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/15-54/OA/2019

आदेश की तारीख़ / Date of Order : 27.12.2019

जारी करने की तारीख़ / Date of Issue : 27.12.2019

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–14/2019-20

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 ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड , अहमदाबाद -380016 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, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

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 जाएंगीम 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.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show Cause Notice bearing No. **VI/1(b)/Tech-48/SCN/Applewood/2019-20** dated **17.10.2019** issued to **M/s. Applewoods Estate Private Limited, 16, Abhishree Corporate Park, Iscon-Ambli Road, Bopal, Ahmedabad-380058.**

BRIEF FACTS OF THE CASE

The facts of the case, in brief, are that M/s. Applewoods Estate Private Limited, 16, Abhishree Corporate Park, Iscon-Ambli Road, Bopal, Ahmedabad-380 058 [*hereinafter referred as the "said assessee", for* brevity] are engaged in providing residential/commerical construction service, and were holding Service Tax Registration No. AAGCA6838BST001. They were also availing the facility of Cenvat Credit under CENVAT Credit Rules, 2004.

2. During the course of audit conducted by the officers of Central Tax Audit, Ahmedabad, it was observed that the said assessee was engaged in the activity of Construction Services of residential/commercial units and was also availing Cenvat Credit of the Service Tax paid on the services received by them for their construction activity and utilizing the same for payment of Service Tax.

3. It was also observed that out of various units constructed during the period, some of them had been booked and sold after the issuance of the Completion Certificate by the competent authority, i.e. the Ahmedabad Municipal Corporation.

4. Under the negative-list regime of Service Tax, with effect from 01.07.2012, certain activities have ben made chargeable to Service Tax, as "Declared Services" by virtue of Section 66E of the Finance Act, 1994. One such declared servie is Construction Services and the relevant text of the statute reads as under: -

> *"Section 66E: The following shall constitute declared services, namely: -*
>
> *a)* -----
>
> *b)* *construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.*
>
> ***Explanation.***- For the purposes of this clause, -
>
> *(I)* -----
>
> *(II)* -----"

4.1. When construction is completed and the "Completion Certificate" is obtained, what turns out is an immovable property. When such property is sold/transferred after "Completion Certificate" is received, it is deemed to be sale of immovable property, which is specifically excluded from the definition of service, in terms of Section 65(B)(44) of the Finance Act, 1994.

4.2. The said assessee is liable to pay Service Tax only for those Residential/Commercial, which have been booked/sold before the issuance of the Completion Certificate, under Section 66B of the Finance Act, 1994. The said assessee has received the Completion Certificate for their different projects namely SEWS-I on 19.12.2014, for SEW-II on 29.06.2017, for Sorrel on 28.10.2016, for Villas-1 on 02.01.2015, for Villas-2 on 08.10.2015, for Villas-3 on 10.04.2017, for Galleria on 10.04.2017 and for SEWS Commercial on 02.01.2015. Consequentially, no Service Tax would be paid for those Units which have been sold after the issue of the Completion Certificate.

5. During the course of construction of complex, the builder/developer utilizes the services of various labour contract such as electrical contractors, furniture contractors (for doors/windows), tiles fitting contractors, colour contractors, etc. constituting major part of expenditure incurred by the builder/developer. In addition, they also utilize certain services such as security service, telephone service, housekeeping service, etc. The builder/developer receives Service Tax paid invoices from such contractors/service providers and avails the Cenvat Credit of Service Tax paid by the contractors/service providers.

6. The eligibility and admissibility of Cenvat Credit flows from the authority of Rule 3 of the Cenvat Credit Rules, 2004, applicable for the period prior to 01.04.2016, which reads as under: -

> *"RULE 3. CENVAT Credit-(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the Cenvat credit) of the duties, taxes, cess specified in the said rule paid on –*
>
> *(i) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service or or after the 10th day of September, 2004; and*
>
> *(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004*

6.1 Though construction of a complex, building, civil structure or a part thereof including a complex or building intended for sale to a buyer, wholly or partly, is considered to be a declared service under Section 66E(b) of the Finance Act, 1994, the developer/builder cannot be said to have provided or agreed to provide such service in respect of each individual unit, till such unit is booked/sold on full or part payment, before the requisite permission is obtained from the competent authority. This situation exists because of the sale of unit after receipt of "Completion Certificate" does not constitute service.

6.2. In other words, the developer/builder is deemed to be the provider of output service only in those cases, where the units are booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) supra, till the time a unit is booked on part/full payment of consideration.

6.3. In view of the above, it appears that the said assessee is not entitled to take Cenvat Cedit proportionate to the services utilized for construction of units which have not been booked/sold prior to receiving Completion Certificate, i.e. Units for which the said assessee is not an Output Service Provider. Rule 3(1) of Cenvat Credit Rules clearly stipulates that only an output service provider is entitled to take Cenvat Credit. The said assessee has therefore, wrongly taken the Cenvat Credit, in respect of those units which do not constitute service, in violation of the Rule 3(1) of the Cenvat Credit Rules, 2004.

7. Further, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, *"Input Service"* means any service used by a provider of output service for providing an output service (*emphasis supplied*). Rule 2(l) thus reads: -

> *(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 up to the place of removal."*

7.1. As amply discussed hereinabove, the said assessee is not an Output Service Provider in respect of the units, which have not been booked/sold, on the date of Completion Certificate is received. Resultantly, the portion of services utilized for construction of such flats/units would not qualify as "Input Service" in as much as such portions of services have not been utilized for providing output service. Therefore the said assessee is not eligible to take Cenvat Credit of such portion of input services, utilized in an activity, which does not constitute "Service".

8. With effect from 01.04.2016, Rule 2(e) of the Cenvat Credit Rules, 2004 reads as under: -

> *"(e) "exempted service" means a-*
>
> *(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*

(3) *taxable service whose part of value is exepted on the condition that no credit of inputs and inputs servicesk used for providing such taxable servicek shall be taken;"*

8.1. The relevant text of Rule 6 of the Cenvat Credit Rules, 2004 after 01.04.2016, reads as under:

> *RULE 6. [Obligation of a manufacturer or producer of final products and a [provider of output service]]. – [(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be :*
>
> *[(2) A manufacturer who exclusively manufactures exempted goods for their clearance upto the place of removal or a service provider who exlusively provides exempted services shall pay the whole amount of credit of input and input services and shall, in effect, not eligible for credit of any inputs and input services.]*
>
> *[(3) (a) A manufacturer who manufactures two classes of goods, namely:-*
>
> *(i) non-exempted goods removed;*
> *(ii) exempted goods removed;*
> *Or*
> *(b) a provider of output service who provides two classes of services namely: -*
> *(iii) non-exempted services;*
> *(iv) exempted services;*
> *shall follow any one of the following options 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 of the exempted services subject to a maximum of the sum total of opening balane of the credit of input and input services availabel at the beginning of the period to which the payment relates and the credit fo input and input services taken durin that period; or]*
> *(ii) pay an amount as determined under sub-rule (3A):"*

8.2. Therefore, after 01.04.2016, service, on which no service tax is leviable under section 66B of the Finance Act has been considered as exempted services under the provisions of Rule 2(e)(2) of the Cenvat Credit Rules, 2004.

8.3. From the foregoing, it appeared that after 01.04.2016, the assessee is liable to follow the provisions of Rule 6 of the Cenvat Credit Rules, 2004 for reversal of Cenvat Credit availed by them on which no service tax was leviable.

9. It appeared that in the instant case the said assessee has taken and utilized CENVAT Credit of the services used for the Units booked/sold prior to obtaining the Completion Certificateon which Service Tax was paid. They have also availed and utilized cenvat credit on services used for units booked/sold after obtaining the B.U. Permission and on which no Service Tax was paid wherein no service was provided by the said assessee. However, no Cenvat Credit is admissible for sales made after obtaining the Completion Certificate as no output service is provided in such cases and the services utilized for the construction of the units unsold at the time and hence, such portion of Cenvat Credit availed and utilized for construction of units sold after obtaining the Completion Certificate is not admissible under Rule 3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004 for the period prior to 01.04.2016 and under Rule 6 of the Cenvat Credit Rules, 2004 for the period after 01.04.2016.

10. On being pointed out, the said assessee under the reply received on 09.10.2019 have not agreed to the objection.

11. It appears from the details that the said assessee has taken Cenvat Credit to the tune of Rs. 11,79,82,517/- of the Service Tax paid on the services utilized for the construction of the projects under the Schemes listed below. The proportionate Cenvat Credit to be reversed by the assessee for the different periods is as per the below mentioned table:

Particulars	SEWS-1	SEWS-2	Sorrel	Villas-1	Villas-2	Villas-3	Villas-4	Galleria	SEWS Commercial	Total
BU Date	19.12.14	29.06.17	28.10.16	02.01.15	08.10.15	10.04.17	NA	10.04.17	02.01.15	
Total Cenvat Credit availed	946541	20548820	42975173	2230033	6386209	7185463	34485452	3058665	166161	117982517
Total saleable area (sq ft)	126360	579571	1776629	297702	397296	260730	972648	110986	22182	4544104
Sold before BU (sq ft)	123228	386131	839288	195795	325287	145800	972648	32455	9967	3030599
Unsold at the time of BU (sq ft)	3132	193440	937341	101907	72009	114930	0	78531	12215	1513505
% of unsold	2.48	33.38	52.76	34.23	18.12	44.08	0.00	70.76	55.07	
Proportionate credit to be reversed	23461	6858459	22673497	763367	1157486	3167358	0	2164237	91500	36899365

12. As is evident from the above table, the Completion Certificate was given on above cited dates for various schemes by the competent authority at different intervals of time. Out of the total built-up area of 4544104 sq.ft, certain area remained unsold at the time of getting the Completion Certificates. Hence, proportionate cenvat credit to the extent of Rs. 3,68,99,365/-, as worked out above, availed and utilized for the part of the construction on which no element of service was involved, appeared to be not admissible as discussed above.

13. Therefore, it appeared that such Cenvat Credit is found to have been availed by the said assessee in contravention of Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 prior to 01.04.2016 and in contravention of Rule 6 of the Cenvat Credit Rules, 2004 post 01.04.2016, with an intent to wrongly avail the cenvat credit. Further, Rule 9(6) of Cenvat Credit Rules, 2004 stipulates that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer or provider of output services. Taking such credit. In this era of self-assessment, the onus of taking legitimate cenvat credit has been passed on to the said assessee in terms of the said Rules. Therefore, it appeared that there is intention to wrongly avail the cenvat credit and therefore they have contravened the provisions of Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, 2004. The wrongly availed and utilized cenvat credit amounting to Rs. 3,68,99,365/- appeared to be recoverable by invoking extended period of five years under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004. Applicable interest also appeared to be demanded and recovered from them in terms of Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004.

14. It also appeared that full trust is placed on the service providers and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. Further, a service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is plaed on them and the private records maintained by them. From the evidences, it appeared that the said assessee has knowingly availed ineligible Cenvat Credit with an intent to wrongly avail the cenvat credit. The deliberate wrong availment of cenvat credit are in disregard to the requirements of law and bread of trust deposed on them.

15. Further, it appeared that the said assessee has wrongly taken cenvat credit of tax paid on various services, proportionate to those used in the construction of units, booked/sold after obtaining the Completion Certificates, in as much as they are neither the provider of output service nor are these services (proportionate to the unsold flats) used for providing an output service, as contemplated in Rule 2(l) of the Cenvat Credit Rules, 2004. It appeared that they have therefore contravened the provisions of Rule 3(1) of the Cenvat Credit Rules, 2004 read with Rule 2(l) of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, 2004, as discussed above. Further, it also appeared that the event of obtaining of Completion Certificate was never disclosed to the department in their ST-3 returns. Thus, it appeared that the said assessee has suppressed the said facts with intent to wrongly avail the cenvat credit and utilize them. Moreover, in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the said assessee to the department and therefore the department would come to know about such wrong availing of cenvat credit only during audit checks. Therefore, the Government has incorporated the provisions of sub-rules 5 and 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of cenvat credit on the output servie provider taking such credit. As the wrong and inadmissible credit taken, is in contravention of the provisions of Cenvat Credit Rules, 2004 by resorting to suppression, the same appeared recoverable under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 by invoking extended period. In the case of *Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241*, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In *2009 (23) STT 275, in case of Lalit Enterprises V/s CST Chennai,* it is held that extended period is invocable when department came to know of service charges received by appellant on verification of his accounts. Interest at the appropriate rate is also required to be recovered from them under Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004. All the above mentioned acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the said assessee have been committed with intent to evade payment of duty and thereby they have rendered themselves liable for penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

16. Pre-Show Cause Notice consultation for Litation Management and Dispute Resolution, in terms of instructions issued from F.No. 1080/09/DLA/Misc/2015 dated 21.12.2015 was granted to the said assessee on 15.10.2019 before the Principal Commissioner, Central Tax Audit, Ahmedabad. Mr. Vipul Khandhar appeared for the pre-consultation and has provided written submissions. He has also cited the case of law of *Alembic Ltd* in their favour. The provisions of Rule 3(1), 6 and 11 of the Cenvat Credit Rules, 2004 were cited to say these Rules have to read harmoniously. It was argued that once the credit was found to be availed when the output service was wholly taxable, then the credit is availed legitimately and the same cannot be denied. The provisions of Rule 4(7) of the Cenvat Rules were cited to say that they could have taken cenvat credit immediately after the receipt of the bill/challan. The Final Order No. A/12229-12232/2018 dated 23.10.2018 was cited in the case of Alembic Ltd and Shreno Ltd.

17. It appeared that in the case of *Aembic Ltd and Shreno Ltd*, the demand for recovery of cenvat credit was to be made as per the provisions of Rule 6 of the Cenvat Credit Rules, 2004 prior to 01.04.2016. However, in the present case, the demand in the noticewas made as per the provisions of Rule 3(1) of the Cenvat Credit Rules for the period prior to 01.04.2016. Only for the period after 01.04.2016, Rule 6 of the Cenvat Credit Rules, 2004 have been invoked. Therefore, the case law appeared to have been not helpful in the case of the said assessee, and hence the submissions made by the said assessee werenot proper and legal.

18. It also appeared that the said assessee was earlier registered under the jurisdiction of the Commissioner of Service Tax, Ahmedabad. Consequent to the issue of Notification No. 12/2017-Central Excise (NT) to 14/2017-Central Excise (NT) all dated 09.06.2017, appointing officers of various ranks as central excise officers and reallocating the jurisdiction of the central excise officers and Trade Notice No. 001/2017 dated 16.06.2017 issued by the Chief

Commissioner, Central Excise & Service Tax, Ahmedabad Zone, the said assessee is now registered under the jurisdiction of the Commissioner, Central Tax, Ahmedabad-North Commissionerate.

19 The provisions of the repealed Central Excise Act, 1944, the Central Excise Tariff Act, 1985 and amendment of the Finance Act, 1994 have been saved vide Section 174(2) of the CGST Act, 2017 and therefore, the provisions of the said repealed/amended Acts and Rules made thereunder were enforced for the purpose of demand of duty, applying interest, etc. and proposing imposition of penalty under this proceedings.

20. Therefore, a show-cause-notice No. VI/1(b)/Tech-48/SCN/Applewood/2019-20 dated 17.10.2019 was issued to the said assessee by the Principal Commissioner, Central Tax Audit, Ahmedabad calling uponthem to show cause to the Commissioner of Central CST, North Commissionerate, Ahmedabad as to why:-

(i) Cenvat Credit wrongly taken and utilized cenvat credit amounting to Rs. 3,68,99,365/- as tabulated above, should not be disallowed and recovered from the said assessee, under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(l)(ii) of the Cenvat Credit Rules, 2004;

(ii) Interest should not be charged and recovered from them under Section 75 of the Finance Act, 1994 read with Rule 14(l)(ii) of the Cenvat Credit Rules, 2004 on the proposed recovery at (i) above; and

(iii) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004 on the proposed recovery at (i) above.

DEFENCE REPLY

21. The said assessee has not furnished any defence reply to the aforesaid show-cause-notice (SCN) although the same was served to them on 17.10.2019. Meanwhile, they submitted a letter dated 14.11.2019seeking extension of time limit for filing defence reply. Subsequently, they submitted another letter dated 24.12.2019 stating that they want to apply for Sabka Vishwas Scheme, 2019 for the aforesaid SCN, for which the last date is 31.12.2019; that they invite attention to the order dated 18.07.2019 passed by Hon'ble High Court in Alembic Ltd covered under R/Tax Appeal No. 133 of 2019; that they also enclose a copy of their letter dated 15.10.2019 earlier submitted to the Principal Commissioner, Central Tax Audit, Ahmedabad; and that they may be given a personal hearing on the same day (24.12.2019) so that adjudicating process could be completed at the earliest.

PERSONAL HEARING

22. As per their letter dated 24.12.2019, a personal hearing was granted on 24.12.2019 which was attended by Shri Sanjay Kumar Tandon, Director and Shri Bhaumik Joshi, DGM (Accounts) of the noticee company. They submitted a copy of their letter which was earlier submitted on 15.10.2019 to Principal Commissioner, Central Tax Audit, Ahmedabad. They also submitted a copy of Order dated 18.07.2019 passed by Hon'ble High Court of Gujarat in the case of *Alembic Ltd in R/Tax Appeal No. 133 of 2019*. They submitted that they are not liable to reverse the cenvat credit in the light of the said order passed by Hon'ble High Court. Further, Shri Sanjay Kumar Tandon, Director and Shri Bhaumik Joshi requested that if the demand is still to be confirmed by the department even in the light of their aforeasid submissions, such adjudication proceedings may be completed on priority basis so as to enable them to file application for Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 before its last date of 31.12.2019. They also undertook that no appeal will be filed by them against such adjudciation order passed in this matter.

DISCUSSION AND FINDINGS

23. Having gone through the records of the case and the submissions made by the said assessee, I find that the issue which requires determination in this case is whether they are liable to reverse proportionate amount of Cenvat Credit, from the total creditavailedearlier on all the inputs and input services received and utilizedby them in construction of residential/commercial units, on the ground that such total credit also involved the credit in respect ofthe units sold/booked after receipt of the Completion Certificate from the competent authority.

24. I find no dispute regarding the availment of Cenvat Credit by the said assessee on all inputs and input services which were actually used for the construction of all their residential/commercial units. There is also no dispute regarding the eligibility of such Cenvat Credit in respect of the units booked/sold before receipt of the Completion Certificate by the competent authority as provided under Section 66E of the Finance Act, 1994. The SCN proposes recovery of proportionate amount of Cenvat Credit involved in such units which were booked/sold after receipt of the Completion Certificate from the competent authority, on the ground that such credit does not qualify the eligibility test as provided under Rule 3 of the Cenvat Credit Rules, 2004. It is the case of the Department that although construction of a complex, building, civil structure or a part thereof including a complex or building intended for sale to a buyer, wholly or partly, is considered to be a 'declared service' under Section 66E(b) of the Finance Act, 1994, the developer/builder cannot be said to have provided or agreed to provide such service in respect of each individual unit, till such unit is booked/sold on full or part payment, before the requisite permission is obtained from the competent authority. This situation exists because of the sale of unit after receipt of "Completion Certificate" does not constitute 'service'. In other words, the developer/builder is deemed to be the "provider of output service" only in those cases, where the units are booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. The result is that no Cenvat Credit can be availed in terms of Rule 3(1) of the Cenvat Credit Rules, 2004, till the time a unit is booked on part/full payment of consideration. Accordingly, it is construed that the said assessee is not an "Output Service Provider" so far as the units which were not booked/sold before receipt of Completion Certificate, are concerned. Since Rule 3(1) of Cenvat Credit Rules provides that an output service provider is only entitled to take Cenvat Credit, the SCN proposes recovery of Cenvat Credit involved in those units which do not constitute 'service', as stated above. I also find no dispute by the said assessee on the manner and method of computing the proportionate amount of cenvat credit demanded in the SCN. And the only submission made by the said assessee to dispute the demand made under the present SCN is the legal position discussed in the order dated 18.07.2019 passed by Hon'ble High Court in R/Tax Appeal No. 133 of 2019 in the matter of *Alembic Ltd* which upheld a decision made by Hon'ble Tribunal vide Final Order No. A/12229-12232/2018 dated 23.10.2018. The said decision states that prior to insertion of Explanation 3 to Rule 6(1) of the Cenvat Credit Rules, 2004 w.e.f. 01.04.2016 wherein a deeming friction was created that for the purpose of the said Rule 6, exempted services as defined in Rule 2(e) *ibid* shall include an activity which is not a 'service' as defined under Section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services.

25. I have also examined the aforesaid submissions made by the said assessee in support of their defence. I find that during the pre-Show Cause Notice consultation for Litation Management and Dispute Resolution, in terms of instructions issued from F.No. 1080/09/DLA/Misc/2015 dated 21.12.2015, the said assessee had made the same submissions on 15.10.2019 before the Principal Commissioner, Central Tax Audit, Ahmedabad. The SCN indicates that the provisions of Rule 3(1), 6 and 11 of the Cenvat Credit Rules, 2004 were cited by them to say these Rules have to read harmoniously; that it was also argued that once the credit was found to be availed when the output service was wholly taxable, then the credit is availed legitimately and the same cannot be denied; and that the provisions of Rule 4(7) of the Cenvat Rules were also cited by them to say that they could have taken cenvat credit immediately after the receipt of the bill/challan. It is also stated that in the case of *Aembic Ltd and Shreno Ltd*, the demand for recovery of cenvat credit was to be made as per the provisions of Rule 6 of the

Cenvat Credit Rules, 2004 prior to 01.04.2016 whereas, in the present case, the demand in the notice was made as per the provisions of Rule 3(1) of the Cenvat Credit Rules for the period prior to 01.04.2016. Only for the period after 01.04.2016, Rule 6 of the Cenvat Credit Rules, 2004 have been invoked. It is, therefore, stated in the notice that the above case law is not helpful in the case of the said assessee, and that the submissions made by the said assessee are not proper and legal. I also find this interpretation valid. I find that except reiterating the same case law, the said assessee has not made any new submissions or arguments to refute the above interpretation. Therefore, I hold that the submissions made by them in this regard are of no help to them. Even otherwise, I find that even prior to 01.04.2016 where the aforesaid amendment was brought in Rule 6(1) of Cenvat Credit Rules, 2004, Rule 2(e) of the said Rules defined exempted service as taxable service exempted from the whole of the service tax payable thereon and includes services in which no service tax is leviable under Section 66 of the Finance Act, 1994. Similarly, non-taxable service has been interpreted to mean and include those services not specified under Section 65(105) also. These facts have also been discussed by the Tribunal in the case of *ING Vysya Life Insurance Co. Ltd. cited at 2014 (2) ECS 261 (Tri.Bang)*. Therefore, I am of the view that even for the period prior to 01.04.2016, Cenvat Credit is not eligible if the output services are not leviable to service tax under Section 66 of the Act. In this context, the amendments made under Rule 6(1) w.e.f. 01.04.2016 could at best be considered clarificatory.

26. Notwithstanding the above position of law, the intention of the legislature is further clear from the wordings of Rule 3 which existed even prior to such amendments on 01.04.2016 which reads: --

> *"RULE 3. CENVAT Credit-(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the Cenvat credit) of the duties, taxes, cess specified in the said rule paid on –*
>
> *(iii) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service or or after the 10th day of September, 2004; and*
> *(iv) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004*

27. This rule entitles cenvat credit only to the provider of output services. If the units sold after receipt of Completion Certificate are not considered as 'services', there is no question of treating them as the provider of 'output services'. Therefore, I am inclined to accept the interpretation that the said assessee is deemed to be the provider of output service only in those cases, where the units are booked/sold prior to obtaining the completion certificate from the competent authority, and hence no cenvat credit can be availed in terms of Rule 3(1) supra, till the time a unit is booked on part/full payment of consideration.

28. The above position is further clear from the wordings of Rule 2(1) of Cenvat Credit Rules, 2004, which defined *"Input Service"* as any service used by a provider of output service for providing an output service. Since the said assessee is not an Output Service Provider in respect of the units, which have not been booked/sold, on the date of Completion Certificate is received, the portion of servies utilized for construction of such flats/units would not qualify as "Input Service" in as much as such portions of services have not been utilized for providing output service. Thus, the said assessee is not eligible to take Cenvat Credit of such portion of input services, utilized in an activity, which does not constitute "Service".

29. I find that availment of Cenvat Credit under the provisions of the Cenvat Credit Rules, 2004 has a direct correlation between the inputs or input services vis-à-vis the output or output services, as the case may be. The crux of the law is that no credit of tax paid on inputs or input services would be eligible in case the output or output servies are exempted or not leviable to service tax. Even the transitional provisions of Cenvat Credit Rules, 2004 are framed on the basis of this basic principle of eligibility. Since Rule 2 and 3 of the said rules specifically mention the

eligibility criteria for availing cenvat credit, as discussed above, I am unable to accept the arguments put forth by the said assessee in this regard.

30. I also find that Section 66E(b) was very much in existence even when the said assessee had availed cenvat credit on all inputs and input services. It is not the case that they were under any bona fide belief the time of taking credit that the entire Cenvat credit availed by them are genuinely available to them in all circumstances. On the other hand, they were quite aware and were in the knowledge that if any of the units on which they avail Cenvat credit are not booked/sold fully/partly before receipt of completion certificate, such units would not be considered as output or output services and that they would not be eligible for such cenvat credit. Therefore, the said assessee had a mandatory obligation to maintain proper records in respect of each unit right from the stage of availment of cenvat credit so as to prove their eligibility to the credit availed and utilized by them as on the date of receiving Completion Certificate. It is because of this position of the law thatdistinguishes the present case from the transitional provisions given under Rule 11 of the Cenvat Credit Rules, 2004. In this case, the said assessee was fully aware right at the time of availing the Cenvat crediitself that they are not eligible for such credit on the portion of units which would remain unsold/unbooked, whether fully or partially, at the time of receiving completion certificate. In other words, they knew that they would not be considered as 'output service provider'for the purpose of Rule 3 *ibid*for such units and hence the services received towards these units would not be considered as 'input services' for the purpose of Rule 2(l) *ibid*.I find that the acts of omission and commission on their part to take these reasonable steps under the law cannot be made good by bringing in extraneous issues while proposing recovery on the ground of ineligibility.

31. Therefore, I am convinced that such Cenvat Credit has been been availed by the said assessee in contravention of Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 prior to 01.04.2016 and in contravention of Rule 6 of the Cenvat Credit Rules, 2004 post 01.04.2016, with an intent to wrongly avail the cenvat credit. I also agree with the fact that Rule 9(6) of Cenvat Credit Rules, 2004 stipulates that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer or provider of output services taking such credit. In this era of self-assessment, the onus of taking legitimate cenvat credit has been passed on the said assessee in terms of the said Rules. Therefore, there is intention to wrongly avail the cenvat credit and therefore they have contravened the provisions of Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, 2004. Accordingly, I hold that the wrongly availed and utilized cenvat credit amounting to Rs. 3,68,99,365/- is liable to be recovered by invoking extended period of five years under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14of the Cenvat Credit Rules, 2004. Applicable interest also appeared to be demanded and recovered from them in terms of Section 75 of the Finance Act, 1994 read with Rule 14of the Cenvat Credit Rules, 2004.Similarly, the above mentioned acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the said assessee have rendered themselves liable for penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15of the Cenvat Credit Rules, 2004.

32. As already mentioned earlier above, the said assessee has approached this authority on 24.12.2019 by requesting immediate grant of a personal hearing and adjudication of this case on priority basis so as to enable them to apply for the benefits notified by the Government under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 [*SVLDRS*] before its last date of 31.12.2019, on any liability that would arise in this case. Shri Sanjay Kumar Tandon, Director and Shri Bhaumik Joshi, DGM (Accounts) of the said noticee company who appeared for the personal hearing granted on 24.12.2019 have also reiterated this request besides the have also undertaken that they would not be filing any appeal against the adjudication order passed in this case. Meanwhile, I also find that Board's Circular No. 1074/07/2019-CX dated 12.12.2019 states that since the main objective of SVLDRS is to liquidate the legacy cases under Central Excise and Service Tax, it would be desirable that the taxpayers are also given opportunity to avail its benefits in respect of the show cause notices issued on or after 01.07.2019 under 'arrears'

category depending the fulfilment of other conditions such as the person giving an undertaking that he will not file any further appeal in the matter, etc. (Member's D.O. Letter F.No. 267/78/19/CX.8 dated 30.10.2019). Therefore, the Circular asks the field formations to take stock of such cases, and complete the ongoing adjudication proceedings expeditiously following the due process.

33. In view of the facts and evidences as discussed in the foregoing paras, I pass the following order:-

ORDER

(i) I confirm demand of **Rs. 3,68,99,365/- [*Rupees Three Crores Sixty Eight Lakhs Ninety Nine Thousand Three Hundred Sixty Five only*]** being the amount of Cenvat Credit wrongly taken and utilized by M/s. Applewoods Estate Pvt. Ltd., Bopal, Ahmedabad, as tabulated above, under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004;

(ii) I order that the said assessee should pay interest as applicable under Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004;

(iii) I impose a penalty of **Rs. 3,68,99,365/- [*Rupees Three Crores Sixty Eight Lakhs Ninety Nine Thousand Three Hundred Sixty Five only*]**on the said assessee under Section 78 of the Finance Act, 1994 read with Rule 15 of the Cenvat Credit Rules, 2004. However, in view of clause (ii) of the second proviso to Section 78(1), 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 said period of thirty days along with duty/Cenvat Credit and interest demanded.

(iv) Show-cause-notice No. VI/1(b)/Tech-48/SCN/Applewood/2019-20 dated 17.10.2019 issued to the said assessee is accordingly disposed of.

(DR. BALBIR SINGH)
COMMISSIONER
CGST & CEX, AHMEDABAD NORTH

F.NO. STC/15-54/OA/2019

Date: 27.12.2019

BY REGD POST AD

To
M/s. Applewoods Estate Private Limited,
16, Abhishree Corporate Park,
Iscon-Ambli Road,
Bopal, Ahmedabad-380 058.

Copy to: -

1. The Principal Chief Commissioner, CGST &Central Excise Zone, Ahmedabad.
2. The Deputy/Assistant Commissioner of CGST & C. Excise, Division-VI, Ahmedabad-North, Ahmedabad
3. The Superintendent of CGST & C.Excise, Range-II, Division-VI, Ahmedabad-North, Ahmedabad
4. Guard file.