barred by limitation since the notice seeks to invoke the extended period of limitation beyond 30 months, which is inappropriate as the impugned SCN has not demonstrated the specific instances of intent to evade payment of tax.

41. That the Assessee would like to submit that the proviso to Section 73(1) of the Finance Act, 1994 envisages that the extended period of five years can be invoked for issuance of notice in case of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or the rules made thereunder with intent to evade payment of service tax.

42. That the Assessee would like to submit that none of the reasons mentioned in the proviso to Section 73(1) is applicable to them as they have neither committed any fraud or collusion nor have given any willful misstatement with an intent to evade payment of taxes. It is hereby submitted that the Assessee has not suppressed any facts or contravened the provisions of the Finance Act, 1994 with the intent to evade the payment of tax. The Assessee hereby submits that it had filed all the prescribed returns for the impugned period, wherein the details with regards to service tax payable and paid were clearly shown. Further, during the time of audit, the Assessee had fully co-operated with the revenue Authorities and supplied all the requisite information in this regard. This justifies that the Assessee has not suppressed any information from the revenue authorities.

43. That the Assessee respectfully submits several other grounds to substantiate that an extended period of limitation cannot be invoked in the present case, considering the fact that there was no malafide intent on the part of the Assessee to evade duty.

No extended period when relevant details disclosed in the returns:

44. That at the outset, the Assessee submits that it has correctly discharged the service tax liability in accordance with the provisions provided under service tax law. Furthermore, it is a settled position in law that if the return is duly filed with the required details, then in such a scenario extended period of limitation cannot be invoked. If the revenue officers had any doubt with regard to any data filled in the return, the authorities were free to call for any information required. The Assessee submits that they are a law-abiding citizen and would have provided any legally required data.

45. That the Assessee respectfully submits that an Assessee cannot be faulted with the allegation of suppression or malafide intention if the format of the service tax returns, which is prescribed under the law, does not fulfil the requirement of the revenue officers. In fact, the officers could have simply asked for the requisite information. Further, if the service tax returns are not serving the purpose of the revenue, the revenue department has the authority to make amendments to the format of returns. Just because the revenue authorities failed to seek the data, the Assessee cannot be blamed for suppression or malafide intention.

46. That the Assessee places reliance on the case of **CCE, Kolkata-Vi vs. ITC Ltd. [2013 (291) ELT 377 (Tribunal Calcutta/ Kolkata)]** which is squarely applicable in the given case. The Relevant para is reproduced below:

"5. Heard both sides and perused the records. The limited issue involved in the present case for determination is, whether the demand for recovery of Cenvat Credit availed on inadmissible input services, is barred by limitation or otherwise. It is the case of the Revenue that the respondent had not disclosed the details of the input services in their monthly returns, resulting into suppression of facts and hence, extended period of limitation is applicable to the facts of the present case. I find that the ld. Commissioner (Appeals) had observed that since the respondent had been filing ER-1 returns regularly indicating the total amount of credit availed by them and nothing prevented the Department from calling for details of the said input services on which credit was availed and the respondents were under a bona fide belief that the credit of service tax paid by the service provider on the said input services were available to them as credit, no suppression on the part of the respondent could be sustained. In my opinion, the said reasoning is sound and in consonance with the principle of law laid by this Tribunal. I find that this Tribunal in similar circumstances, in the case of Commr. of Central Excise, Jaipur-I v. Pushp Enterprises (cited supra), had observed as under:

> *"10. In these cases, there is no dispute about the fact that the ER-I Returns had disclosed the availment of Cenvat Credit but since there is no requirement for enclosing the invoices or giving the details of such credit or neither such details were given, nor the invoices were enclosed. However, once ER-I Return is filed, even though it is filed under self-assessment system, the officers are supposed to*

scrutinize the same. Just because the respondent had taken Cenvat Credit in respect of certain input services, which according to the Department was not admissible to them, it cannot be concluded that the credit had been taken knowing very well that the same was not admissible, unless there is some evidence in this regard. ***Moreover, when the quantum of service tax credit availed had been disclosed, the officers were always free to inquire from the respondent about details of the same and satisfy themselves about its correctness.*** *In view of these circumstances, I am of the view that there is no infirmity in the impugned order. Revenue's appeal is dismissed."*

(Emphasis supplied)

47. That the extended period of limitation cannot be invoked by alleging suppression for not disclosing the details which the statute itself does not require disclosing. Following judicial precedents are being submitted herewith which strongly supports the Assessee's view:

    a. **Apex Electricals (P.) Ltd. vs. UOI - 1990 taxmann.com 679 (Gujarat - HC)**
    b. **M/s Neptune EquipmentsPvt. Ltd. vs. CCE, Ahmedabad – 2011-TIOL-504-CESTAT-AHM**
    c. **Balsara Extrusions (P.) Ltd. vs. CCE & C, Surat-II - 2001 taxmann.com 1715 (CEGAT- Mumbai)**

48. That furthermore, the Assessee was filing the returns regularly. In this regard, it has been held by the Tribunals and Higher Courts in various cases that if the Assessee has submitted its returns in time, there cannot be any allegation of suppression against the Assessee. In the case of **M/s Saurin Investments Private Limited vs. CST Ahmedabad 2009-TIOL-1322-CESTAT-AHM** it has been held that when the Assessee is filing returns regularly, no suppression or misstatement can be attributed to the Assessee. In order to substantiate further, the Assessee places reliance on the following cases:

    a. **M/s. Chandra Shipping and Trading Services Vs. CCE. Vishakhapatnam-II [2009(13) S.T.R. 655 (Tri. Bang)],**
    b. **Anagram Capital Ltd. Vs. Commissioner of Service Tax, Ahmedabad [2010 (17) STR 55 (Tri. Ahmd)]**

49. That the Assessee further places reliance on the ruling in the case of **Commissioner of Central Tax Customs and Central Excise Rang Reddy Commissionerate, (Hyderabad-IV Commissionerate), Posnett Bhavan Ramkoti, Hyderabad vs M/s Quislex Legal Services Pvt Ltd [2019-TIOL-2090-CESTAT-HYD]**

50. That in view of the above judicial presents, the impugned SCN should be set aside.

No extended period when there is no intention to evade duty:

51. That the Assessee further submits that in the present case, they have not contravened any provisions of law with a deliberate intent to evade duty. The Assessee places reliance on the following judicial precedents wherein, the judicial authorities have held that when the Assessee has bonafide belief that no duty is payable and there is no intention to evade duty, extended period of five years is not applicable:
    a. **Pushpam Pharmaceuticals Company v. CCE Bombay [1995 (78) E.L.T 401 (S.C)**
    b. **CCE v. Chemphar Drugs & Liniments [1989 (40) ELT- 276]**

52. That the Assessee further submits that the onus of proof is on the department to show fraud, collusion, suppression of facts, misstatement, or contravention of Act or Rules made thereunder, with intent to evade duty, as the SCN followed by OIO is alleging this to invoke a larger period of five years. This view has been upheld by Hon'ble Apex Court in the case of **Tamilnadu Housing Board v. CCE [1994 (74) ELT 9 (SC)]**.

53. That additionally, the Assessee would like to draw your attention to the landmark decision of Hon'ble Apex Court in the case of **Uniworth Textiles v. CCE 2013 (288) E.L.T 161 (SC)** wherein the Court has upheld that burden to prove mala fide is on the department.

54. That in addition to the above, the Assessee submits that merely making an allegation of suppression of facts/fraud/misstatement/collusion/contravention of law with an intent to evade would not suffice. The intent to evade tax is built in the expression's 'fraud' and 'collusion,' however otherwise than making an allegation, the SCN has not proved that there was an intention to evade the payment of taxes.

55. The Hon'ble Supreme Court in the case of **Cosmic Dye Chemical v. CCE 1995 (75) E.L.T. 721 SC** (SC 3-member bench judgment) has upheld that so long an Assessee acts *bonafide* i.e., without an intention to evade duty, an extended period of limitation cannot be invoked. \

No extended period, for mere non-payment/short payment of taxes:

56. That the Assessee further places reliance on the following cases wherein, the Hon'ble Supreme Court has held that the extended period of limitation cannot be invoked in the cases of mere non-payment / short payment of taxes.
    a. **Uniworth Textiles Limited Vs. CCE, Raipur (2013-288-ELT-161-SC)**
    b. **Easland Combines, Coimbatore Vs. CCE, Coimbatore (2003-152-ELT-39-SC)**

57. That in view of the aforementioned legal and factual submissions, the Assessee respectfully submits that the SCN which has invoked an extended period of limitation is invalid and legally untenable.

No extended period of limitation when the matter involves interpretation of the law:

58. That the Assessee submits that the extended period of limitation cannot be invoked in respect of cases which involve interpretation issues. The allegation of malafide intention or suppression cannot be sustained in such matter. In the present case, the matter involves interpretation, the issuance of SCN and the protest by the Assessee is a fact that the matter involves interpretation issue. Since the impugned SCN is in respect of a matter which involves interpretation issue, the extended period of limitation could not be invoked. The Assessee places reliance on the following judicial pronouncements which supports the view of the Assessee:

a. **Mexim Adhesive Tapes Pvt. Ltd. vs CCE, Daman [2013 (291) E.L.T. 195 (Tri. - Ahmd.)]**
b. **Lubrizol Advanced Materials India Pvt. Ltd. vs C.C.E., Vadodara-I [2013 (290) E.L.T. 453 (Tri. - Ahmd.)]**
c. **ChansamaTalukaSarvodayMazoorKamdarSahakariMandli Ltd. vs C.C.E., Ahmedabad [2012 (25) S.T.R. 444 (Tri. - Ahmd.)]**
d. **Lanxess Abs Ltd. Vs. CCE, 2011 (22) S.T.R. 587 (Tri. - Ahmd.)**
e. **Indian Hotels Company Ltd Vs. CST, 2014-TIOL-1801-CESTAT-BANG**
f. **Atwood Oceanics Pacific Ltd. Vs. CST, 2013 (32) S.T.R. 756 (Tri. - Ahmd.)**
g. **K.K Appachan vs. CCE Palakkad 2007 (7) S.T.R. 230 (Tri. - Bang.).**

59. That the Assessee would like to reiterate the submissions made under para 44 to 46 that the Assessee cannot be faulted with the allegation of suppression or malafide intention if the format of the service tax returns, which is prescribed under the law, does not fulfil the requirement of the revenue officers. In fact, the officers could have simply asked for the requisite information. Further, if the service tax returns are not serving the purpose of the revenue, the revenue department has the authority to make amendments to the format of returns. Just because the revenue authorities failed to seek the data, the Assessee cannot be blamed for suppression or malafide intention. Further, the extended period of limitation cannot be invoked by alleging suppression for not disclosing the details which the statute itself does not require disclosing.

60. Accordingly, the Assessee submits that the extended period of limitation cannot be invoked in the present case and thus the impugned SCN needs to be quashed.

IV. Submission on interest:

62. That as per Section 75 of the Finance Act, 1994 as amended from time to time, a person shall be liable to pay interest only when there is a delay in the payment of tax.

63. That under the heading 'Submission on Merits', the Assessee has at length discussed why there does not arise the reversal of CENVAT and in turn recovery of the service tax. Thus, when the demand of duty itself does not exist, the question of levying interest cannot arise.

64. That the Assessee places reliance on the decision of Karnataka High Court in the case of **CCE & ST, Bangalore vs. Bill Forge Private Limited 2012 (26) S.T.R. 204 (Kar.),** wherein it has been held that interest should not be applicable where there is no liability to discharge the tax.

65. That in view of the above clear and undisputable settled position in respect of non-applicability of interest, it is humbly requested to your good self to kindly drop the demand.

V. Submission regarding penalty

66. That the Assessee at the outset submits that it is a law abiding taxpayer and had extended full co-operation with the revenue authorities. The Assessee never had the intention to evade payment of service tax. The dispute regarding wrong availment of Cenvat Credit of ineligible input service i.e., Works Contract Services under civil construction cannot be said to exist basis the fact that the said Cenvat Credit has already been reversed by the Maharashtra registration of the Assessee along with interest.

67. That in the ensuing paragraphs, the Assessee submits in respect of non-applicability of the penalty.

68. That the Assessee hereby submits the following, against the penalties levied under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004, each of which are without prejudice to the other and in the alternative:

a. It is not mandatory to levy penalty;
b. Penalty cannot be imposed in a case which is pertaining to interpretation of law;
c. No penalty for non-disclosure of facts not required to be disclosed;
d. Penalty under Section 78 of the Finance Act, 1994 is not applicable;
e. Penalty, if at all to be invoked, could be levied under Section 76 of the Finance Act, 1994;

❖ **<u>It is not mandatory to levy penalty:</u>**

69. That the Assessee hereby submits the following, against the penalties levied under Section 78(1) of the Finance Act, 1994 read with Rule

15(3) of the Cenvat Credit Rules, 2004, each of which are without prejudice to the other and in the alternative.

70. That the Assessee submits that it is a well settled position in law that imposition of penalty is the result of quasi-judicial adjudication. It is not a mechanical process or cannot be imposed just because there is an enabling provision to impose penalty. The element of *mens rea* or *malafide* intent must be necessarily present, in order to justify the imposition of penalty. The penalty may not be imposed on the Assessee in absence of any dishonesty or wilful intent to defraud revenue or evade the payment of duty. In other words, there has to be positive act on part of Assessee to evade payment of service tax.

71. That on the basis of the submission made in the aforesaid paragraphs; it can be clearly stated that the Assessee did not have an intention to evade the payment of tax. In fact, the Assessee's Maharashtra registration had already reversed the Cenvat Credit amounting to 9,05,62,820/- along with the interest of Rs. 35,62,227/- as stated in the aforesaid paragraphs. Thus, the allegation of intention to evade could not be made and resultantly penalty cannot be imposed.

72. That the submission of the Assessee is supported by judicial precedent pronounced by the Supreme Court in the case of **Devans Modern Breweries Ltd. vs CCE, Chandigarh 2008 (10) S.T.R. 511 (S.C.).**

73. That the penalty would not be imposable in absence of any deliberate act on part of the Assessee. This view finds support in the decision of the Supreme Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa [1978 (2) ELT (J 159) (SC)]**, which was subsequently followed by the Supreme Court in **Akbar BadruddinJiwani vs. Collector of Customs [1990 (47) ELT 161 (SC)].**

74. That the Assessee would additionally like to submit that in the case of bonafide belief of availability of the Cenvat Credit, penalty should not be imposed. In this regard, they rely on the judgement of Karnataka High Court in the case of **CST, Bangalore vs. Motor World (2012-27-STR-225-Kar.).**

75. That in the case of **Majestic Mobikes Pvt. Ltd. vs CST, Bangalore [2008 (11) S.T.R. 609 (Tri. - Bang.)]** the penalties were set aside in absence of mala fide and intention to evade payment of service tax.

76. That the Tribunal in the case of **CCE, Mangalore vs Abharan Motors Pvt. Ltd. [2011 (23) S.T.R. 72 (Tri.** - Bang.)] held that imposition of penalty under Section 76 and 78 was not required where the Assessee had a bonafide belief of non-levy of tax.

77. That it is submitted that the element of mensrea or any positive act or intent to evade duty is evidently absent in the instant case and thus, it is humbly submitted that the penalty imposed be dropped.

❖ **Penalty cannot be imposed in a case which is pertaining to the interpretation of law:**

78. That without prejudice to above, the Assessee submits that penalty is not imposable in a case where the issue is pertaining to the interpretation of law. On perusal of the issue involved, it can be understood that there was an interpretation issue to the extent:

(a) Whether the demand for reversal of same Cenvat Credit by Gujarat registration of the Assessee is legally valid in light of the fact that the Centralized registration has validly transferred the same Cenvat Credit to Maharashtra registration on the same day, it was availed in Form Tran-1, in accordance with the provisions of Section 140(8) of the CGST Act, 2017 and also that the Maharashtra registration has reversed the same along with interest.

79. That in this regard, the Assessee places reliance on the following judicial precedents:

a) **Euro Ceramics Ltd. vs CCE, Rajkot [2013 (32) S.T.R. 642 (Tri. - Ahmd.)]**
b) **Lanxess Abs Ltd. Vs. CCE, 2011 (22) S.T.R. 587 (Tri. - Ahmd.)**
c) **Rajhans Metals (P) Ltd.Vs. CCE 2007 (8) S.T.R. 498 (Tri. - Ahmd.)**
d) **Mech & Fab Industries Vs. CCE 2014 (303) E.L.T. 282 (Tri. - Del.)**
e) **CCE Vs. MothersonSumi Systems Ltd. 2014 (34) S.T.R. 70 (Tri. - Mumbai)**
f) **Moon Network Pvt. Ltd. Vs. 2011 (24) S.T.R. 723 (Tri. - Del.)**
g) **CCE Vs. Maersk India Pvt Ltd, 2014-TIOL-1751-CESTAT-MUM**

80. That taking into consideration the above submission, it is amply clear that the penalty cannot be imposed under the Finance Act, 1994.

❖ **No penalty for non-disclosure of facts not required to be disclosed:**

81. That at para 11 of the impugned SCN, it has been alleged that the Assessee has not disclosed the availment of Cenvat Credit on construction services in the returns and that the Assessee has suppressed the material facts and have wrongly availed the Cenvat Credit on construction services which are ineligible. It has further been alleged at para 12 of the impugned SCN that the Assessee has knowingly availed the wrong Cenvat Credit and the deliberate wrong availment of Cenvat Credit and non-reversal of credit is in disregard of the requirements of law and breach of trust reposed on the Assessee as the fact of wrong availment and non-reversal of Cenvat Credit had remained unnoticed if these were not raised during the course of audit. The Assessee humbly submits that the format of the return does not specify the requisite columns for disclosing items which in the view of the Assessee are ambiguous in nature

82. That the Assessee respectfully submits that it cannot be faulted with the allegation of wilful suppression or misstatement if the format of service tax returns, which is prescribed under the law, does not provide the requisite columns for disclosing the items which in the view of the Assessee are ambiguous in nature. It is a settled position in law that penalty cannot be imposed by alleging wilful suppression or misstatement for not disclosing the details which the statute itself does not require to disclose.

83. That the judicial precedents in the following case laws strongly support the Assessee's view:

    a. **Rajasthan Textile Mills vs CCE, Jaipur [2006 (205) E.L.T. 839 (Tri. - Del.)]**
    b. **Hindustan Lever Ltd. vs CCE, Nagpur [2012 (275) E.L.T. 477 (Tri. - Mumbai)]**

84. That in view of the above, it is prayed to your good self to kindly drop the penalty levied.

❖ **Penalty under Section 78 of Finance Act, 1994 is not applicable:**

85. That the impugned SCN has imposed penalty under Section 78 of the Finance Act, 1994. It may be noted that imposition of penalty under Section 78 is applicable only when service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Finance Act, 1994 or of the rules made there under with an **intent to evade payment of duty.**

86. That the Assessee has categorically proved in the aforesaid paragraphs that there was no intention to evade service tax. Further, the impugned SCN fails to provide any logical/reasonable grounds of the Assessee's intention to evade service tax. The impugned SCN at para 14 has imposed penalty under Section 78, by merely mentioning that the Assessee has suppressed information and misstated the facts without any concrete reasoning or findings. Thus, the question of imposing penalty under Section 78 is bad in law and deserves to be set aside.

87. That the view of the Assessee is supported by judicial precedent pronounced by the Supreme Court in the case of **Devans Modern Breweries Ltd. vs CCE, Chandigarh 2008 (10) S.T.R. 511 (S.C.).**

88. That the Assessee hereby submits that the impugned SCN has wrongfully alleged that the Assessee has wilfully suppressed the information with intent to evade service tax. In this regard, reference is drawn towards aforesaid paragraphs wherein, it is clear that the Assessee had no intention to evade service tax.

89. That from the above, it can be understood that all the information was readily available with your good self. Ergo, the allegation that the Assessee had an intention to evade stands canard. To reiterate, there

was no malafide intention on the part of the Assessee to evade payment of duty.

90. That it is a settled position in law that the penalty would not be imposable in absence of any deliberate act on part of the Assessee. This view finds support in the decision of the Supreme Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa [1978 (2) ELT (J 159) (SC)]**, which was subsequently followed by the Supreme Court in **Akbar BadruddinJiwani vs. Collector of Customs [1990 (47) ELT 161 (SC)]**.

91. That furthermore, attention is drawn towards the judicial precedent pronounced by Mumbai Tribunal in the case of **Interjewel Pvt Ltd vs CST, Mumbai 2015-TIOL-1223-CESTAT-MUM**. Brief fact of the case is that the Assessee had filed a writ petition before the Hon'ble Bombay High Court challenging the constitutional validity in respect of levy of tax. On account of such pending petition, the Assessee had not discharged tax liability and accordingly the revenue had demanded duty along with applicable interest and penalty. The Hon'ble Tribunal held that penalty cannot be levied in a case where the Assessee had not discharged tax liability on account of a bonafide belief that the outcome of the writ petition filed by them, would be favourable.

92. That it is submitted that the element of *mensrea* or any positive act or intent to evade duty is evidently absent in the instant case and therefore, penalty under Section 78 of the Finance Act, 1994 cannot be imposed. It may be noted that the Assessee has voluntarily reversed the Cenvat Credit as being demanded by the departmental authorities along with interest and therefore the intent to evade duty or tax is evidently absent in the instant case.

93. That a relevant document evidencing the reversal of said Cenvat Credit by the Maharashtra registration of the Assessee has been enclosed herewith as **Annexure-G** for your ready reference. This proves that the Assessee is a law abiding citizen and has no malafide intention to evade payment of duty/tax.

94. It has been stated in the impugned SCN that since the availment of the disputed Cenvat Credit was discovered during the course of audit undertaken by the department, the allegation of suppression has been made against the Assessee. In this regard, the Assessee would like to draw attention of your good self towards a recent ruling delivered by tribunal in the case of **M/s. Accura Valves Pvt. Ltd. Appellant vs. CCGST & CE, Nashik [Appeal No. E/86191/2018]** wherein it has been held that only because audit party had found non-maintenance of separate records the Assessee cannot be tasked for suppression.

95. That taking into consideration the facts of the case, discussed legal position and the judicial precedents, it is clear that no penalty can be levied on the Assessee and hence it is requested to your good self to drop the penalty proceedings.

❖ **Penalty, if at all to be invoked, could be levied under Section 76 of the Finance Act, 1994 :**

96. That without prejudice to the submission made in the foregoing paragraphs, a penalty if at all is required to be imposed should be imposed under Section 76 of the Finance Act, 1994. However, 1st proviso to Section 76(1) of the Finance Act, 1994 states that where such service tax (here, reversal of Cenvat Credit) and interest is paid within a period of 30 days of the date of service of notice under sub-section (1) of section 73 of the Finance Act, 1994, no penalty shall be payable and the proceedings in respect of such service tax and interest shall be deemed to have been concluded.

97. That in the given case, the Maharashtra registration of the Assessee has made the reversal of Cenvat Credit and has also paid the interest on October 04, 2021, i.e., much prior to issuance of SCN and can be validly said as being within 30 days from receipt of SCN (SCN was received on February 07, 2022). Thus, on account of the 1st proviso to Section 73(1), no penalty can be imposed and furthermore all the adjudication proceedings shall be deemed to be concluded.

98. That taking into consideration the facts of the case, discussed legal position, and the judicial precedents, it is crystal clear that no penalty can be levied on the Assessee. It is prayed to your good self to set aside the impugned SCN.

15. The Assesee vide their reply dated 01.04.2022 submitted the following documents–

1. Copy of the E.A. 2000 audit notice letter dated 01.07.2020.
2. Copy of the letter dated 23.08.2021 stating the observations, issued by the Supdt. AP-48 C-VII, CGST Audit, Ahmedabad.
3. Copy of detailed reply vide letter dated 26.08.2021 filed by the Assessee to the Supdt. AP-48 C-VII, CGST Audit, Ahmedabad.
4. Copy of audit report bearing F.No. CTA/04-363/C-VII/AP-48 / 2019-20/1303 dated 07-October-2021
5. Copy of letter dated 25.10.2021 submitted by the Assessee addressed to the Deputy Commissioner, Mumbai-LTU-521, Div. Mumbai LTU-2, Mumbai Zone and the Deputy/Assistant Commissioner, CGST Division-I, Mumbai (East)

15.1 The Assessee during the course of Personal Hearing on 20.02.2023 submitted a synopsis (alongwith the supportive document) as their reply to the Show Cause Notice dated 07.02.2022, wherein they have inter alia stated as under :-

1. That the very demand of Service Tax of Rs. 9,05,62,820 proposed in the Notice stands reversed by the Assessee in the month of April, 2018 which fact is evident from the copy of the Form GSTR-3B as well as copy of the Notice and Final Audit Report, copies of which were submitted along with the reply. Copy of relevant Form GSTR-3B is enclosed. Accordingly, the demand of Service Tax, in case found

sustainable, shall be appropriated against the reversal of input tax credit made in Form GSTR-3B.

2. That the very act of refraining from appropriating the amount paid by way of reversal of input tax credit under the garb of different registrations under GST Law results into double jeopardy to the Assessee.

3. That the Cenvat Credit of Rs. 9,05,62,820 availed by the Assessee in relation to construction of building was an input service defined in rule 2(l) of Cenvat Credit Rules, 2004 (*hereinafter referred to as "Rules"*). Assessee denies the allegation levelled in the Notice that the said services were falling in the exclusion provided in Rule 2(l). Assessee submits that the said services were received and used by the Assessee in relation to execution of a works contract and thus it did not fall into the exclusion given in Rule 2(l). It can be appreciated from the copies of the VAT Assessment that the tax has been paid by the Assessee in respect of the Contract which was recognized as a works contract for the purpose of VAT and accordingly tax appears to have been paid. Copies of the same are enclosed. It is no more *res integra* that the works contract under respective VAT Law stands a works contract for the purpose of Service Tax as the necessary concomitant resembles to each other. Hence, the very exclusion provided in Rule 2(l) was not applicable to the case.

4. That the allegations made in the Notice that the Cenvat Credit was availed by the Assessee in the month of June, 2017 was factually incorrect. It can be appreciated from the copies of the Form ST-3 enclosed; that the Cenvat Credits in relation to construction of buildings were availed by the Assessee prior to the month of June, 2017 and reversed. However, the said Credits, reversed earlier, were merely re-credited in the month of June, 2017 due to transition to GST. Accordingly the cause of dispute lied in the months prior to the June, 2017 and not in the month of June, 2017. Accordingly, the Notice ought to have been issued for the months in which the Cenvat Credits were actually availed and not merely re-credited i.e. June, 2017.

5. That the period of limitation under Section 73(1) ought to be counted from the months in which the Cenvat Credits were actually availed and not the month of June, 2017.

6. That the fact of having availed the Cenvat Credits and reversal thereof was very well communicated to the revenue by the Assessee in Form ST-3 and thus the extended period of limitation contemplated in the Notice was not available with ld. Audit Officer.

7. That in light of above facts and grounds including additional grounds, it is felt necessary to make further detailed written submission covering all the grounds. Therefore, it is requested to grant additional time of 15 days.

PERSONAL HEARING:

16. Personal hearings were granted to the Assessee on 19.01.2023, and 06.02.2023. The Assessee did not appear for personal hearing on any of the above mentioned dates. Finally the personal hearing was fixed on 20.02.2023 and the same was attended by Shri Rahul Patel, Chartered Accountant. During the course of personal hearing on 20.02.2023 Shri Rahul Patel submitted a synopsis of the defence of the case and requested to decide the issue in a fair and just manner.

DISCUSSION AND FINDINGS:

17. I have carefully gone through the facts of the case and records available in the case file, the Show Cause Notice dated 07.02.2022, the defence reply dated 01.04.2022 and 20.02.2023, the documents submitted by the Assessee vide said letters and oral submissions made by the Assessee during the course of personal hearing on 20.02.2023. Accordingly, I find that the following issues are required to be decided by me as an adjudicating authority

i. Whether the Service Tax has been correctly demanded vide the Show Cause Notice dated 23.04.2021.

ii. Whether the contentions of the Assessee the demand made vide the Show Cause Notice dated 07.02.2022 is wrong on multiple counts as submitted in their defence replies, is sustainable or not.

18. I find that the basic charge on which the SCN dated 07.02.2022 has been issued is that the Assessee has wrongly availed the Cenvat Credit of input services related to building construction of Rs. 9,05,62,820/- in their ST-3 returns for the period April 2017 to June 2017, which was ineligible to them in terms of Rule 2(l) of Cenvat Credit Rules, 2004. In this regard, I find that the Assessee in their initial reply has not contested the ineligibility of the Cenvat Credit availed by them as charged in the SCN. Their entire contention against the SCN was that they had already reversed the Cenvat Credit in April 2018 alongwith interest and therefore the demand in the SCN is not correct.

19. However, in their subsequent submissions dated 20.02.2023, I find that the Assessee has claimed that the Cenvat Credit availed by them is not ineligible as has been alleged in the SCN. In this regard, their argument with regard to eligibility of the Cenvat Credit is that the Cenvat Credit of Rs. 9,05,62,820 availed by them in relation to construction of building was an input service defined in rule 2(l) of Cenvat Credit Rules, 2004; that they deny the allegation levelled in the

Notice that the said services were falling in the exclusion provided in Rule 2(l); that the said services were received and used in relation to execution of a works contract and thus it did not fall into the exclusion given in Rule 2(l); they have submitted copies of the VAT Assessment evidencing that the tax has been paid in respect of the Contract which was recognized as a works contract for the purpose of VAT; that it is no more *res integra* that the works contract under respective VAT Law stands a works contract for the purpose of Service Tax as the necessary concomitant resembles to each other; hence, the very exclusion provided in Rule 2(l) was not applicable to the case.

20. I also find that it's the Assessee's own admission that the Cenvat Credits in relation to construction of buildings were availed by them prior to the month of June, 2017 and reversed earlier. However, the said Credits, reversed earlier, were merely re-credited by them in the month of June, 2017 due to transition to GST. Accordingly the cause of dispute lay in the months prior to the June, 2017 and not in the month of June, 2017.

21. In this regard, it is observed that there is no provision in the Cenvat Credit Rules, 2004 to avail such re-credit of the amount which was already reversed earlier. The only situations where recredit of a credit reversed earlier, have been mentioned in Circular No. 990/14/2014-CX-8 dt. 19/11/2014. The text of the Circular is reproduced herein below for ready reference –

> "2. Concerns have been expressed by trade that in view of above changes, the re-credit taken in following three situations may be hit by the time limit of six months prescribed:
>
> i. 3rd proviso to Rule 4(7) of CCR, 2004 prescribes that if the payment of value of input service and service tax payable is not made within three months of date of invoice, bill or challan, then the Cenvat Credit availed is required to be paid back by the manufacturer or service provider. Subsequently, when such payment of value of input service and service tax is made, the amount so paid back can be re-credited.
>
> ii. According to Rule 3(5B) of CCR, 2004, if the value of any input or capital goods before being put to use on which Cenvat Credit has been taken, is written off or such provisions made in Books of Account, the manufacturer or service provider is required to pay an amount equal to credit so taken. However, when the inputs or capital goods are subsequently used, the amount so paid can be re-credited in the account.
>
> iii. Rule 4(5)(a) of CCR, 2004 prescribes that in case inputs sent to job worker are not received back within 180 days, the manufacturer or service provider is required to pay an amount equal to credit taken on such inputs in the first instance. However, when the inputs are subsequently received back from job worker, the amount so paid can be re-credited in the account.
>
> 3. The matter has been examined. The purpose of the amendment made by Notification No. 21/2014-CE (NT) dated 11.07.2014 is to ensure that after the issue of a document under sub rule (1) of Rule 9, credit is taken for the first time within six months of the issue of the document. Once this condition is met, the limitation has no further application. It is, therefore, clarified that in each of the three

situations described above pertaining to Rule 4(7), Rule 3(5B) or Rule 4(5) (a) of CCR, 2004, the limitation of six months would apply when the credit is taken for the first time on an eligible document. It would not apply for taking re-credit of amount reversed, after meeting the conditions prescribed in these rules

22. Accordingly, I find that other than the 3 situations elaborated in the Circular No. 990/14/2014-CX-8 dt. 19/11/2014, there is no provision or mechanism in the Cenvat Credit Rules, 2004 to allow a re-credit of a reversed Cenvat Credit. Rule 9(6) of the Cenvat Credit Rules, 2004 clearly stipulates that the burden of proof regarding the admissibility of the Cenvat Credit shall lie upon the provider of output services taking such credit. I find that the Assessee has not given any justification as to under what statutory provisions they have availed the re-credit of the amount earlier reversed by them, in their ST-3 return for the period April 2017 to June 2017.

23. I also find that until their submissions during the personal hearing on 20.02.2023, the Assessee had never claimed the eligibility of the Cenvat Credit, neither had they ever brought their contention about eligibility of Cenvat Credit on the grounds that the exclusion provided in Rule 2(l) was not applicable to them, to the notice of the audit officers or during pre SCN consultations held on 30.01.2022.

24. Thus, from the analysis of the chronology of events regarding initial availment of credit, earlier reversal of the credit, subsequent availment of the credit and subsequent reversal by the Assessee vis-a-vis the provisions in the Cenvat Credit Rules, 2004 and the Circular No. 990/14/2014-CX-8 dt. 19/11/2014, as discussed hereinabove, it appears that the subsequent availment of the credit of Rs. 9,05,62,820/- by the Assessee in their ST-3 return for the period April 2017 to June 2017 was not correct and the credit was not eligible to them.

25. Therefore I find that the charge of ineligibility of the Cenvat Credit of Rs. 9,05,62,820/-, availed by the Assessee in their ST-3 return for the period April 2017 to June 2017 in the show cause notice is quite correct.

26. I also find that the SCN states that the said Cenvat Credit of Rs. 9,05,62,820/- was transferred through TRAN-1 to the business unit of Maharashtra having GSTN 27AAFCM9410L1Z6 of the Assessee (having same PAN No. AAFCM9410L). It is further stated in the SCN that Maharashtra entity having GSTN 27AAFCM9410L1Z6 had reversed the entire Cenvat Credit in the month of April 2018 in their respective GST return.

27. I also find that it is further stated in the SCN that since the Assessee was registered under the jurisdiction of Ahmedabad having Centralized Registration of

Service Tax (AAFCM9410LSD001), the reversal/payment of wrongly availed Cenvat Credit of input service of Rs. 9,05,62,820/- by the Assessee from their GSTIN: 27AAFCM9410L1Z6 of Maharashtra was erroneous. This amount of Cenvat Credit wrongly availed was required to be reversed from GSTIN at Ahmedabad. In the GST regime, the Gujarat unit and Maharashtra unit of the said Assessee were legally distinct entities having separate GSTN. Therefore, the said Assessee had taken inadmissible Cenvat Credit on the construction services in the months of April' 2017 to June' 2017 and by way of filing TRAN-1 they had wrongly transferred their inadmissible Cenvat Credit to their Maharashtra unit having different GSTN. Therefore it appeared that such Cenvat Credit wrongly availed by Gujarat unit was required to be recovered from the unit of the said Assessee having Gujarat GSTN.

28. Therefore, from the contents of the SCN, I find that the demand has been raised also for the reason that the reversal of the wrongly availed Cenvat Credit was made by the Maharashtra unit of the Assessee instead of their Ahmedabad unit.

29. In this regard, I find that Section 140(8) of the Central Goods and Services Tax Act, 2017 (the 'CGST Act, 2017') reads as under:

> *Where a registered person having centralized registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of Cenvat Credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed:*
>
> *Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:*
>
> *Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:*
>
> ***Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralized registration was obtained under the existing law.***

30. In view of the provisions of Section 140(8) of the Central Goods and Services Tax Act, 2017 (the 'CGST Act, 2017') reproduced above, I find that the Assessee

was well within his statutory rights to avail the closing balance of Cenvat Credit as on 30.06.2017 to their Maharashtra Unit having the same pan based GST registration. Since the availment of Cenvat Credit was correct, the subsequent reversal of the Cenvat Credit by the Maharashtra Unit on being found that the Cenvat Credit of input services was ineligible, cannot be termed wrong & incorrect.

31. Therefore, in view of the above facts, I find that the charge in the SCN that the reversal of the ineligible Cenvat Credit by the Maharashtra unit is wrong and the reversal should have been by the Ahmedabad unit of the Assessee, is not correct and tenable. However, as discussed in the preceding paras, I am of the view that the issue regarding availment of ineligible Cenvat Credit as brought out in the SCN is absolutely correct.

32. I find that the Assessee in their elaborative replies has contested the SCN basically on the following grounds –

i. Cenvat Credit has been availed by the centralized registration under the erstwhile regime and it was transferred to the Maharashtra registration, at the time of introduction of the GST regime, in accordance with the provisions of Section 140(8) of the CGST Act, 2017, the reversal of the said Cenvat Credit cannot be demanded from the Gujarat registration which has never availed the same in its electronic credit ledger.

ii. SCN issued by the revenue authorities with the enactment of GST law is illegal and is liable to be quashed. The Assessee submits that as per Section 174(2)(e) of the CGST Act, 2017 only those investigation, inquiry, audit, and adjudication are saved which were instituted prior to repeal/omission of the Finance Act, 1994. In the given case, the audit was conducted and the SCN was issued post the implementation of GST law. Thus, the audit conducted by the Department was illegal and the subsequent SCN issued on the basis of such illegal audit is ultra vires Section 174(2)(e) of the CGST Act, 2017 and is liable to be quashed. SCN was issued by the revenue authorities after the enactment of GST law which is illegal and hence liable to be quashed.

iii. Demand cannot be made merely based on audit objections, without making further investigations

iv. Extended period cannot be invoked, in absence of suppression of facts or wilful misstatement or intent to evade tax

v. As per Section 75 of the Finance Act, 1994 as amended from time to time, a person shall be liable to pay interest only when there is a delay in the payment of tax. The Assessee has at length discussed why there does not arise the question of reversal of CENVAT and in turn recovery of the service tax. Thus, when the demand of duty itself does not exist, the question of levying interest cannot arise.

vi. Regarding imposition of penalty the Assessee has contended as below -

- It is not mandatory to levy penalty;
- Penalty cannot be imposed in a case which is pertaining to interpretation of law;
- No penalty for non-disclosure of facts not required to be disclosed;
- Penalty under Section 78 of the Finance Act, 1994 is not applicable;
- Penalty, if at all to be invoked, could be levied under Section 76 of the Finance Act, 1994;

33. I find that the Assessee has contended that the Cenvat Credit has been availed by the centralized registration under the erstwhile regime and the same was transferred to the Maharashtra registration, at the time of introduction of the GST regime, in accordance with the provisions of Section 140(8) of the CGST Act, 2017, and the reversal of the said Cenvat Credit cannot be demanded from the Gujarat registration. In this regard, I find that the Assessee has failed to appreciate the fact that the demand has arisen on the basis of the audit of their Service Tax entity having centralized registration at Ahmedabad. The issue under dispute is not the transfer of Cenvat Credit through Tran-1, but the wrong availment of Cenvat Credit by the Assessee as a Service Tax Assessee in their ST-3 for the period of April 2017 to June 2017. Therefore I do not find any merit in the argument of the Assessee that the Cenvat Credit cannot be demand from their Gujarat registration.

34. I also find that the Assessee has contended that as per Section 174(2) only those investigations, inquiry, audit, and adjudication are saved which were instituted prior to repeal/omission of the Finance Act, 1994; that in the given case, the audit was conducted and the SCN was issued post the implementation of GST law; thus, the audit conducted by the Department was illegal and the subsequent SCN issued on the basis of such illegal audit is ultra vires Section 174(2)(e) of the CGST Act, 2017 and is liable to be quashed. In this regard, I find that the Assessee has totally misconstrued provisions of Section 174(2)(e) of the CGST Act, 2017. For ease of understanding, I reproduce the text of Section 174(2)(e) below -

"Section 174. Repeal and saving.-

(1) .....

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as " such amendment " or "amended Act " , as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-

(a).....

(b).....

(c) .....

(d) .....

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of

arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

Thus, the Section 174(2)(e) of the GST Act, 2017 provides for instituting conducting the Audit as per the provisions of the Finance Act, 1994 of the Service Tax assessees and thereby demanding and recovering the tax dues, if any found, recoverable during the course of such audit. Accordingly, I find that the contention of the Assessee is not correct. In the case of JSK Marketing Ltd. v. Union of India **[2021 (46) G.S.T.L. 369 (Bom.)]** the Hon'ble Bombay High Court had ruled that under the provisions of Section 174(2) of the CGST Act, 2017 the department is empowered to enforce demand and recovery of any non-payment of Service Tax that may have occurred prior to the commencement of CGST Act, 2017 w.e.f. 01.07.2017. The said ruling of the Hon'ble Bombay High Court was upheld by the Hon'ble Supreme Court in the Special Leave to Appeal (C) No. 13774 of 2021.

35. As regards the contention of the Assessee that the subject demand cannot be made by invoking extended period, I hold that the Cenvat Credit of Rs. 9,05,62,820/- availed by the Assessee on the input services was ineligible to them and not in consonance with the provisions of Cenvat Credit Rules, 2004. I find that this act of availment of Cenvat Credit by the Assessee, who appears to be well conversant with the provisions and procedures of the Service Tax and Cenvat Credit provisions, was a clear attempt to wrongly avail the benefit of the transitional provisions to the GST era. The Assessee had suppressed the correct facts with intent to avail the ineligible Cenvat Credit of input services. This was a mischievous attempt on the part of the Assessee and therefore the extended period as per the proviso to sub section (1) of Section 73 of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 was correctly invoked in the SCN for demanding and recovering the wrongly availed Cenvat Credit by the Assessee.

36. The Assessee has contested the issue of charging interest on the premise that the demand is not sustainable. In this regard, they have submitted that a person shall be liable pay interest only when there is a delay in the payment of tax. Further on the basis of their submission they have also contested that when the demand of duty itself does not exist, the question of levying interest cannot arise. In this regard, the Assessee has relied on the decision of Karnataka High

Court in the case of **CCE & ST, Bangalore vs. Bill Forge Private Limited 2012 (26) S.T.R. 204 (Kar.),** wherein it has been held that interest should not be applicable where there is no liability to discharge the tax.

36.1 In this regard, I find that Rule 14 of the Cenvat Credit Rules, 2004 provides as under:

> *"14. Recovery of Cenvat Credit wrongly taken or erroneously refunded.-*
> *(1)(i)...*
> *(ii)Where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 1 IA and 1 IAB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."*

In the instant case, as already discussed in the preceding paras the Cenvat Credit has been wrongly taken by the Assessee as the credit of input services was not eligible for Cenvat Credit. Therefore, as provided in the Rule 14 of the Cenvat Credit Rules, 2004, I hold that the Assessee is also liable for payment of interest in terms of Section 75 of the Finance Act, 1994 for the wrong availment of Cenvat Credit.

37. Further, I find that Section 78 stipulates as under -

> **SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —**
>
> "(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax."

In the instant case as discussed herein above I find that the SCN has been rightly issued by invoking the proviso to sub-section (1) of Section 73 of the Finance Act, 1994. As can be seen from the text of Section 78, the penalty under Section 78 is consequential when the Notice has been served under the proviso to sub-section (1) of section 73 of the Finance Act, 1994. The act of availment of ineligible Cenvat Credit by the Assessee, who appears to be well conversant with the provisions and procedures of the Service Tax and Cenvat Credit provisions, was a clear attempt by them to wrongly avail the benefit of the transitional provisions to the GST. The wrongful availment of ineligible Cenvat Credit by the Assessee can only be described as a malafide act to avail undue benefit during the transition of the tax regime and thereby misuse a well-intentioned benefit granted by the Government. Accordingly I hold that the Assessee is liable for penalty under the Section 78 of the Finance Act, 1994 read with the provisions of Rule 15(3) of the Cenvat Credit Rules, 2004.

38. I also find that the Assessee has not complied with the provisions of the Finance Act, 1994, the Service Tax Rules, 1994 and the Cenvat Credit Rules, 2004 in as much as they have availed the Cenvat Credit of ineligible input services despite the fact that they were very much aware of the fact that they were not eligible for such Cenvat Credit. Therefore, I hold that the Assessee is guilty of suppression of facts, wilful mis-statement and contravention of provisions of the Finance Act, 1994, Service Tax Rules, 1994 and Cenvat Credit Rules, 2004 with intent to evade the payment of Service Tax by wrongful availment of Cenvat Credit. Accordingly, I also hold that Service Tax has been correctly demanded vide the SCN dated 07.02.2022 under the provisions of Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 by invoking extended period of time.

39. I also hold that the Assessee has wrongly availed the Cenvat Credit amounting to Rs. **9,05,62,820/-**, which was ineligible to them in terms of Rule 2(l) of Cenvat Credit Rules, 2004 and the same is required to be recovered from them under the provisions of Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004. However, the total amount of Rs. 9,05,62,820/- paid/reversed by the Assessee is required to be appropriated against the said liability of Rs. **9,05,62,820/-**.

40. I also find that Rule 14 of the Cenvat Credit Rules, 2004 mandates that where the Cenvat Credit has been taken or utilised wrongly, the same is liable to be recovered alongwith interest. I thus hold that the Assessee is also liable to pay the interest on the demand of service Tax of Rs. **9,05,62,820/-**. However, I also hold that the amount of Rs. **35,62,227/-** paid by the Assessee is required to be appropriated against their total interest liability.

41. In view of the above discussion and findings, I pass the following order:

ORDER

(i) I hereby confirm the demand of service tax of Rs. **9,05,62,820/- (Rs. Nine Crore Five Lakh Sixty Two Thousand and Eight Hundred Twenty Only)** and order to recover the same from the Assessee under proviso to Sub-section (1) of Section 73 of Finance Act,1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004. I further appropriate the amount of Rs. **9,05,62,820/-**, already paid/reversed by the Assessee against the confirmed demand.

(ii) I order to charge Interest at the appropriate rate on the demand of Service tax of Rs. **9,05,62,820/-** and to recover the same from the

Assessee under Section 75 of the Finance Act,1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004; I further appropriate the amount of Rs. **35,62,227/-** paid by the Assessee against their total interest liability.

(iii) I impose penalty of Rs. **9,05,62,820/-** on the Assessee under the provision of Section 78 of the Finance Act, 1994 read with provisions of Rule 15(3) of the Cenvat Credit Rules, 2004.

42. However, in view of clause (ii) of the second proviso to Section 78 (1), if the amount of Service Tax confirmed and interest thereon is paid within period of thirty days from the date of receipt of this Order, the penalty shall be twenty five percent of the said amount, subject to the condition that the amount of such reduced penalty is also paid within the period of thirty days.

(Upendra Singh Yadav)
Commissioner
Central Excise & CGST,
Ahmedabad North.

F. No. STC/15-01/OA/2022 Date: __/03/2023

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2. The Commissioner, Central Tax, Audit Commissionerate, Ahmedabad.
3. The Assistant Commissioner, Division-VII, CGST & C.Ex., Ahmedabad North.
4. The Superintendent, Range-I, Division-VII, CGST & C.Ex., Ahmedabad North.
5. The Superintendent, AP-48, Circle-VII, CGST Audit, Ahmedabad.
6. The Assistant Commmissioner, SGST, Unit-Ghatak 8 (Ahmedabad), Range-2, Division-1, State – Gujarat (B-3, Rajya Kar Bhavan, Ashram Road, Ahmedabad – 380009)
7. The Deputy Commissioner, Cgarge-Mumbai-LTU-521, Division-Mumbai-LTU-2, Zone-Mumbai-North-West, Maharashtra (Address – 4th Floor, Old Building, Wing-8, Mazgaon, Mumbai – 400010)
8. The Deputy/Assistant Commissioner, CGST Division-I, Mumbai-East Commissionerate (Address – 110, Ganga House, LBS Marg, Vikhroli West Mumbai, Maharashtra – 400083)
9. The Superintendent (Systems), Hq., CGST & C.Ex., Ahmedabad North.
10. Guard File.