आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		GST ONE NATION_ONE TAX_ONE MARKET **OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009**
फ़ोन नंबर./ PHONE No.: 079-27544557	फैक्स/ FAX : 079-27544463	E-mail:- *oaahmedabad2@gmail.com*

निबन्धित पावती डाक द्वारा/**By R.P.A.D**

फा.सं./ **F.No.V.30/15-04/OA/2017** आदेश की तारीख़/Date of Order:- 13.11.2017

जारी करने की तारीख़/Date of Issue :- 14.11.2017

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

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. **08/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।

(5) उक्त अपील की प्रति।

(6) 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 शुल्क़ 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:

(5) Copy of accompanied Appeal.

(6) 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.V.30/15-04/OA/2017 dated 27.02.2017 issued to M/s. Astra Life Care(India) Pvt. Ltd.(100%EOU), Plot No.57/P, Sarkhej Bavla Highway, Taluka Bavla, Ahmedabad, State : Gujarat.**

Brief facts of the case:

On the basis of an intelligence to the effect that M/s. Astra Life Care (India) Pvt. Ltd (100% EOU), Plot No.57/P, Sarkhej Bavla Highway, Taluka Bavla, Ahmedabad (herein after referred to as 'the said assessee'), who are engaged in the manufacturing and clearance of Pharmaceuticals Products (falling under chapter no.30 of the Central Excise Tariff Act,1985) and registered with the department under No.AAECA6553DXM001 are also engaged in trading of Pharmaceutical products , which are exempted , however they are not maintaining the separate accounts for receipt of common input services used for the manufacturing dutiable pharmaceutical products as well as for providing exempted service i.e. trading of goods as required under the provisions of Rule 6(3) of Cenvat Credit Rules, 2004, the said premises of above assessee was searched on 20.07.16. The search also revealed that they have also claimed the refund of non-utilized Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004 for the period from 2012-13 to 2016-17.

2. The fact that they were engaged in the trading activities of pharmaceutical products was never declared to the department. The storing & clearing of traded goods as well as the manufactured Pharmaceutical products was being done from their factory premises, though in their books of accounts, they had declared the address of trading business from their Corporate office which had no facilities to store such goods. The details of the trading activity during the period 2012-13 to 2016-17 (up to 30.6.2016) was taken from their balance sheet and in terms of Rule 6(3) of the CCR,2004, they were required to reverse Cenvat credit of Rs.1,16,67,599/-.

3. Further verification of records also revealed that the said assessee has failed to reverse the Cenvat credit of duty paid on inputs which later expired and were not used in or in relation to the manufacture of finished goods. In terms of Annexure-B to the SCN (showing details of time expired inputs), the said assessee was required to pay Rs.52,301/- along with interest.

4. During the investigation , a statement of Shri Mahendrasinh Fulubha Rana, Director of the said firm, was recorded on 20.07.2016 and 22.12.2016 under Section 14 of the Central Excise Act, 1944 wherein he admitted to the above offence and willingly paid Rs.1,16,67,599/- & Rs.52,301/- by way of reverse entry No.464 & entry No.465 both dated 20.07.2016 of Cenvat credit register.

5. In view of above, a show cause notice dated 27.02.2017 was issued to the said assessee requiring to show cause to the Joint Commissioner of Central Excise, Ahmedabad-II, having office at 1st Floor, Custom House, Navrangpura, Ahmedabad - 380009, as to why:-

a) **Rs.1,16,67,599/-**(Rupees One Crore Sixteen Lakh Sixty Seven thousand Five Hundred Ninety Nine Only) Cenvat Credit which were availed by the said assessee on trading goods and were required to be reversed as prescribed under Rule 6(3) of Cenvat Credit Rules, 2004 2012-13 to 2016-17 (up to 30.06.2016) (Detailed as per Annexure "A" to the SCN) should not be demanded and recovered under Section 11A (4) of the C. Ex. Act, 1944 read with rule 14 of Cenvat Credit Rules, 2004; The Cenvat Credit of Rs. 1,16,67,599/- (Rupees One Crore Sixteen Lakh Sixty Seven

thousand Five Hundred Ninety Nine Only) by way of reverse entry No. 464 dated 20.07.2016 in their Cenvat Credit Account (RG-23 Part II) without any protest by M/s. Astra Life care (India) Pvt. Ltd. (100 % EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taluka Bavla, Ahmedabad should not be adjusted against the total duty demanded,

b) **Rs.52,301** of Cenvat Credit of duty paid on inputs which was later on expired and not used in or in relation to the manufacture of finished goods, were required to be reversed as prescribed under Cenvat Credit Rules, 2004. The Cenvat Credit of Rs. 52,301 reversed vide entry No. 465 of Cenvat Credit register (RG 23A part Ii) without any protest by M/s. Astra Life care (India) Pvt. Ltd. (100 % EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taluka Bavla, Ahmedabad should not be adjusted against the total duty demanded.

c) Interest on amount (a) & (b) above should not be recovered from them under Section 11AA of the Central Excise Act, 1944 read with Rule 14 (2) of Cenvat Credit Rules, 2004 on the above Central Excise duty liability;

(d) Penalty in terms of the provisions of 11AC (C) of the Central Excise Act, 1944 read with Rule 15 (2) of Cenvat Credit Rules, 2004 should not be imposed upon them;

(e)Shri Mahendrasinh Fulubha Rana, Director of M/s. Astra Life care (India) Pvt. Ltd. (100 % EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taiuka Bavla, Ahmedabad are hereby required to Show Cause to the Joint Commissioner, Central Excise, Ahmedabad-II having office at Ist Floor, Custom House, Navrangpura, Ahmedabad as to why penalty should not be imposed on him u under Rule 26 of Central Excise Rules, 2002;

6. Defence Reply:

In response to above notice, the said assessee vide their letter dated 3.04.2017 filed their written submission *inter-alia* stated that;

- They have been maintaining separate accounts for the inputs received on which cenvat credit is taken and are used in the manufacture of excisable goods. Cenvat credit on the inputs which are to be used for trading activity is not taken and these inputs are accounted for separately in the books of accounts. (Copy of RG-23-A-Pt.I & Pt.II for specimen period submitted). Hence condition of Rule 6(1) and 6(2) of CCR, 2004 are fulfilled and are not required to reverse any credit.
- As regards input services are concerned, they are not maintaining separate account for input services used in excisable goods and trading of goods (non taxable or exempted service), therefore option-3 of Rule 6(3) is applicable and are required to reverse Cenvat credit proportionately.

- As per said sub clause(iii) of Rule 6(3) if a manufacturer maintains separate accounts and inventory for inputs, cenvat credit on inputs can be taken in terms of (ii) and/or (iv) of clause (a) to Rule 6(2) of the said Rules. As per Rule 6(3) as amended by Notfn.No.3/2011-CF(NT) dated 01.03.2.011 w.e.f. 1.4.2011 manufacturer opting not to maintain separate accounts, shall follow any one of the options, wherein under Option-1, there is provision to pay amount equal to 6% or 7% of the value of the exempted goods. They claim in their case, they have maintained separate accounts for inputs hence this option is not applicable to them and the department has also wrongly applied this option and demanded reversal of cenvat credit. As per Option-3 they have to pay an amount as determined under sub-rule (3A) in respect of input services. They also stated that they have been filing quarterly refund claims of accumulated cenvat credit and department has been issuing show cause notice for each quarter and the department has never raised this issue about reversal of proportionate cenvat credit.
- Further, at the material point of time, the Director was not aware about the correct position so he did not counter the officers. In fact, they are maintaining separate records for input credit so the credit required to be reversed would be only to the extent of service tax credit taken on input services and not on the inputs. Therefore, the entire exercise of the department in demanding reversal or cenvat credit on the basis of formula given for determining the value and calculating 6% or 7% of such value is erroneous as the same is applicable only when the manufacturer has not maintained separate accounts for inputs. Thus formula of demanding reversal @ 6% or *7%* is therefore arbitrary, erroneous and baseless being contrary to the facts and therefore the entire demand of Rs.1,16,67,599/- is required to be quashed and set aside on merits.
- They have never done any trading of the inputs which are received in our factory. All the inputs received in their factory are used in the manufacture of finished goods which are then exported. R.6. 23A Part - II register for the period 01st April 2016 to 31st July 2016 is attached as Annexure - "A" which shows inward of raw material only and that is used for manufacturing. That means it indicates that they maintained separate account for inputs used for manufacturing and separate account for trading. They submit copies of ER-2 for the period April, 2016 to July, 2016 in Annexure-"B". The finished goods which they manufacture are cleared on payment of duty for export. Similar goods were purchased from local market and traded. But the accounts for such

goods are kept separately. Therefore, the admission of our Director reproduced in para 4.5 of the show cause notice is factually incorrect as it refers to "inputs" whereas, they have not done any trading of inputs. If they had not maintained separate account for inputs which they used in the manufacture of excisable goods, the department would have sought reversal of such Cenvat credit availed and commonly used in manufactured finished goods and traded goods also, but there is no such allegation in the show cause notice. They placed reliance on the decision of the Honorable Tribunal passed in the case of Mercedes Benz (India) Pvt. Ltd reported in 2015 (40) STR 0381 (Tri-Mum) which support their contention that Rule 6(3A) sub-clause (ii) was applicable when the separate account is not maintained for common input services.

- As regards the demand of Rs.52,301/- they would like to know which statutory or private records are verified by the officers to allege that they have destroyed the inputs without taking permission of the department. Besides, a look at Annexure-B would show that the title of the said Annexure states "Duty calculation of expired materials for last 3 years" and the said search in the factory premises was on 20.07.2016 so last three years means upto 20.07.2013 period should be covered, whereas, column relating to GRN No. & Date would show that certain entries of 2011, 2012 and April, 2013 are also covered. This shows that the Annexure is incorrect. It would also be seen from these columns that even GRN dated 15.07.2016 is also taken to show that inputs received under this GRN had expired. This entry is just 5 days prior to visit: of the officers and there is no such material which would expire in 5 days and entire quantity received under the invoice is shown to have been destroyed. Perhaps it would have been a case of having received some low quality material, for which they would have returned entire quantity to the supplier and not taken any credit. Merely Director of the company confessing in the statement that a particular amount of cenvat credit is reversible on the inputs which could not be used for manufacture of finished goods as had expired is not sufficient evidence to make allegations and demand duty. Annexure-C to the show cause notice would also show that there is no document being relied upon by the department. Statement recorded under Section 14 of the Central Excise Act, 1944 is also not sufficient evidence to prove the allegations unless it is corroborated by the documentary evidence. The OIOs of refund taken by them in the past years is contrary to the evidence which shows that department was aware that they are taking cenvat credit on various input services. Statement of Director was required to be supported by the

department with some documentary evidence. Therefore the said demand is not sustainable in the eyes of law as being unsubstantiated with documentary evidence.

- The entries at 1 and 3 are for the goods received beyond five years period of issuance of show cause notice and the cenvat credit on these entries cannot be demanded even in the present show cause notice invoking extended period. Besides, that the entire demand is time barred for the reason that facts are not suppressed from the department. The trading activities being done are reflected in Profit & Loss Account, Trading Account and Balance Sheet. The central excise officers and CERA officers have audited their records on more than one occasion in past five years. Copies of Department Audit Reports attached in Annexure - "C". It is a well known fact that whenever any audit is conducted, the Balance sheet is the primary document required to be seen and the trading activity mentioned in the balance sheet could not have escaped the site of the officers. Para 8.1 of the show cause notice shows that sales figures are taken from Balance Sheet, so where is the suppression. For that matter, even the inputs expired and destroyed would not escape the officers. Therefore, the entire demand is time barred.
- They placed reliance on following decisions:

1) SDL Auto Pvt. Ltd. -2013 (294) ELT 0577 (Tri-Del)
2) *Continental Foundation Jt. Venture* - 2007 (216) LLL I-77 (S.C.)
3) *Jaiprakash Industries Ltd.* -2002 (146) E.L.T. 481 (S.C.)
4) *Pushpam Pharmaceuticals Company* -1995 (78) E.L.T. 401 (S.C.);
5) *Chemphar Drugs & Liniments* -1989 (40)JCLI. 276 (S.C.)
6) Rohit: Industries Limited -2009 (242) ELT 0240 (Tri - Mum)
7) *Gopal Zarda Udyog* v. CCE-2005 (188) ECU. 251
8) oi' *Cosmic Dye Chemical* -1995 (75) E.L.T. 7211. 13.4.
9) Primella Sanitary Products Pvt. Ltd.- 2005 (184) E.L.T. 117
10) *Anand Nishikawa Co. Ltd.* v. *CCE*-2005 (188) E.L.T. 146
11) *T.N.* Dadha Pharmaceuticals *v. 2003 (152) E.L.T. 251*

- In view of the above submissions and case laws, they also requested for cross examination of Shri A.S. Kundu, Superintendent who had investigated the case.

- Regarding interest, they submitted that interest and penalty proposals in the show cause notice are consequential to demand as the demand is entirely required to be set aside, hence, there would not remain any question of confirming any interest or imposing any penalty.

- Regarding proposal to impose penalty on Shri M.F. Rana, Director of the firm

under Rule 26 of the Central Excise Rules, 2002, they submitted that first and foremost the entire demand is time barred, secondly on merits also Rs.1,16,67,599/- is not legally sustainable as incorrect formula has been adopted by the department. Thirdly, the show cause notice does not specify as to how Shri Rana has rendered himself liable for penalty under the said Rule. By using terminology of the Rule, the offence cannot be proved. The department has failed to bring on record any act, omission or commissioning of any offence conducted by Shri Rana which shall render him liable for the said penalty. Hence, the proposal is required to be dropped forthwith. They placed reliance on following decisions:-

a) Nashik Strips Pvt. Ltd. - 2010 (256) ELT 0307 (Tri-Mum),
b) V.K. Tuisian -2015 (329) ELT 0810 (Tri-Del).
c) Deepak Minda -2015 (317) ELT 588 (Tri-Del).
d) Gurmeet Singh-2014 (312) ELT 0689 (Tri-Del).

- They also requested for personal hearing on the main merits of the show cause notice and reserve their right to file final defence reply after incorporating the depositions made by the I.O.

7. However before finalization of this case by the Joint Commissioner, with the introduction of GST, the geographical jurisdiction of Division-III of Central Excise Ahmedabad–II Commissionerate was redefined vide Trade Notice No.02/2017 dated 21.6.2017. Consequently the present case, wherein the assessee was made answerable to the Joint Commissioner, shall now falls under Division-V and is taken up by the undersigned for adjudication.

8. On receipt of this case for adjudication, personal hearing was accordingly granted to M/s Astra Life care (India) Pvt. Ltd. Shri Bhavesh T. Jhalawadia (Chartered Accountant) appeared on behalf of the said assessee and the co-noticee for personal hearing on 7.09.2017 and submitted additional reply dated 6.9.2017 reiterating their earlier submissions. Shri Bhavesh also requested for cross-examination of Shri A.S.Kundu, Superintendent which was denied to him.

DISCUSSION AND FINDINGS

9. I have very carefully gone through the facts of the case, show cause notice, written submissions made vide letters dated 03.04.2017 & 6.09.2017 and relevant citations submitted at the time of personal hearing.

10. The issues under consideration are whether;

a) Rule 6 of the Cenvat Credit would be applicable to instant case since the said assessee was not maintaining separate accounts for receipt of common input services used for the manufacture of dutiable Pharmaceutical products as well as provision of exempted services (i.e trading of goods);

b) Reversal of Cenvat credit of duty paid on inputs which later expired and were not used in the manufacture of finished dutiable goods;

11. On the first issue, the notice alleges that trading being exempted service declared in Union budget 2011-12, the assessee was required to maintain separate accounts for input services which were used in manufacture of dutiable pharmaceutical products as well as for traded goods (i.e exempted service). The assessee on the other hand is contending that option under Rule 6(3) seeking reversal of 6% or 7% of the value of exempted goods\ services is applicable only if separate accounts for inputs are not maintained; this condition is not applicable for input service used in dutiable and exempted service.

12. There is no dispute to the fact that the said assessee is engaged in manufacture of dutiable pharmaceutical product as well as trading activity which is an exempted service since 2011. In the given scenario the said assessee will have to follow the provisions laid down under Rule 6 of the CCR,2004, which is reproduced below:-

Rule 6 *of the CCR, 2004 an obligation on the manufacturer of dutiable and exempted goods and provider of taxable and exempted services.*

(1) 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 for provision of exempted services, except in the circumstances mentioned in sub-rule (2).

Provided *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

Explanation 1:- For the purpose of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2 Value of non-excisable goods for the purpose of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made there under]

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for

(a) *receipt, consumption and inventory of inputs used.*

(i) *in or in relation to the manufacture of exempted goods;*

(ii) *in or in relation to the manufacture of dutiable final products excluding exempted goods;*

(iii) *for the provision of exempted services;*

(iv) *for the provision of output service excluding exempted services; and*

(b) *the receipt and use of input services—*

(i) *in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;*

(ii) *in or in relation to the manufacture of dutiable final products excluding exempted goods and their clearance upto the place of removal;*

(iii) *for the provision of exempted services; and*

(iv) *for the provision of output service excluding exempted services;*

and shall take CENVAT credit only on inputs under sub clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b)]

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow anyone of the following options, as applicable to him, namely:-

(i) *pay an amount equal to **six per cent**, of value of the exempted goods and Seven per cent of value (w.e.f.01.06.2015 as per Notification No. 14/2015 C.E.(N.T. dated 19.05.2015) of the exempted services; or*

(ii) *pay an amount as determined under sub-rule 3A; or*

(m) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take Cenvat credit only on inputs under sub clause (ii) and (iv) of the said clause (a) and pay an amount as determined under sub-rule 3A in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

***Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):*

***Provided** further that if any part of value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be **(Seven Per cent)** of value of exempted- [with effect from 01.06.2015 as per Notification No. 14/2015 CE (N.T.) dated 19.05.2015],*

***Provided** also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 Per cent of the value of exempted, [with effect from 01.06.2015 as per Notification No. 14/2015 CE (N.T.) dated 19.05.2015],*

***Explanation I.-** If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.*

***Explanation II.-** For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance up to the place of removal or for provision of exempted services.*

Explanation III.- *No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services]*

13. In terms of above provisions, Cenvat credit of inputs service used for providing exempted service is not admissible. The manufacturer/service provider has to maintain separate accounts for inputs & input services used in dutiable/exempted goods or taxable/exempted services. If separate accounts are not maintained as prescribed in sub-rule (2), then the manufacturer / service provider opting not to maintain separate accounts has three options under sub-rule (3). The manufacturer can pay an amount equal to 6% or 7% of the value of exempted service; or pay an amount determined under sub-rule 3A or maintain separate accounts for receipt, consumption & inventory of inputs as provided for in clause (a) of sub-rule (2), take Cenvat credit only on inputs under clause (ii) & (iv) of the said clause and pay an amount as determined under sub-rule 3A in respect of input services.

14. In the instant case, I find that the said assessee is a 100% EOU engaged in the manufacture of P.P. Medicaments and trading activity of similar goods. The goods manufactured are cleared on payment of duty for export for which they subsequently claim refund of accumulated Cenvat credit availed on inputs & input services under Rule 5 of the CCR, 2004 read with relevant notification. The assessee claims that they also purchased similar goods from the local market for trading purpose and accounts for such goods were kept separately. In addition to the manufacturing activities; storing and clearing of traded Pharmaceuticals products was also carried out from their factory premises as their Corporate office did not have separate storage facility. Shri Mahendrasinh Fulubha Rana, Director of the said assessee in his statement dated 20.7.2016 admitted the fact that they were not maintaining separate accounts for receipt of common input services on which Cenvat credit of service tax paid was taken & utilized for manufacture of pharmaceutical products as well as for provision of exempted service.

15. Since the assessee was engaged in manufacture of dutiable goods and also provision of exempted service, they were required to maintain separate accounts for receipt of common input services as per the provisions of Rule 6(2) of Cenvat Credit Rules, 2004. By not following the provision of Rule 6(2) the said assessee will have to follow the options available in sub-rule(3) therein. I find that the assessee neither declared to the department that in addition to the manufacturing activities they were also engaged in trading activities which they carried out from their factory premises nor did they follow the procedures laid down under Rule 6(3) of Cenvat Credit Rules, 2004. I find that the trading activity carried out by the said assessee was also not disclosed in their ER-2 return nor an intimation submitting particulars as required

under clause (a) of sub-rule (3A) of Rule 6, was filed to the jurisdictional Range Superintendent. In absence of any such intimation communicating their option to the department as provided under Rule 6(3)(ii) they are left with no other option but to pay an amount equal to 6% / 7% of the value of exempted services.

16. The assessee has relied on Hon'ble Tribunal's decision passed in the case of Mercedes Benz(India) Pvt. Ltd reported in *2015 (40) STR 0381 (Tri-Mum)* in support of their claim that Rule 6(3)(ii) was applicable only when separate account is not maintained for common input services. I have gone through the case of Mercedes Benz(India) Pvt. Ltd and find that tribunal has allowed the appeal holding that *all the particulars, procedures & conditions stipulated in Rule 6(3A) were intimated to the Jurisdictional Superintendent and followed by the appellant. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.* However, in the instant case as no intimation communicating their option (as provided under Rule 6(3)(ii)) was filed with the department nor this fact was disclosed in their ER-2 returns, I find that the above case law cannot be applied to this case and in the given scenario they are left with no other option but to pay an amount equal to 6% / 7% of the value of exempted goods\services.

17. I therefore find that the demand of Rs.1,16,67,599/- in terms of rule 6(2) of the CCR, 2004 proposed to be recovered under Section 11A(4) is sustainable. The amount of Rs.1,16,67,599/- already paid through their Cenvat account without any protest needs to be appropriated against the confirmed demand along with interest.

18. As far as the non-reversal of Cenvat credit of Rs.52,301/- on time expired inputs (which were not utilized in the manufacture of their finished goods) is concerned, I find that Rule 3 of the CCR, 2004 allows Cenvat credit of duty paid on inputs/input services as the case may be, used in the manufacture of final products. The credit of duty paid on inputs which were not used in subsequent manufacturing process is not admissible. However, the assessee is contending that the search was carried out on 20.07.2016 while Annexure-C to SCN includes the inputs received under GRN dated 15.07.2016 while considering the demand stating that they are time expired goods and destroyed however, the fact is that the goods were actually

received just 5 days prior to the search and would have been returned to the supplier due to short receipt of inputs on which no credit was taken. Further it is also argued that entry No.1 & 3 are goods received prior to 5 yrs hence Cenvat on such inputs will be time barred. To verify the above argument, I have gone through Annexure-C, I agree with their contention that entry No.1 & 3 are in respect of inputs received in 2011 hence Cenvat recovery of Rs.4,561/- on such inputs shall be time barred hence the demand to that extent shall be reduced to **Rs.47,740/-.** However for the rest of entries, I find that even if it is assumed that the goods were not expired but were returned due to short receipt, even then the assessee in terms of Rule 3(5) should have paid the amount equal to the credit availed in respect of such inputs which were removed as such. Also that such removal shall be made under an invoice referred to in Rule 9. Since no collaborative evidence was produced before me to support their above claim, I find that the demand of Rs.47,740/- will sustain on above grounds.

19. I also place my reliance in the case of Biopic India Corpn. Ltd. reported in 2008 (224) E.L.T. 548 (Tri. - Ahmd.) wherein Hon'ble Tribunal upheld the demand by relying on the decision of the Tribunal in the case of *Golden Polymex (India) Ltd.*, (2003 (160) E.L.T. 545 (Tri.-Kolkata)) wherein it has been held that credit availed on the inputs destroyed in the fire is required to be reversed. This decision has been followed in the case of *Paras Foam Industries*, 2007 (209) E.L.T. 241 (Tri.-Delhi). In the instant case since the credit availed on such time expired inputs which were later on not used in the manufacturing process needs to be reversed along with interest.

20. Another argument raised is that the demand is time barred. The assessee contended that the demand was barred by limitation as the trading activity was well within the knowledge of the department by way of visits, audit of records and activity being reflected in the P&L account, Trading account & Balance Sheet. I find that the assessee's contention that the fact of availing of credit by the assessee was known to the department in view of the audit of the records cannot be accepted. Knowledge/awareness of the department is not a relevant factor for invoking extended period of time. They had not declared to the department about the fact of availing credit attributable to the trading activity either in the statutory returns filed or otherwise. I find that the decision of Tribunal in the case of *Tigrania Metal & Steel Industries* [2001 (132) E.L.T. 103] and of the Hon'ble High Court of Gujarat in the *Neminath Fabrics* case [2010 (256) E.L.T. 369 (Guj.)] support this view. In view of the above factual and legal position, invocation of extended period of time cannot be faulted at all. Even the Tribunal in *M/s. Nizam Sugar Factory* v. *C.C.E. Hyderabad* - 1999 (114) E.L.T. 429 (T) has taken the view that specific knowledge on the part of the department has to be established by the assessee about the activities carried out by

him, in respect of the production/removal of the goods.

21. I have also gone through the case laws relied by the assessee. In the case of SDL Auto Pvt Ltd, the issue decided is whether the value of items supplied free of cost and cost on account of amortization is to be added in the assessable value. There is no case of any duty liability arising against them as they are covered by the provision of Rule 4(5)(a) of the Cenvat Credit Rules and Rule 57F/57AC(5)A. Hence decision cannot be applied to the present case where the facts are distinguishable. In the case of Continental Foundation Hon'ble Apex Court held that;

"The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

22. In the instant case, I find that no option was filed with the department neither any letter communicating their activity and stating correct information was given to the department .This clearly shows that the non-disclosure of correct information was done with an intent to evade payment of duty.

23. I also find that there is no ground to permit the cross-examination of the officers without citing any compelling reason. The role of an officer in the above allegations is also not forthcoming in the submission. I therefore by relying on Tribunal's decision reject the request for cross-examination. Tribunal in the case of Debu Saha reported in 1990 (48) E.L.T. 302 (Tribunal) held that *"It is no doubt true that in all cases cross-examination need not be granted. It all depends on the circumstances of each case. If the appellant had asked for cross-examination only for the purpose of dragging the proceedings or if the learned Collector comes to the conclusion that the cross-examination is not material, then by assigning sufficient reasons, he can reject the prayer."*

24. In so far as imposition of penalty under Section 11AC of the CEA, 1944 is concerned, I find that M/s Astra Life Care (India) Pvt. Ltd. were fully cognizant of the fact that they were not maintaining separate accounts for input services that were used in both dutiable goods and exempted services and also failed to reverse the credit on time expired destroyed inputs which they availed and intentionally suppressed this fact from the department by not intimating the above activity to the department. Suppression of material facts was manifested resulting in invocation of

extended period in terms of proviso to Section 11A of the Act. Once suppression is manifested, M/s Astra Life Care (India) Pvt. Ltd. is liable to the imposition of equal penalty. However, in terms of Section 11AC(b), the person liable to pay duty as determined under sub-section (10) of Section 11A shall be liable to pay a penalty equal to 50% of the duty determined. However if the duty as determined and interest payable under Section 11AA in respect of the transaction referred above is paid within 30 days of the date of communication of the order then the amount of penalty shall be 25% of the duty determined. 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.

25. Regarding imposition of penalty under Rule 26 of the CER, 2002 on Shri. Mahendrasing Fulubha Rana, Director of M/s. Astra Life Care (India) Pvt. Ltd, I find that the Director is responsible for overall supervision and compliance of Central Excise Law and procedure. He was fully aware that the assessee was carrying out trading as well as manufacturing activity and admitted the fact that they were not maintaining separate accounts as prescribed in Rule 6 of the CCR, 2004 and was also aware that the assessee was not entitled for benefit of Cenvat credit of common input services. He also agreed to their duty liabilities and reversed the disputed credit voluntarily without protest. Being Director he is in-charge and all activities are conducted under his overall supervision. I therefore find that Shri Mahendrasinh Fulubha Rana, has aided and abetted M/s Astra Life Care (India) Pvt. Ltd in contravention of the provisions of Central Excise Act, 1944 and Rules made there under with intent to evade payment of Central Excise duty hence have rendered himself liable to penal action under Rule 26 of the Central Excise Rules, 2002.

26. In view of above findings, I hold that M/s Astra Life Care (India) Pvt. Ltd by willful suppression of facts contravened the provisions of Rule 6(3) of the CCR, 2004; failed to reverse the Cenvat credit of duty paid on inputs which later on expired and were not used in the manufacture of finished goods. They wrongly availed the Cenvat credit which I find is required to be recovered under Rule 14 of the CCR, 2004 read with Section 11A(4) along with interest under section 11AA and penalty under Section 11AC(c) of the CEA, 1944. Shri Mahendrasinh Fulubha Rana, Director of M/s Astra Life Care (India) Pvt. Ltd has also rendered himself liable to penal action under Rule 26 of the Central Excise Rules, 2002. I therefore pass the following order.

ORDER

a) I confirm the recovery of Cenvat credit amounting to **Rs.1,16,67,599/-** **(**Rupees One Crore Sixteen Lakh Sixty Seven Thousand Five Hundred Ninety Nine Only**)** availed by the said assessee on trading of goods, under provisions of Section 11A(4) of the CEA, 1944. The Cenvat Credit of Rs.1,16,67,599/- paid by M/s. Astra Life Care (India) Pvt. Ltd is ordered to be appropriated against the present demand;

b) I confirm the recovery of Cenvat Credit of duty of **Rs.47,740/-**(paid on inputs which was later on expired and not used in or in relation to the manufacture of finished goods) under Rule 14 of the Cenvat Credit Rules, 2004. The Cenvat Credit of duty of Rs 47,740/ is ordered to be appropriated against the already paid amount of Rs.52,301/ vide entry No. 465 of Cenvat Credit register (RG 23A part Ii) without any protest by M/s. Astra Life Care (India) Pvt. Ltd. .

c) I order to recover interest at appropriate rate on the amount of duty payable as mentioned at (a) & (b) above under Section 11 AA of the CEA, 1944 read with Rule 14 (2) of Cenvat Credit Rules, 2004 on the above Central Excise duty liability;

d) I also impose a penalty of **Rs.41,76,237/-** *(50% of Rs.8352473=Rs.8345015+Rs.7458/-)* **(**Rupees Forty One Lac Seventy Six Thousand Two Hundred Thirty Seven Only**)** for the period (2012-13 to 14th May,2015) under proviso to Section 11AC(1)(c)of the CEA, 1944 (erstwhile Section 11AC(1)(b) of the CEA, 1944). If the duty confirmed above is paid along with interest within 30 days of receipt of this order, the penalty payable will stand reduced to 25% of the duty determined, subject to the condition that such reduced penalty is also paid within the period of thirty days.

e) I also impose a penalty of **Rs.33,62,866/-** **(**33,22,584+40,282) **(**Rupees Thirty Three Lac Sixty Two Thousand Eight Hundred Sixty Six Only**)** for the period (May,2015 to June, 2016) under proviso to Section 11AC(1)(c)of the CEA, 1944 (erstwhile Section 11AC(1)(b) of the CEA, 1944). If the duty confirmed above is paid along with interest within 30 days of

receipt of this order, the penalty payable will stand reduced to 25% of the duty determined, subject to the condition that such reduced penalty is also paid within the period of thirty days.

f) I also impose a penalty of **Rs.50,000/-** (Rupees Fifty Thousand Only) on Shri Mahendrasinh Fuluba Rana, Director, of M/s. Astra Life Care (India) Pvt. Ltd. (100 % EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taiuka Bavla, Ahmedabad under Rule 26 of Central Excise Rules, 2002.

The Show Cause Notice issued vide F.No.V.30/15-04/OA/2017 dated 27.02.2017 to M/s. Astra Life Care (India) Pvt. Ltd. (100 % EOU), Plot No. 57/P, Sarkhej Bavla Highway, Taluka- Bavla, Ahmedabad (Noticee No.1) & Shri Mahendrasinh Fuluba Rana, Director (Noticee No. 2) stands disposed of in above manner.

13.11.17

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

F.No: V.30/15-04/OA/2017 Date: 13.11.2017

By Regd. Post A. D./Hand Delivery

To,

(1) M/s. Astra Life Care (India) Pvt. Ltd. (100 % EOU),
Plot No. 57/P, Sarkhej Bavla Highway,
Taluka Bavla, Ahmedabad.

(2) Shri Mahendrasinh Fuluba Rana,
Director of M/s. Astra Life Care (India) Pvt. Ltd. (100 % EOU),
Plot No. 57/P, Sarkhej Bavla Highway,
Taluka Bavla, Ahmedabad.

Copy to:

1. The Commissioner, CGST, Ahmedabad-North.
2. The Asstt Commissioner, CGST, Division-V, Ahmedabad-North.
3. The Asstt Commissioner (RRA), CGST, Ahmedabad-North.
4. The Superintendent, CGST, AR-V Division-V,Ahmedabad-North
5. Guard File.

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