आयुक्त का कार्यालय,
केंद्रीय जी. एस. टी. एवं
केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर,
कस्टम हॉउस, प्रथम तल,
नवरंगपुरा ,अहमदाबाद- 380009

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OFFICE OF COMMISSIONER
CENTRAL GST & CENTRAL EXCISE,
AHMEDABAD- NORTH
CUSTOM HOUSE, 1ST FLOOR,
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./ **F.No.ST/15-55/C-C/AP-XXII/2015-16** आदेश की तारीख़/Date of Order:- 31.10.2017

जारी करने की तारीख़/Date of Issue :- 31.10.2017

द्वारा पारित/Passed by:- आर. ऍम. गौतम / ***R.M.Gautam***

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 06/ADC/2017/RMG

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

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

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 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 Commissioner (Appeal) 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)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice **F.No.ST/15-55/C-C/AP-XXII/2015-16 dated 23.10.2015 issued to M/s. Nirma University, S.G.Highway, Ahmedabad, State : Gujarat.**

Brief facts of the case:

During the audit of the records of M/s Nirma University, S.G.Highway, Ahmedabad-382481 (hereinafter referred to as 'the assessee'), for the F.Y 2010-11 to 2014-15 having Registration No. AAATT6829NSD001, it was noticed that the assessee were providing the exempted services under 'Commercial Training & Coaching', and also providing the taxable services of 'Management Consultant', 'Technical Testing & Analysis' and 'Management & Repair'. Therefore they are required to maintain separate records. However they have not maintained separate records and availed Cenvat credit on the inputs used in exempted services. Thus they have violated the provisions of Rule 6(1) & Rule 6(2) of the CENVAT Credit Rules, 2004 (CCR, 2004 for brevity).

2. While submitting their clarification on the issue during the course of audit, the assessee submitted that they are having status of deemed university recognized by University Grants Commission / AICTE (All India Council for Technical Education). They are imparting education to students under "Commercial Training & Coaching"leading to any Degree / Diploma, recognized by law in India which is exempt from the levy of service tax. In addition to the exempted services of "Commercial Coaching or Training services", they were also providing taxable services viz. 'Management Consultant', 'Technical Testing & Analysis' and 'Maintenance or Repair' service. They also stated that the registration was obtained in Oct, 2011. They also informed that they are availing CENVAT credit on all the input services (used in exempted and taxable services) and utilized the same for payment of service tax since 2010-11.

3. The assessee also contended that they had maintained separate accounts for the input services used in taxable services hence under the provisions of Rules 6(1) and 6(2) of the CCR, 2004 ,they are entitled for the credit of input services to the extent to which they were used for providing taxable services as separate records were maintained. Further, the assessee, vide their letter dtd. 14.10.2015, submitted the calculation of the CENVAT credit wrongly availed by them in the above manner totaling to Rs.92,07,034/- and reversed CENVAT amount to the tune of Rs.68,57,740/- vide their journal voucher entry No. 181 dtd. 14.10.2015. They further, paid an amount of Rs.23,49,294/- vide GAR challans as detailed in work-sheet attached to the notice along with interest of Rs.5,49,904/-.

4. On calculation of the CENVAT credit wrongly availed by the assessee and liability of interest thereon, it was noticed that the assessee had reversed CENVAT credit of Rs.92,07,034/-. However, they failed to calculate correct interest liability and paid only Rs.5,49,904/- towards interest. The correct interest works out to Rs.50,71,395/ and is shown as per annexure to notice dt 23.10.15.

5. Thus it appears that the assessee intentionally availed CENVAT credit on input services used in exempted services despite maintaining separate records and being aware of the fact that the provisions that credit for the inputs used in exempted services is not admissible. They also failed to file their ST-3 returns for the period 2010-11 and never disclosed the above practice either in writing or in the ST-3 return. The fact that the credit was wrongly availed came to the knowledge of the department only during audit. Thus the assessee was held liable to pay an amount of Rs.92,07,034/- towards

wrongly availed CENVAT Credit Rules,2004 and applicable interest of Rs.50,71,395/- under Rule 14 of the CCR, 2004 read with the provisions of Section 73(1) & Section 75 of the Finance Act, 1994 during the period 2010-11 to 2013-14.

6. In view of above a show cause notice dated 23.10.2015 was issued to the assessee to show cause to the Principal Commissioner of Service Tax, having office at 1st Floor, Central Excise Bhavan, Near Panjrapole, Ambawadi, Ahmedabad - 380015, as to why:-

i. Amount of Rs. 92,07,034/- (Rupees Ninety two lakh, seven thousand, thirty four only), should not be demanded and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994 by invoking extended period.

ii. Amount of Rs.92,07,034/- paid by them, should not be adjusted against the above demand.

iii. Interest of Rs.50,71,395/- should not be demanded and recovered from them under Rule 14(1)(ii) of the Cenvat Credit Rules, 2004; read with Section 75 of the Finance Act, 1994;

iv. An amount of Rs.5,49,904/- paid by the assessee should not be appropriated against their interest liability of Rs.50,71,395/-

v. Penalty should not be imposed upon them under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 76 of the Finance Act, 1994 as discussed supra for wrong availment and utilization of Cenvat Credit and thereby not paying appropriate service tax.

vi. Penalty should not be imposed upon them under Section 77(2) of the Finance Act, 1994, as amended as they failed to follow all the procedure as prescribed under the Act and Rules made there under;

vii Penalty should not be imposed upon them under Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994, as amended for wrong availment and utilization of Cenvat Credit with an intention to evade payment of service tax by adopting suppression and misstatement of the facts.

7. Defence Reply:

In response to above notice, the assessee vide their letter dated 23.12.2015 submitted their written submission wherein they inter alia submitted that;

- During the period from 01.04.08 to 31.03.11, full credit was allowed on certain services under Rule 6(5) of the CCR, 2004, even if the services were partly used in exempted output services. Therefore they were under the *bona-fide* belief that CENVAT credit accumulated will not lapse and since they were also providing taxable service, they continued to avail the Cenvat credits. The credit availed in the year 2009-10 to 2011-12 amounting to Rs.75,24,051/-, out of which eligible credit is Rs.33,63,673/- and during the same period they have utilized only Rs.23,44,708/- which is eligible for the said period. Further it is settled law that Cenvat credit prior to registration is allowed. In support they relied on following decisions;

a) C .Metric Solution Pvt. Ltd.-2012(286) ELT 58 (T-Ahmd)
b) Well Known Polyester Ltd-2011-(267) ELT 221
c) M Portal India Wireless Solutions -2012(27) STR 134 (Kar.)
d) Imagination Technologies India P. Ltd-2011(4) TMI 406 (T-Mum)
e) India Housing – 2015(11) TMI 1422 (T-Del)

- Interest was paid on the amount of credit which was utilized from the date of utilization till the date of the payment. The interest is not payable on the amount which was never utilized till the reversal. Once the payment is made along with interest, the proceedings should be concluded as the credit was wrongly taken under the bona fide intention. They placed reliance on citations: 2007(214) ELT A050, 2014(310) ELT 509 (Mad.), 2012(26)STR 204 (Kar), 2013 (297) ELT 391 (Tri-Del), 1996(88) ELT 12 (SC). For the period after 16.3.2012, interest was paid on the credit taken & utilized. For the year 2010-11 & 2011-12, they claimed to have utilized the credit which was eligible or admissible hence no interest liability exists. For the year 2012-13, the credit of only Rs.11,610/- was utilized which was paid along with interest. For 2013-14, excess credit of Rs.10,43,420/- and in 2014-15 cenvat credit of Rs.12,94,265/- was utilized which was paid along with interest. They have also reversed un-utilized Cenvat credit of Rs.69,94,657/-

- As in ST-3 return filed for the year 2011-12, the credit carried forward from earlier period was shown, suppression cannot be alleged. They relied on citations reported at 2014(302) ELT 333 (Kar), 2013(294) ELT 260 (Tri-Ahmd), 2013(291) ELT 377 (Tri-Kokata).

- Regarding limitation, they contended that the proposed demand for the period 2010-11 to 2014-15 issued on 23.10.15 is time barred as suppression with an intent to evade duty was not proved or established. Reliance is placed on decisions passed in citations reported in 2007 (216) ELT 177 (SC); 2009(14) STR 359 (Tri-Ahmd); 2009(237) (Tri-Amd); 2009(242) ELT 260 (Tri-Del).

- Penalty under Rule 15(1) cannot be imposed as the Cenvat is not utilized and the entire Cenvat wrongly taken has been reversed. Reliance is placed on 2015(323) ELT 273; 2015(317) ELT 767 (Tr-.Del); 2014(308) ELT 144(Tri-Mum); 2013(293) ELT 703 (Tri-Ahmd); 2009(240) ELT 641 (SC) & 2009(240) ELT 661(SC).

- They requested to drop the entire proceedings and also requested for personal hearing.

8. However before the said case could have been taken up for personal hearing, the Board vide Circular No.1049/37/2016-CX dated 29.09.2016 revised the monetary limits

for adjudication of Show Cause Notice in Central Excise & Service Tax. As a consequent duty/tax/credit demand for Central Excise & Service Tax above Rupees Fifty lakh but not exceeding Rupees Two crore will be issued and adjudicated by Additional/Joint Commissioner. Thus the personal hearing was fixed on 16.12.2016 or 21.12.2016 by the Additional Commissioner, Service Tax Commissionerate, Ahmedabad.

9. Shri Motibhai A. Patel, Consultant appeared for hearing on 21.12.2016 before the said officer and reiterated the submissions made in written reply. He also submitted additional submissions dated 20.12.2016 and various pronouncements at various judicial forum.

10. However the final order could not be issued by earlier adjudicating authority. In the meantime CBEC vide Notification No.12/2017-CE (NT) dated 9.6.2017, dismantled the Service Tax formations and merged the same with jurisdictional Central Excise commissionerates now known as GST Commissionerate. The CBEC appointed officers of Central Excise Department as Central Excise Officers and vested them with the power under the Central Excise Act, 1944 (1 of 1944) and the rules made there under, with respect to the jurisdiction specified in the notification issued under Rule-3 of the Central Excise Rules 2002. The said notification was made effective from 22.6.2017 vide Notification No.16/2017-CE (NT) dated 19.06.2017. With the Amendment of Act 32 of Finance Act, 1944, Chapter V (Service Tax) of the Finance Act, 1994 has been omitted hence all the service tax cases have been transferred to concerned jurisdictional Central Excise & Central GST Commissionerate.

11. In light of above, the present case has been transferred to CGST & Central Excise Commissionerate, Ahmedabad- North. On receipt of the said case for adjudication, personal hearing was again granted to M/s Nirma Ltd on 5.9.2017. Shri Vikramsingh Jhala, A.G.M, appeared and represented the case on behalf of the party. He reiterated the written submissions made by them vide reply dated 23.12.2015 as well as the additional submissions made by them during the personal hearing made before the earlier adjudicating authority on 20.12.2016.

DISCUSSION AND FINDINGS:

12. I have carefully gone through the facts of the case on record, submissions made in their defense reply including the case laws relied upon by the assessee. The issue before me to decide is whether Cenvat credit of inputs services used in exempted service is admissible during the disputed period and whether the assessee is liable to pay any interest on the credit taken?

13. The notice alleges that during the disputed period (2011-12 to 2014-15) the assessee was providing taxable services viz 'Management Consultant', 'Technical Testing & Analysis' and 'Management & Repair' as well as exempted services viz 'Commercial Training & Coaching' and availed Cenvat credit of input services used in exempted service during the period.

14. Section 65 (105) (zzc) stipulates that any service provided or to be provided to any person, by a commercial training or coaching centre in relation to commercial training or coaching, is a 'taxable service'. The term "commercial training or coaching centre" up to 01.05.2011 was defined as under:-

> *"Commercial coaching or training centre" means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or filed other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes.*

15. The above definition was substituted w.e.f. 01-05-2011, which is reproduced below:-

> *"Commercial coaching or training centre" means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or filed other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes but does not include pre-school coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by law for the time being in force."*

16. After 01.7.2012, 'commercial coaching or training service' has been covered under negative list at Sr. No. (1) of Section 66D of the Finance Act, 1994, by way of-

(i) Pre-school education and education up to higher secondary school or equivalent;

(ii) Education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force;

(iii) Education as a part of an approved vocational education course

17. The assessee is having a status of deemed university and is recognized by University Grant Commission/AICTE (All India Council for Technical Education). The Board vide Circular No.107/1/2009-ST dated 28.01.2009 had clarified that any educational institution specifically recognized by the statutory authorities such as UGC, AICTE are exempt from service tax. 'Nirma University' is recognized under Section 2(f) of UGC and is imparting qualification recognized by law. They are providing education recognized by law and are exempt under Section 66D of the Finance Act and Auxiliary education service exempt under Notif.No.25/2012-ST dated 20.06.2012. The assessee is also providing taxable service like 'Management Consultant', 'Technical Testing & Analysis' and 'Management & Repair' on which they are required to pay service tax.

18. The assessee took registration during Oct, 2011 and filed ST-3 returns thereafter. They were rendering the above services prior to Oct, 2011 whereas the registration was obtained only in October, 2011. They failed to file the ST-3 return for the F.Y. 2010-11 and also adjusted the credit availed during this period against their service tax liability on their own. Though separate records were maintained they availed entire credit of input services used in exempted services thereby contravening the provisions of Rule 6(1) & Rule 6(2) of the CCR, 2004. On the above allegation, the assessee has contended

that they were under the bona fide belief that CENVAT credit accumulated will not lapse and since they were also providing taxable service, they continued to avail & utilize the Cenvat credit of input services used in exempted services.

19. The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2) in terms of the Cenvat Credit Rules,2004 till the amendment made on 01.03.2011. If the output service provider avails CENVAT credit in respect of any input service and provides both taxable and exempted services, then, the provider of output service shall maintain separate accounts for receipt, consumption and inventory of input service meant for use in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in providing output service on which service tax is payable.

However, if the service provider opts not to maintain separate accounts in terms of Rule 6(3) then in terms of clause (c) of the sub-rule the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service. The explanation to said sub-rule (3) is reproduced below:-

Explanation I. - The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.

Explanation II. - If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 14, for recovery of CENVAT credit wrongly taken.

20. Subsequently w.e.f. 1.3.2011, Rule 6 was amended vide Notif.No.03/2011-CE(NT) dated 1.3.2011, wherein it is mentioned that the provider of output service availing CENVAT credit in respect of any input or input services used in provision of taxable and exempted goods shall have to maintain separate records for receipt and use of input service and shall take CENVAT credit only on that quantity of input or input service which is intended for use in providing output service on which service tax is payable. However, if the service provider opts not to maintain separate accounts then in terms of Rule 6(3)(c) the provider of output service shall utilize credit only to extent of an amount not exceeding 5% (five) per cent of the value of exempted output service or an amount as determined under sub-rule 3(A).

21. Above provisions made it clear that an output service provider is eligible to take Cenvat credit of input services used only on taxable services, provided separate accounts are maintained for receipt and use of input service used in providing taxable & exempted output service. In the present case, I find that though the assessee was maintaining separate accounts they took inadmissible credit of input services used in exempted services 'Commercial coaching or training service' which was in contravention to Rule 6 (2) of the CCR, 2004.

22. The term 'exempted service' as defined in Rule 2(e) of the CCR, 2004 reads as under;

> *"Exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act and taxable services whose part of value is exempted on the condition that no credit of input services, used for providing such taxable service, shall be taken.*
>
> *Explanation- For the removal of doubts, it is hereby clarified that 'exempted services" includes trading.*

23. Exempted service under Rule 2(e) of Cenvat credit Rules w.e.f. 01.07.2012 was amended as;

> *(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*
> *(2) service, on which no service tax is leviable under section 66B of the Finance Act; or*

Thus, in terms of above definitions credit of input services, used for providing exempted service is not admissible.

24. As the Cenvat credit scheme allows Cenvat credit on input service intended for use in or in relation to providing of any taxable services, I find that the assessee is not eligible for the Cenvat credit of input services used in providing exempted output service i.e. 'Commercial Coaching & Training service'. However on being pointed out by the department they reversed the credit taken for providing such exempted output service.

25. The next issue under consideration is whether the assessee is liable to pay any interest on the credit wrongly taken but not utilized. During the disputed period till 16.3.2012, Rule 14 of the Cenvat Credit Rules, 2004, provided for recovery of interest on the *Cenvat credit taken* ***or*** *utilized wrongly* under the provisions of the said Rule read with Section 73(1) of the Finance Act, 1994. Recovery of Cenvat credit is prescribed in Rule 14 of the CCR, 2004 which is reproduced below:-

> ***Rule 14: Recovery of CENVAT credit wrongly taken or erroneously refunded.*** *- 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 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.*

26. The above rule was amended on 17.3.2012 vide Notif.No.18/2012-CE(NT) dated 17.3.2012 wherein following amendment were made;

Rule 14: *Recovery of CENVAT credit wrongly taken or erroneously refunded.- Where the CENVAT credit has been taken* ***and*** *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 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.*

27. A bare reading of the said Rules imply that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly and that in the case of the aforesaid nature the provision of Section 73 & 75 would apply for effecting such recovery. The assessee however is claiming that the interest liability on the inadmissible Cenvat credit does not arise as the said amount was never utilized till the reversal.

28. This issue also came up for consideration before the Hon'ble Apex Court in the case of *Union of India* v. *Ind-Swift Laboratories Ltd.* - 2011 (265) E.L.T. 3 (S.C.) = 2012 (25) S.T.R. 184 (S.C.). The question before the Hon'ble Apex Court was *"when interest on irregular credit arises, is it from the date of availing of such credit or from the date of utilization*?" The Hon'ble Apex Court held that Rule 14 of the Cenvat Credit Rules, 2004 specifically provides for interest on Cenvat credit taken or utilized wrongly or erroneously refunded. Therefore, interest on irregular credit arises from the date of taking of such credit. Accordingly it was held that if Cenvat credit taken is irregularly, though not utilized, liability to pay interest would arise from the date of taking of the credit till the date of reversal of the credit.

29. In view of the above decision by the Hon'ble Apex Court, the ratio of which is squarely applicable to the present case, it becomes evident that the assessee is liable to discharge interest liability on the Cenvat credit wrongly taken from the date of taking of the Cenvat credit till the date of reversal. The reliance placed by the assessee on the decision of the Hon'ble Karnataka High Court in the case of *Bill Forge Pvt. Ltd. (2012 (26) STR 204 (Kar)* and the other decisions will not apply to the facts of the present case. In the case of *Bill Forge Pvt. Ltd.,* the appellant therein took the credit and also reversed the credit within the same month i.e. before any liability to pay any duty arose. It was in that context the Hon'ble High Court held that if a credit has been taken but reversed before any liability to pay duty arose then no interest liability would accrue. Since the facts of the case relied upon are different with that of the present case, the above decisions cannot be relied upon. It is also not the case of the assessee that between the date of taking the credit and the date of reversal when the exempted service was rendered, liability to pay tax did not arise at all. Therefore, the facts of the case before me are clearly distinguishable from the facts involved in *Bill Forge Pvt. Ltd.* cited (supra) and hence ratio of the said decision would not apply. Since Gary Pharmaceuticals (P) Ltd 2013(297) ELT 391 (Tri-Del) and Strategic Engineering (P) Ltd 2014 (310) ELT 509 (Mad) also follow the ratio of the *Bill Forge Pvt. Ltd.* they would also not apply to the facts of the present case.

30. As regards the reliance placed in the case of Pratibha Processors (1996 (88) ELT 12 (SC)), I find that the facts are distinguishable hence cannot be made applicable to this case. Moreover, the said order was passed much before the decision in *Ind-Swift Laboratories Ltd.* (supra) by the Hon'ble Apex Court was pronounced. Therefore, the ratio of *Ind-Swift Laboratories Ltd.* would prevail over all the other decisions of various Courts.

31. Applying the ratio of above judgment, I find that the assessee has contravened the provisions of Rule 6(1) & Rule 6(2) of the CCR,2004 hence the inadmissible Cenvat credit wrongly taken or utilized till 17.3.2012 and cenvat credit wrongly taken and utilized after 17.03.2012 is recoverable along with interest under Section 73(1) of the Finance Act, 1994. As the assessee has already paid the entire tax liability of Rs.92,07,034/- and also paid Rs.5,49,904/- against their interest liability of Rs.50,71,395/- . I find that these payments can be adjusted against their tax and interest liabilities. I also find that the remaining interest amount of Rs.50,71,395/- demanded in the notice is also sustainable hence should be recovered.

32. The contention that the notice is time barred as no suppression involved is not acceptable. The assessee suo-moto took the inadmissible credit of input services used in exempted services without disclosing these facts to the department since no registration was obtained till Oct, 2011 though they were already rendering both taxable & exempted services prior to registration. I also do not agree with their contention that the credit was wrongly taken under a *bona fide* belief. A blind belief cannot substitute *bona fide* belief. A belief can be said to be *bona fide* only when it is formed after all the reasonable considerations are taken into account. Hence the argument that credit was taken under *bona fide* belief assuming that the same is admissible, cannot sustain when the law clearly disallowed such credit. Hon'ble Larger Bench in the case of Udaipur Tyre Retreading Co. P.Ltd -***2017 (52) S.T.R. 501 (Tri. - Del.)*** held that

> "*Bona fide* belief is not a hallucinatory belief but a belief of a reasonable person operating in an appropriate environment. Thus, there was no scope for a *bona fide* belief that the impugned service is tantamount to repair or maintenance of motor vehicle and therefore the extended period is rightly invoked and penalty under Section 78 ibid is attracted."

33. I find that the assessee has not given any justified reason for not taking registration and not following the provisions of Rule 6 of the CCR, 2004. The delay in taking registration and not filing monthly return in time makes a clear cut case for suppression hence extended period is invokable. The willful suppression of facts was done with an intention to take inadmissible Cenvat credit which was also utilized during the disputed period. Though they reversed the entire credit on 14.10.2015 when pointed out by the department, they deliberately short paid the interest by mis-interpreting the provisions of Rule 14 of CCR, 2004 hence the inadmissible service tax credit taken by the assessee is recoverable under proviso to Section 73 (1) read with Section 68 of the Finance Act, 1994. *In so far as the extended period of time for demand under proviso to Section 11A(4) of the Act is concerned, it is noticed that the case of wrong availment of Cenvat Credit could not have been detected but due to audit undertaken by the*

department. Thus, I am of the considered opinion that this is the fit case where extended period can be invoked.

34. For not obtaining registration on time and by taking and adjusting the credit suo moto, they have contravened the provisions of Finance Act, 1994, penalty, therefore is imposable under Sections 77 of the Finance Act, 1994. I also find that penalty under Section 78 is also imposable as the assessee has willfully suppressed the facts, availed inadmissible Cenvat credit and utilized the same for tax liability which resulted in short payment of service tax to that extent. In so far as penalty under section 76 is concerned, I find that w.e.f 10.05.2008 penalty under Section 76 is not imposable, if penalty is imposed under section 78. Hence provisions of section 76 will not apply since the SCN has been issued after 10.5.2008.

35. I find that all the case laws cited by the party for not imposing penalty are on facts at variance with theirs. In those cases the Cenvat was reversed alongwith interest or there were contradicting decisions on the issue whereas in this case Cenvat was reversed only after the department audited the records, which clearly proves the mala fide intention of the party for which they need to be penalized.

36. In terms of Section 78, w.e.f. 10.9.2004 to till 8th April, 2011, where any service tax has not been paid by fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Act, rules made there under with the intent to evade payment of service tax, the person shall be liable to pay penalty which shall not be less than but shall not exceed twice the amount of service tax short paid. If the service tax determined under section 73(2) and interest payable u/s 75 is paid within thirty days from the date of communication of the order determining such service tax, the penalty shall be 25% of the service tax determined provided the benefit of reduced penalty has also been paid within thirty days. Thereafter from 8th April 2011, Section 78 of the Finance Act, 2011 was amended, wherein the assessee shall be liable to pay penalty equal to the amount of service tax short-levied or short-paid. If true& complete details of the transactions are available in the specified records, penalty shall be reduced to 50% of the service tax short-paid. Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be 25% of such service tax. Benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days.

37. As the period of demand in the instant case is for the period F.Y. 2010-2011 to 2014-15, to extend the benefit of reduced penalty, month-wise break-up of inadmissible Cenvat credit (Rs.92,07,034/-)availed was sought from the assessee by the jurisdictional range officer vide letter No. SD-02/O&A/SCN-55/Nirma University/15-16 dated 25.09.2017 and reminder dated 11.10.2017. However, the required information was not provided hence I am left with no option but to impose equal penalty for the entire period.

38. In view of the above discussions and findings, I pass the following orders:

ORDER

a) I confirm the demand of Cenvat credit of Rs.92,07,034/- (Rupees Ninety Two Lakh Seven Thousand Thirty Four only) under Rule 14 of the CCR, 2004 read with provisions of Section 73(1) of the Finance Act, 1994 and the Cenvat Credit of Rs. 92,07,034/- paid by them is ordered to be appropriated against the present demand;

b) I order to recover interest of Rs. 50,71,395/- on the above confirmed demand from M/s Nirma University under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994. The interest of Rs.5,49,904/- paid by them is ordered to be appropriated against the demand of interest;

c) I refrain from imposing penalty under Rule 15(1) of the Cenvat Credit Rules, 2004 read with Section 76 of the Finance Act, 1994;

d) I impose a penalty of Rs. 10,000/ (Rupees Ten Thousand only) on M/s Nirma University under Rule 15(1) of the Cenvat Credit Rules, 2004 read Section 77(2) of the Finance Act, 1994 for not taking the S Tax registration on time.

e) I impose a penalty of Rs. 92,07,034/-(Rupees Ninety Two Lakh Seven Thousand Thirty Four only) on M/s Nirma University under Rule 15(3) of the Cenvat Credit Rules, 2004 read Section 78 of the Finance Act, 1994;

The Show Cause Notice bearing F. No. ST/15-55/C-C/AP-XXII/2015-16 dated 23.10.2015 is disposed of accordingly.

31.10.17

[R. M. GAUTAM]
Additional Commissioner
C.Ex. & CGST,Ahmedabad-North

F.No: ST/15-55/C-C/AP-XXII/2015-16 Date: 31.10.2017

By Regd. Post A. D./Hand Delivery

To, M/s Nirma University
S.G.Highway, Ahmedabad.

Copy to:

1. The Commissioner, C.Ex.& CGST, Ahmedabad-North.
2. The Deputy Commissioner, C.Ex.& CGST, Division-VII, Ahmedabad- North.
3. The Assistant Commissioner (RRA), C.Ex.& CGST, Ahmedabad-North.
4. The Superintendent, C.Ex.& CGST, AR-IV, Division-VII, Ahmedabad-North.
5. Guard File.

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