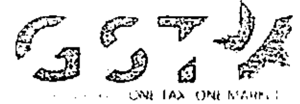
आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		 OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
फ़ोन नंबर./ PHONE No.: 079-27544557	फैक्स/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

निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN 20210464WT000000FEE9

फा.सं./F.No.STC/15-13/OA/2020

आदेश की तारीख़/Date of Order :- 29.04.2021

जारी करने की तारीख़/Date of Issue :- 29.04.2021

द्वारा पारित/Passed by:- ऍम.एल.मीणा / *M.L.Meena*

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 02/ADC/ MLM /2021-22

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 एस टी -४ (ST-4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच 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. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एस टी -४ (ST-4) 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।

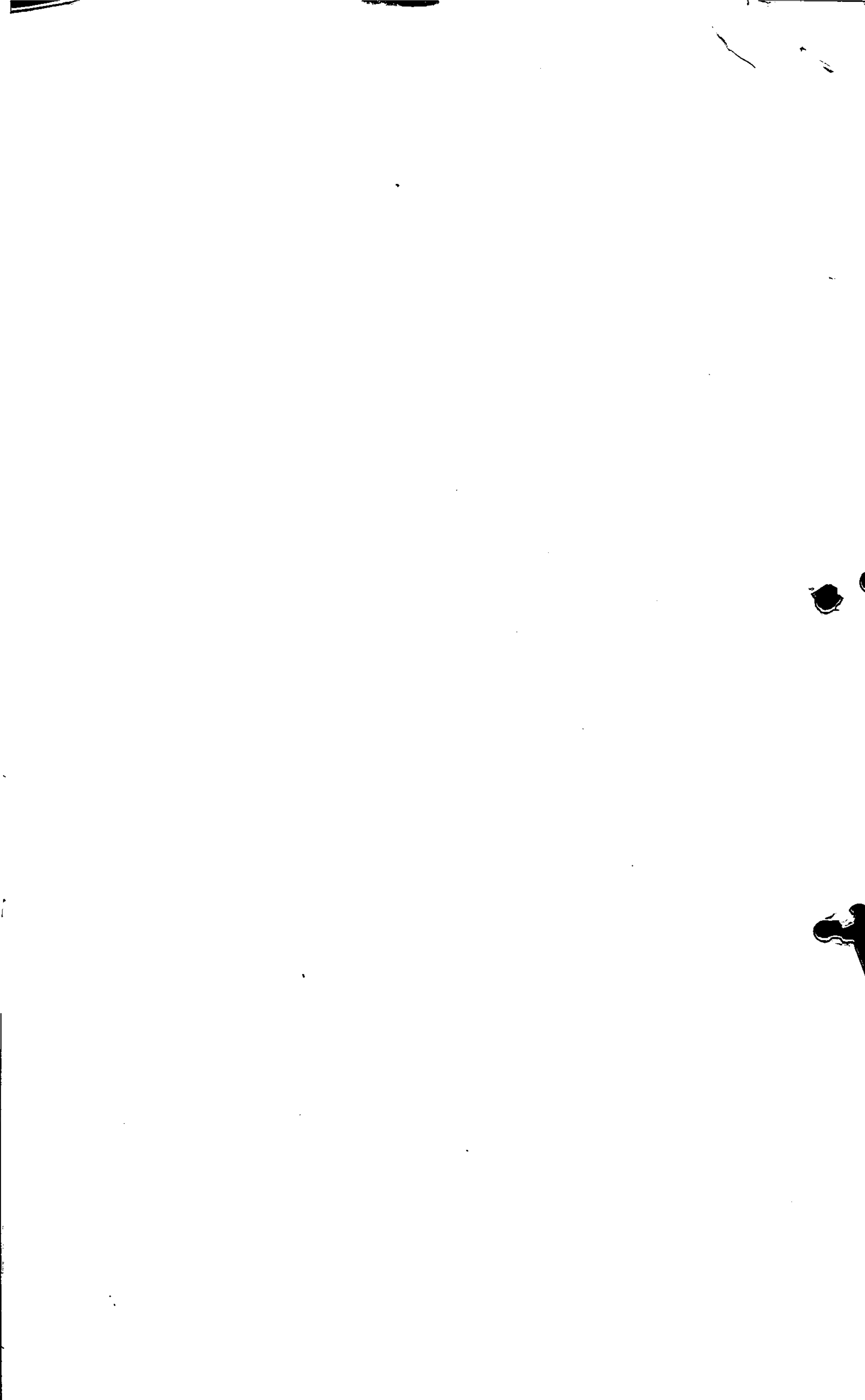
(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू .5) 00. पांच रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form एस टी -४ (ST-4) 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.5.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice No. VI/1(b)/Tech-60/SCN/Sanghi Industries/2019-20 dated 25.02.2020 issued to M/s.Sanghi Industries Ltd (RMC Plant), Plot No.215, Naroda Industrial Estate, GIDC, Naroda.



Brief Facts of the case:

1 M/s Sanghi Industries Ltd (RMC Plant), Plot No 215, Naroda Industrial Estate, GIDC Estate, Naroda-382330 *(hereinafter referred to as the 'assessee')* were registered under Central Excise with Registration No AAECS5510QEM008 for manufacture of Ready Mix Concrete (RMC). They were also registered with Service Tax (Registration No AAECS5510QSD008) for providing services.

2 Audit of the assessee was conducted for the period February 2015 to June 2017, and the following observations were raised and communicated to the assessee under Final Audit Report No. 330/2019-20 dated 13.11.2019.

Revenue Para No 6: Nonpayment of service tax on pumping activities

3. Verification of records revealed that in addition to supply of Ready Mix Concrete, the assessee had also provided services of pumping of such Ready Mix Concrete to certain customers. The assessee had charged for such pumping services in the invoices issued to their customers. Further, in situations where the customer had not availed such pumping services, the assessee had reduced such charges from the total supply price of the Ready Mix Concrete, as mentioned in the Purchase Orders. In case the supply of Ready Mix Concrete is without pumping, a deduction @150/- per cubic meter has been allowed to the customer as per the Purchase Orders.

4. For example, on scrutiny of Purchase Order dated 19/7/2017 entered into by the assessee with Patel Foundation, the assessee had quoted a total price for Ready Mix Concrete which is inclusive of pumping charges. In case the consignee did not wish to avail pumping services, then the supply price of ready mix concrete has been reduced and a deduction of Rs.150/- per cu meter has been allowed. Similar terms are laid down is the case of Purchase Order dated 15/7/2017 entered into with Veer Associates. From such orders it is seen that they have included an additional cost towards pumping services. On such cost, the assessee had discharged Central Excise duty at concessional rate but the assessee has not discharged Service Tax on pumping charges recovered from their customers.

5. It was also noticed that in case of certain invoices wherein only the service of pumping has been provided to customers; the assessee had discharged Service Tax on the value of such services, for example, Bill No. 8316000001 dated 24.08.2016 issued to Soham Build Well, Bill No. 831600002 dated 14.1.12016 issued to Punjab automobiles India Pvt Ltd and Bill No.8316000003 dated 22.12.2016 issued to Nila Infrastructures Limited. However, in situations where Ready Mix Concrete had been provided along with pumping services, the assessee had only discharged Excise duty at concessional rate and has not discharged Service Tax at the applicable rate on pumping services. For example, scrutiny of Invoice No 8217001326 dated 26.5.2017 issued by the assessee to Aqua Developers against Purchase Order dated 13.5.2017, indicates that the assessee had supplied Ready Mix Concrete to the consignee along with pumping services but had only discharged Excise duty on the total price which is inclusive of such pumping services. Similarly, it was noticed that the assessee had supplied Ready Mix Concrete along with pumping services to M/s Hetu Constructions Pvt Ltd, Ahmedabad against Purchase Order dated 22.6.2017 and had issued Invoice No 8217002345 dated

29.6.2017 against which they have discharged excise duty on the total value. The assessee had failed to discharge appropriate Service Tax on the consideration recovered from the consignee on the pumping services provided to them in addition to supply of Ready Mix Concrete.

6. A worksheet showing the quantity of RMC in cubic meters supplied by the assessee during the period from February 2015 to June 2017 were also attached to the SCN. The unpaid service tax on such pumping services provided by the assessee to their customers for a consideration is as calculated below:

(Rs in actuals)

Period	Quantity in cubic meter	Value @ Rs 150 per c meter	Service tax payable
February 2015 to M 2015	2883	4,32,450/-	53,451/-
2015-16	22199.5	33,29,925/-	4,82,839/-
2016-17	19240	28,86,000/-	4,32,900/-
April 17 to June 17	4701.5	7,05,225/-	1,05,784/-
Total			10,74,974/-

7. A query memo dated 12.07.2019 was issued to the assessee. The assessee vide letter dated 03.06.2019 did not agree to the objection and stated that they had not charged pumping charges separately; that it is an inclusive price of RMC and when pumping of RMC was not required by customers, they allow a nominal deduction from price of the RMC. The assessee had further clarified that they had paid Central Excise duty and sales tax on the entire value and that the value on which Central Excise duty/sales tax is paid cannot be again made liable to Service Tax. It appeared that the contention of the assessee cannot be accepted as they had provided Ready Mix Concrete along with pumping services to their customers and have also charged for such pumping services in the invoices issued by them to their customers.

8. The term *'service'* is defined in Section 65B(44) of the Finance Act, 1944 (*hereinafter referred to as the 'Act'*) as any activity carried out by a person for another for consideration, and includes a declared service. *'Taxable Service'* is defined under Section 65B(51) as any service on which service tax is leviable under Section 66B.

9. From the documentary evidences, it was noticed that an activity of pumping has been carried out by the assessee for their customers for consideration and therefore such an activity carried out by the assessee for their customers, falls within the meaning of *'service'* as defined under Section 65B(44) of the Act.

10. Further, such pumping services do not find mention in the list of services numbered as (a) to (q) under Section 66D of the Act and hence, do not fall under the Negative List and are therefore, taxable services. Pumping services are also not exempted under Mega Exemption Notification No 25/2012-ST dated 20.6.2012, as amended or any other Notification issued under the Act. Accordingly, it appeared that the services provided by the assessee are taxable as defined under Section 65B(51) of the Act and are liable for payment of service tax.

11 From the foregoing facts and discussions, it appeared that the assessee had contravened the provisions of:

- Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ('Rules') as they have failed to pay service tax at the rate specified in Section 66B in such manner and within such period as may be prescribed;
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed.

12 It appeared that the assessee had failed to disclose to the Department that they had provided services of pumping of Ready Mix Concrete to their customers on which consideration was received by them. They also failed to reflect the consideration as receipt in the ST3 returns filed by them before the department, until the audit objection was detected. Therefore, it appeared that they have suppressed the material facts from the department, with an intent to evade the payment of Service Tax. Accordingly, unpaid Service Tax of Rs.10,74,974/- is to be demanded and recovered from the assessee, under the proviso to Section 73(1) of the Act by invoking the extended period of time of five years as there is a case of suppression of facts with an intent to evade the payment of service tax. As the assessee had not paid the Service Tax, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act. By the act of contravention of the various provisions of the Act and the rules made thereunder and by not disclosing the amount of consideration received against services provided, the assessee had rendered themselves liable to penal action under Section 78(1) of the Act.

Revenue Para No 7: Wrong availment of credit of service tax paid on hiring charges of transit mixers.

13. Scrutiny of the records revealed that the assessee had hired Transit Mixers on rent and had availed Cenvat Credit of Service Tax paid on such hiring charges as under :

(Rs. In actuals)

Period	Cenvat credit
February 2015 to March 2015	4,28,375/-
2015-16	17,14,020/-
2016-17	16,15,773/-
April 2017 to June 2017	8,12,047/-
Total	45,70,215/-

14. It appeared that the assessee had hired Transit Mixers for delivery of Ready Mix Concrete to the sites of their customers. The assessee had delivered the goods to the carrier (Transit Mixers) for the purpose of transmission to the buyer, and therefore, the property in the goods would thereupon pass to the buyer. Any delivery of the goods to a carrier, whether named by the buyer or not for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer. Therefore, in the present case, the assessee had loaded the ready mix concrete in the transit mixers for transportation to their buyers and hence, '*place of removal*' of goods is their factory premises. Further, the services of Transit Mixers have been used after the goods have been cleared from their factory gate and therefore it appeared that such services have been used for transportation of final products beyond

the place of removal and after sale has taken place. Since such services have been received after the clearance of goods from their manufacturing premises, it appeared that the Credit of Service Tax paid on hiring charges of transit mixers would not be admissible to them.

15 *'Input service'* is defined under Rule 2(l) of the Cenvat Credit Rules, 2004 (*hereinafter referred to as the 'Cenvat Rules')* as under:

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

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

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

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

16 *'Place of removal'* is defined under Section 4(3)(c) of the Central Excise Act, 1944 *(hereinafter referred to as the 'Act')* as under:

"(c) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed.

17 In the present case, the assesse had availed the Cenvat Credit of Service Tax paid on hiring of transit mixers. The services of transit mixers have been used after the sale of goods from the factory gate which is the *place of removal.* As per the definition of *'input service'* under Rule 2(l) of the Cenvat Rules read with the definition of *'place of removal'* under Rule 4(3)(c) of the Act, it is seen that Cenvat Credit is only available on services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal. It, therefore, appeared that Cenvat Credit of tax paid on hiring charges of Transit Mixers, whose services were utilized beyond the place of removal would not be admissible to the assessee, as such services are not covered under *'input service'* as defined under Rule 2(l) of the Cenvat Rules. Hence, the Cenvat Credit of Rs.45,70,215/- of tax paid on hiring of transit mixers used after the sale of goods and beyond the place of removal is inadmissible to the assesse.

18 The inadmissible Cenvat Credit of Rs.45,70,215/-, as shown in the above Table, wrongly availed and utilized by the assessee, and required to be reversed by them. A query memo dated 12.07.2019 was issued to the assessee but the assessee vide letter dated 03.06.2019 stated that they did not agree to the objection. They stated that the customers place order to supply RMC with a condition to discharge at the place of construction, i..e., required floor of building. The FOR price quoted includes discharge of RMC at construction site. They hire such Transit Mixer Vehicles on rental basis at the rate with combination of minimum guaranteed rent and usage in kms of movement and fuel. They have taken Credit of tangible goods (Transit Mixers) hired. They have not engaged any trucks or GTA to transport the goods and no consignment notes have been issued. The Transit Mixers are specially designed for transportation of Ready Mix Concrete so that the concrete should not settle during transportation. Their contention is that they have availed credit on hiring of tangible goods and not on transportation services. It appeared that the contention of the assessee cannot be accepted as they have availed Credit on input services utilized beyond the place of removal. As per the definition of input services provided under Rules 2(l) of Cenvat Rules, only input services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, is admissible. Since the Credit of input services have been utilized beyond the factory premises of the assessee, i.e. place of removal, it appeared that such credit of tax paid on hiring charges of Transit Mixes used for transportation of final products, cannot be allowed to the assessee.

19. From the above, it appeared that the assessee had contravened the provisions of Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(l) of the Cenvat Rules as they have wrongly availed and utilized the Cenvat Credit amounting to Rs 45,70,215/- on tax paid on hiring charges, which were ineligible.

20 It appeared that the assessee was aware that the goods have been cleared from the place of removal, i.e., their factory gate, and that the credit of tax paid on services availed beyond the place of removal was inadmissible as per the definition of 'input services' provided in Rule 2(l) of the Cenvat Rules read with the definition of *'place of removal'* under Section 4(3)(c) of the Act. Hence it appeared that the assessee had willfully availed Cenvat Credit on hiring services which they knew were ineligible to them, as envisaged in the definition of *'input service'* under Rule 2(l) of the Cenvat Rules. It, therefore, appeared that by the act of wrong availment of Cenvat Credit on such services, in contravention of the provisions of Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(l) of the Cenvat Rules and by non-disclosure of availment of cenvat credit in the ST-3 returns filed by them, the assessee had suppressed the material facts with an intent to avail ineligible Cenvat Credit. It, therefore, appeared that the wrongly availed and utilized cenvat credit of tax paid on hiring services is to be demanded and recovered from the assesse under the provisions of Section 11A(4) of the Central Excise Act, 1994/proviso to Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Rules by invoking the extended period. It also appeared that the assesse is liable to pay interest under the provisions of Section 11AA of the Central Excise Act, 1944/Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Rules. It further appeared that the assessee had suppressed the material facts and have wrongly availed the cenvat credit on the hiring

charges services and therefore, the assessee would also be liable for penal action under the provisions of Section 11AC(1)(c) of the Central Excise Act, 1944/Section 78(1) of the Finance Act, 1994 read with the provisions of Rule 15(2)/15(3) of the Cenvat Rules.

21 In the present regime of liberalization, self-assessment and filing of returns online, no documents are submitted by the assessee to the department and therefore, the department would only come to know about such non-payment of Service Tax during audit or preventive/other checks. The deliberate non-payment of tax and wrong availment of Cenvat Credit would have remained undetected if audit had not been carried out. From the evidences, it appeared that the assessee had knowingly evaded payment of Service Tax/wrongly availed and utilized inadmissible Cenvat Credit with intent to evade the payment of Service Tax/wrongly avail inadmissible Cenvat Credit. All the above mentioned acts of contravention of the provisions of the Central Excise Act, 1944, Finance Act, 1994 and Cenvat Credit Rules, 2004 on the part of the assessee have been committed with intent to evade the payment of Service Tax and they have, therefore, rendered themselves liable to penalty under the provisions of Section 11AC of the Central Excise Act, 1944/Section 78(1) of the Finance Act, 1994.

22. Pre-SCN Consultation in terms of instructions issued from File No 1080/09/DLA/MISC/15 dated 21.12.2015, F.No. 1080/DLA/CC Conference/2016 dated 13.10.2016 and Master Circular No. 1053/02/2017-CX dated 10.03.2017, was granted to the assessee on 13.02.2020, before the Additional Commissioner, Central Tax Audit, Ahmedabad. Shri Dayalan Naidu, GM, Indirect Taxation attended the consultation on behalf of the assessee.

23. The assessee vide letter dated 13.2.2020, reiterated the contentions made under their letters dated 3.6.2019 They submitted that the issue of pumping charges is no longer res Integra and is settled in favour of the assessee vide GMK Concrete Mixing Pvt Ltd 2012(25) STR 357 (Tri-Del), which is affirmed by the Hon'ble Supreme Court. It was held by the Tribunal that in absence of cogent evidence to the effect of providing taxable service, primary and dominant object of the contract throws light that contract between the parties was to supply ready mix concrete (RMC) but not to provide any taxable service. On Cenvat Credit availed on hiring of transit mixers, it was stated by the assessee that they had taken Credit of tangible goods (Transit Mixer) hired. They had not engaged any trucks or GTA to transport the goods and no consignment notes have been issued. The Transit Mixers are specially designed for transportation of Ready Mix Concrete so that the concrete should not settle during transportation.

24 The submissions made by the assessee during Pre-SCN consultations were examined. As per the copies of purchase orders and invoices it was seen that the assessee had discharged Service Tax on pumping charges, when such services have been provided exclusively to their customers. However, in cases where the pumping services were included while delivering RMC, the assessee had not discharged Service Tax on such pumping services. They had however, shown the rate charged for such pumping services in such invoices at rate / per cu.mtr but had discharged Central Excise duty, at the applicable concessional rate, on such charges. Hence, it appeared that the assessee is liable to discharge Service Tax on such pumping services provided to customers in addition supply of RMC.

25 Further, Board vide Circular No. 1065/4/2018-CX., dated 8-6-2018 clarified issues relating to the place of removal. Hon'ble Supreme Court in the case of *CCE* v. *Ispat Industries Ltd.*, has upheld the principle that *'place of removal'* is to be referred with reference to the premises of the manufacturer and not to the buyer of excisable goods. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. Hence, the place of removal of Ready Mix Concrete, i.e, the final goods manufactured by the assessee, is the factory premises of the assessee. Therefore, the Cenvat Credit of Service Tax paid on hiring charges of Transit Mixers cannot be availed by the assessee as it is inadmissible as per the definition of *'input service'* under Rule 2(l) of the Cenvat Credit Rules, 2004 read with the definition of *'place of removal'* under Section 4(3)(c) of the Act.

26 Therefore, M/s Sanghi Industries Limited (RMC Plant), Plot No 215, Naroda Industrial Estate, GIDC, Naroda 382 330 were called upon to show cause to the Additional/Joint Commissioner, Central GST & Central Excise, Ahmedabad North, vide Show Cause Notice No.VI/1(b)/Tech-60/SCN/Sanghi Industries/2019-20 dated 25.02.2020 as to why:

i. Service tax amounting to Rs 10,74,974/- (Rupees Ten lakhs seventy four thousand nine hundred seventy four only) should not be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994;
ii. Penalty should not be imposed on them under the provisions of Section 78(1) of the Finance Act, 1994 on the demand at (i) above;
iii. Interest should not be charged and recovered from them under the provisions of Section 75 of the Finance Act, 1994 on the demand at (i) above;
iv. Cenvat credit wrongly availed and utilized by them amounting to Rs 45,70,215/- (Rupees Forty five lakhs seventy thousand two hundred fifteen only), should not be disallowed and recovered from them, under the provisions of Section 11A(4) of the Central Excise Act,1994/proviso to Section 73(1) of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004;
v. Penalty should not be imposed on them under the provisions of Section 11AC(1)(c) of the Central Excise Act, 1944/Section 78(1) of the Finance Act read with the provisions of Rule 15(2)/15(3) of the Cenvat Credit Rules, 2004 on the demand at (iv) above;
vi. Interest should not be charged and recovered from them under the provisions of Section 11AA of the Central Excise Act, 1944/Section 75 of the Finance Act on the demand at (iv) above.

27 The show cause notice had clearly indicated that the provisions of the repealed Central Excise Act, 1944 and amendment of the Finance Act, 1994 have been saved under Section 174(2) of the Central Goods and Services Tax Act, 2017 and therefore, the provisions of the repealed/amended Acts and Rules made thereunder are enforced for the purpose of demand of duty, interest and imposition of penalty under this notice.

Defence Reply:-

28. Vide email dated 06.04.2021, the assessee, inter-alia stated that –

in the present case, the demand has been proposed on them under the provisions of erstwhile Finance Act, 1994 read with Section 174 (2) of the CGST Act, 2017. With effect from 01.07.2017, the provisions of Chapter V of the Act have been omitted vide Section 173 of the Central Goods and

Services Tax Act, 2017 (for short '**CGST Act**'). Further, the Constitution (One Hundred and First Amendment) Act, 2016 (for short '**Constitution Amendment Act**') was notified on 08.09.2016. Section 7 of the Constitution Amendment Act omitted Article 268A of the Constitution. Section 7 came into force on 16.09.2016.

29. They stated that consequently, Entry 92C of List I of Seventh Schedule of the Constitution was also omitted vide Section 17 of the Constitution Amendment Act (which came into force on 16.09.2016). Entry 92C read as- "taxes on service". Thus, with effect from 16.09.2016, the levy of Service Tax was done away with.

30. They stated that the provisions of the General Clauses Act, 1897, which saves the rights accrued under the prior legislation and empowers the Government to initiate any proceedings under the repealed legislation and drawn attention to Section 6 of the General Clauses Act, 1897.

31. They submitted that the provision contained in General Clauses Act, 1897 saves the rights accrued under the old legislation and gives the power of the legislature to initiate proceedings in respect of any liability incurred under the old statute. They relied the case of ***Rayala Corporation* v. *Directorate of Enforcement*, 1969 (2) SCC 412**, a five-judge bench of Hon'ble Supreme Court held that Section 6 of the General Clauses Act, 1897 applies only to repeals and not omissions. They referred to the relevant portion of the above judgment. They submitted that in the present case, the legislature has omitted the provisions of Chapter-V of the Act. Thus, Section 6 of the General Clauses Act, 1897 shall not be applicable in view of the judgment of Hon'ble Supreme Court in ***Rayala Corporation* (Supra).**

32. They stated that no proceedings can be initiated, and no liability can be fastened by the Government in respect of the any alleged violation or non-compliance of the provisions contained in Chapter-V of the Act, as omitted vide Section 173 of the CGST Act, 2017. The initiation of the impugned proceedings vide SCN issued on 25.02.2020 is without jurisdiction, unconstitutional and erroneous and deserves to be quashed.

33. They submitted that the whole proceedings gets vitiated for want of proper show cause notice. In the case of **CCE v. Brindavan Beverages (P) Ltd.** reported at **2007 (213) E.L.T. 487 (S.C.)**, the Hon'ble Supreme Court held that SCN is foundation on which the Department has to build up its case. If allegations in show cause notice not specific and on the contrary vague, lack details and/or unintelligible, sufficient to hold that noticees have not given proper opportunity to meet allegations indicated in show cause notice. They placed reliance is on the following judgments in this regard:

i) CCE v. Brindavan Beverages 2007 (213) E.L.T. 487 (S.C.)

ii) Royal Oil Field Pvt. Ltd. V. UOI 2006 (194) E.L.T. 385 (Bom.)

iii) B. Lakshmichand Vs. Government of India 1983 (12) ELT 322.

iv) Collector of Central excise Vs. H.M.M Ltd. 1995 (76) ELT 497 (SC)

v) Amrit Foods Vs. CCE 2005 (190) ELT 433 (SC)

vi) Madhur Hosiery INDS. Vs. CCE 2006 (200) ELT 147

34. They submitted that the SCN does not analyze as to how the noticees have short paid the Service Tax. In fact, the SCN has conveniently took the amount of deduction granted by the Noticees, and raised the demand of service tax thereon without any independent analysis or application of mind. They submitted that, the SCN in para 6 has wrongly alleged that the Noticees have provided RMC along with pumping services to their customers and have also charged for such pumping services in the invoices issued by the Noticees. However, it is pertinent to note that they have not charged any amount for pumping services in the Invoices. Therefore, no verification is done in this regard is in itself not tenable in the eyes of law.

35. They submitted that, the SCN in para 5 has concluded the exact service tax liability on the value of Rs. 150 per cubic meter i.e. the deduction amount provided by the Noticees and concluded the demand of Rs. 10,74,974/- which in itself clarifies that the present SCN is vague. The same was clarified by the Hon'ble CESTAT in the case of ***Shubham Electricals v. CST & ST, Rohtak 2015 (40) S.T.R. 1034 (Tri. - Del.).*** They stated that the aforementioned judgement was duly affirmed by the Hon'ble High Court in the case of ***Principal Commissioner ST Delhi v. M/s Shubham Electricals 2016 (42) S.T.R. J312 (Del.).*** They also placed reliance in the case of ***M/s Coromandel Infotech India Ltd. v. Commissioner of GST and C.E. 2019 (1) TMI 323*** in which the CESTAT.

36. They stated that since in the present SCN, the exact service tax liability cannot be adjudged by department, therefore, the present SCN is not maintainable and is liable be dropped. They also submitted that, the SCN in para 23.2 has wrongly relied upon the decision of CCE v. Ispat industries ltd. and Circular No. 1065/4/2018 – CX dated 08.06.2018 as both these decision and circular is on the valuation of tax liability and nowhere related to the eligibility of Cenvat Credit. Therefore, the issuance of SCN based on the decision or circular which is not at all applicable to the present issue is baseless and therefore the present SCN shall be liable to be dropped on this ground alone.

37. They submitted that a show cause notice forms the foundation of any proceedings. The SCN is issued to an assessee asking him to show cause against the allegations which are made thereunder, and which are based on prima-facie reasoning. Once the SCN has been issued, the scope of allegations against the Noticees therein is restricted to what has been alleged thereunder. The allegations in the SCN are expected to be based on a prima-facie exercise by the department, which is requirement of the principles of natural justice as in the absence of it, the subsequent proceedings would be rendered a nullity. If the allegations in the SCN are based on violation of provisions which are not even applicable to the subject case, the whole proceedings lose validity.

38. They placed reliance on the decision of the Hon'ble Bombay High Court in ***Rajmal Lakhichand v. Commissioner of Customs, 2010 (255) ELT 357 (Bom)***, which has been affirmed by the Hon'ble Supreme Court in ***2012 (278) ELT 577 (SC).*** They also placed reliance on the decision of the Hon'ble Bombay High Court in ***Royal Oil Field Private Limited v. Union of India, 2006 (194) ELT 385 (Bom),*** wherein it was held that if a show cause notice is totally vague and does not disclose any material for raising the demand, then such a show cause notice cannot be said to be validly issued and thus, is liable to be quashed.

39. They stated that it is an indispensable requirement of the SCN that the exact allegation must be put forth so as to give an opportunity to the assessee to show cause against the same mere extraction of provisions does not result in fulfillment of essentials of a SCN. They submitted that Hon'ble Supreme Court in plethora of cases have held that the SCN is the foundation for the judicial proceedings and the basic requirement for following the principles of natural justice, i.e. opportunity to defend is denied if SCN is without reasoning or without specific grounds. In this regard they placed reliance on the following cases:

i. *CCE* v. *Brindavan Beverages P. Ltd.*, 2007 (213) ELT 487 (SC)

ii. *Kaur & Singh* v. *Collector of Central Excise*, New Delhi, 1997 (94) E.L.T. 289 (S.C.)

iii. *Royal Oil Filed P. Ltd.* v. *Union of India*, 2006 (194) ELT 385 (Bom.)

iv. *Oryx Fisheries (P) Ltd. v UOI*, (2010) 13 SCC 427

40. In view of the above, they stated that the SCN is liable to be dropped. They further submitted that when a tax demand is raised by the Department on the ground of short/non-levy of tax by an assessee, the burden of proof to establish such short/non-levy of tax is on the Department and that the Department has failed to discharge its burden in view of the submissions made above and relied the following case laws.

i. *Union of India v. Garware Nylons Ltd., (1996) 10 SCC 413*

ii. *Commissioner of Customs, Mumbai v. Foto Centre Trading Co., 2008 (225) ELT 193 (Bom.)*

iii. *Commr. of C. Ex., Chandigarh v. KhalsaCharan Singh And Sons, 2010 (255) ELT 379 (P&H)*

41. The assessee submitted that burden of proof lies upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. This rule, derived from the maxim of Roman Law, *ei qui affirmat, non ei qui negat, incumbitprobatio*, is adopted partly because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The phrase 'burden of proof' is used in two distinct meanings in the law of evidence, viz., the burden of establishing a case and burden of introducing evidence. The burden of establishing a case remains throughout the trial where it was originally placed; it never shifts. The burden of producing evidence may shift constantly as the evidence is introduced by one side or the other. The burden of producing evidence is also known as 'onus of proof'. In support of this, they placed reliance on the decision of *Rajendra Jagannath Parekh and Ajay Shashikant Parekh v. Commissioner of Custom, 2004 (175) ELT 238 (Tri-Mumbai)*. In this case, the Hon'ble Tribunal referred to various judgments of Hon'ble Supreme Court.

42. The assessee submitted that the parties, on whom 'onus of proof' lies must, in order to succeed, establish a *prima facie* case. On the other hand, the burden of proof should be strictly discharged. In other words, one has to prove the point which he asserts on his own evidence and not by any weakness in the case of the defendant. Further, it is a settled legal position that the burden of proof never shifts. Therefore, in a matter where Revenue has raised demand of tax by alleging short/non-levy, the burden of proof is always on the Revenue to prove such allegations/assertions and it never shifts.

The assessee further placed reliance on the following case laws:

- **Commissioner v. Kuber Tobacco Products Ltd., 2016 (339) E.L.T. A130 (Del.)**
- **Commissioner of Central Excise, Coimbatore v. Vyas Textiles, 2015 (327) E.L.T. 681 (Tri. - Chennai)**
- **Commissioner of Customs, Amritsar v. Neeldhara Transfers, 2012 (284) E.L.T. 673 (Tri. - Del.)**

43. The assessee stated that they are, inter alia, engaged in the manufacture of RMC for various customers. They are involved in domestic clearance of goods on payment of duty of excise duty. Since, RMC has short span of life therefore, the customer places the order to them for the supply RMC with a condition that the discharge of the same shall be at the place of construction. In such cases, they require pumping to discharge the RMC at required level/height; that the customers places the order for supply of RMC along with the pumping and the Noticees were duly providing the RMC along with the pumping. They recovered the charges from the customer for the supply of RMC and applicable excise duty and sales tax is discharged on the entire value.

44. The assessee submitted that they have entered into an agreement with the customers to provide RMC along with the pumping. They raises single invoice upon its customers for sale of finished goods. Therefore, it is clear that the transaction between the parties is for sale and not for provision of service. They placed reliance on the case of ***Indian Oil Corporation Ltd v. CCE 2015 (38) STR 501 (Tri. - Mumbai)***, wherein the tribunal has held that *"whatever expenses have been incurred before transfer of the goods, form part of the sale price of goods"*. Hence, the understanding of department to make the transaction fall under the ambit of service is erroneous and devoid of legal merits. The assessee also cited the case of ***Metzeller Automotive Profiles India Pvt. Ltd. v. C.CE., Ghaziabad 2005 (3) TMI 595*** and stated that the aforementioned judgement clarifies that when the cost is included in the manufactured product and were cleared on the payment of excise duty then the demand confirming in respect of service tax is not sustainable.

45. The assessee referred to Section 65B(44) of the Finance Act, 1994 defined service and stated that w.e.f. 01.07.2012, any activity carried out by a person for another for consideration in the taxable territory (i.e. whole of India except the State of Jammu & Kashmir), including declared services, unless otherwise excluded or covered by the negative list of services will be leviable to service tax.

46. The assessee stated that para 2.3 of the Revised Guidance Paper on Taxation of Services dated 20.06.2012 issued by the CBEC clarifies the term "Activity for Consideration". They produced relevant extract of the same is as under:

> **"2.3 Activity for a consideration**
>
> The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.

....

47. The main element involved to classify an activity as service is 'activity for consideration'. In the present case, the pumping services is not provided for any consideration, the cost of pumping is part of the assessable value of RMC and the excise duty on the full amount has already been discharged by the Noticees.

48. The assessee stated that term 'consideration' is not defined in the Act or the Rules made thereunder. However, Explanation (a) to Section 67 of the Act provides that 'consideration' includes any amount that is payable for the taxable services provided, but since the above definition is an inclusive one, meaning of the term 'consideration' will have to be required to be understood from various external aids including natural meaning given in various dictionaries, meaning given to the term in rulings by various forums, etc.

49. The assessee further referred to the service as defined under Section 65B (44) of the Finance Act, 1944 and stated that the definition clarifies that any activity which constitutes a transfer of title in goods shall be outside the purview of the definition of service. They submitted that the present case is for the transfer of title in RMC i.e. goods therefore the present transaction shall be outside the purview of definition of Service. The assessee stated that the present issue is already decided in the case of GMK Concrete Mixing Pvt. Ltd. v CST, Delhi 2012 (25) STR 357 (Tri.-Del) and the test of 'dominant nature' would apply in the present case. The assessee submitted that the agreement between the parties clarifies that the intent of the parties is to provide RMC to the customers for which pumping services are necessarily to be provided by the noticees to the customers.

50. The assessee submitted that the dominant object of the contract is to provide the RMC to the customers. However, for ease of convenience and their expertise in the business line, they were asked to pumping services as well for proper discharge of RMC. To maintain the pumping as the ancillary activity to the main object. The assessee cited the judgment of **Bharat Sanchar Nigam Ltd. v UOI 2006 (2) STR 161 (S.C)**, the Hon'ble Supreme Court has discussed the 'dominant nature theory'. The question before the Apex court was whether sales tax is leviable on telephone services being rendered by BSNL. The assessee further stated that in similar case the Hon'ble Delhi tribunal in the case of **GMK Concrete Mixing Pvt. Ltd. v CST, Delhi 2012 (25) STR 357 (Tri.-Del)** wherein the assessee was engaged in preparation of Ready Mix Concrete (RMC). While carrying out such dominant objects, other ancillary and incidental activities of pouring, pumping and laying of concrete were also carried out by the assessee. The Department sought to levy service tax on such ancillary activities. It was held by the Hon'ble Tribunal that the primary and dominant object of the contract between the parties was to supply Ready Mix Concrete (RMC) but not to provide any taxable service. The said decision was affirmed by the Hon'ble Supreme Court in **2015 (38) STR J113 (SC)**. Since the **GMK Concrete case cited supra** was already affirmed by the Hon'ble Supreme Court. Therefore, it is clear that on ancillary activities such as pumping service tax shall not be applicable as there is no intention of providing any service by the Noticees.

51. The assessee submitted that in construing the contracts, the intention between the parties is the determining factor as to the nature of the contracts and this intention is of paramount importance in

interpreting contracts. The object of the construction of the terms of a contract is to discover there-from the intention of the parties to the contract. They submitted that the cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. Further, it is a well settled principle that the meaning of the document in the form of a written contract, has to be sought in the document itself. In this regard, they relied on the decision of the Hon'ble Supreme Court in the case *of State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v M/s Variety Body builders (1976) 3 SCC 500.*

52. The assessee also submitted that the task of construction of contracts should be approached not with a concentration on individual words but by looking into the Contract as a whole. Thus, a contract must be interpreted in a way which is permitted by its language and which will best effectuate the intention of the parties as emanating from the whole of the contract. Hence, regard is to be had to the clear intention of the parties than to any particular words which they might have used in the expression of their intent. They further submitted that every contract is to be construed with reference to its object and the whole of its terms and accordingly, the whole context must be considered in endeavoring to collect the intention of the parties. The different clauses of contracts clearly shows that the intention of the parties is to. Hence, the contracts should be read as a whole with specific reference to the clauses thereof which specify the exact nature of the activities performed by the Noticees. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of *State of Madras v. Gannon Dunkerley& Co. (Madras) Ltd., 1958 19 STC 353 (SC)* wherein it has been upheld that two contracts, one for the sale and the other for the work, can be separately entered into between the parties. They referred to the decision of the Hon'ble Supreme Court in the case of *State of Himachal Pradesh v. Associated Hotels of India Ltd 1972 (29) STC 474.* In this case, a view has been taken that even while entering into a contract of work or even service, parties might enter into two separate agreements, one for sale and the other for work/service so that the transaction will be divisible as two separate agreements. The assessee also place reliance on the **UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004.** The assessee submitted that in arriving at a conclusion about the nature of the agreement entered into by the Noticees, the intention of the parties as emanating from the said agreement has to be considered and this clearly establishes the existence of agreement for sale of RMC for which pumping services are also provided by the Noticees and no provision of service is intended between the parties.

53. The assessee submitted that service tax has been paid on the amount received specifically for pumping services and the same were duly recorded in the ST-3 returns. Further, they have duly discharged the excise duty and CST/VAT on the amount received for the sale of RMC. The said facts are not in dispute. Service is defined under the Finance Act, 1994 under Section 65B (44). The assessee submitted that the provision clearly states that any goods supplied which is deemed to be a sale within the meaning of Clause 29A of Article 366 of the Constitution shall not come within the purview of the definition of Services. Since supply of RMC shall be treated as supply of goods as sales within the meaning of Clause 29A of Article 366 of the Constitution. Therefore, the sale of RMC along with pumping in the present case shall not come within the purview of definition of services. Therefore, the service tax cannot be imposed.

54. The assessee also stated that levy of VAT/CST/Excise Duty on a particular transaction is different from levy of service tax. The powers of the Union and States to levy tax are mutually exclusive and there can be no overlap in the powers of taxation. In this regard they placed reliance on the case of **M/s Hoechst Pharmaceuticals Ltd. and Ors Vs. State of Bihar and Ors.** reported in **(1983) 4 SCC 45 and Godfrey Philips India Ltd and Anr. Vs. State of UP and Ors** reported in **(2005) 2 SCC (515)** wherein the Hon'ble Supreme Court has categorically laid down that a taxing statute must be construed with clarity and precision so as to maintain mutual exclusivity, and a construction of a taxing entry which may lead to overlapping must be eschewed.

55. The assessee stated that it is a settled law that the taxing power under List I and List II of the Constitution of India must be mutually exclusive and that the power conferred to tax must not overlap. Therefore, if a transaction is such which is within the legislative competence of the State Government, the same cannot also be brought within the legislative competence of the Union Government to tax on such transactions. They stated that the CST Act which provides for levy of sales tax on inter-state transaction was also amended in the year 2002 to include the transfer of right to use goods within the definition of sale. In result, the Union of India cannot levy Service Tax under Entry 97 on a transaction which is subject to sales tax under Entry 54 of State List (or Entry 92A of Union List as the case may be). Therefore, the service tax cannot be imposed on the transaction which are leviable to VAT and they have duly discharged the VAT liability. They further, stated that service tax shall not be levied on the supply on which the Excise duty/VAT/CST has already been paid as the same lead to the double taxation on the same transaction.

56. As regards the credit of service tax paid on hiring of Transit Mixers, the assessee stated that the services were used directly in relation to the manufacture and clearance of final products. Hence, they are eligible to take the credit of service tax paid on hiring of tangible goods i.e. transit Mixers. They referred to the definition of "input service" in Rule 2(l) of Cenvat Credit Rules, 2004 as amended with effect from 1.4.2012. The 'means' portion of the definition of input service, provided that any service used by the manufacturer of final products whether directly or indirectly for the manufacture of final products will qualify as 'input service'. The definition of manufacture is also an inclusive definition and the definition includes any process carried which is incidental or ancillary to the completion of manufactured product. On combined reading of the definition of Input service and manufacture it clarifies that the any service used by the manufacturer which are incidental or ancillary to the completion of manufactured products shall be treated as input service as defined under the Cenvat Credit Rules, 2004.

57. The assessee submitted that the present situation is one such situation where the finished goods i.e. RMC were manufactured at the site of construction of the customer therefore, the hiring charges paid by them for the completion of manufacturing process shall form part of the manufacturing of RMC only. Therefore, the credit of the same will be available to them. The assessee stated that the place of removal shall be the place where the goods were transferred to the customer i.e. the site of the construction and referred to the definition of 'Place of removal' under section 4 of the Central Excise Act, 1944. The said definition clarifies that the place of removal shall be the place where the excisable goods are sold after their clearance from the factory. It is pertinent to note that the RMC was sold at

the site of the construction therefore, the place of removal shall be the site of the construction. Hence, the expenses incurred by them for the hiring of transit mixers shall form part of the cost of production and hence the credit of the same shall be available to them.

58. The assessee submitted that in the present case there is clear understanding between the parties that the expenditure towards hiring charges shall form part of the price for the goods. Therefore, the hiring charges shall be part and parcel of the manufacturing cost of RMC and hence credit of the tax paid on hiring charges shall be available to them. They referred to Sections 23(1) and 23(2) of the Sale of Goods Act, section 39(1) of the Sale of Goods Act, and Section 2(2) of Sale of Goods Act. They stated that the above provisions of the Sale of Goods Act clearly lay down that the actual transfer of possession shall be treated as actual delivery of the goods to the buyer. In the present case the goods were transferred at the site of construction. The above submission is further supported by the invoices and work order between the parties, which clarifies it is the duty of the Noticees to supply the RMC at the site of the construction. Therefore, the place of removal shall always be the site of the construction. The assessee further submitted that they have cleared the finished goods without any consignment note which is the mandatory document for transportation of goods. The non-issuance of consignment note clarifies that the Noticees have not availed GTA or transportation services but availed the hiring services. Since, transit mixers are specifically designed vehicle for RMC so that concrete should not settle during the transportation. Therefore, the place of removal shall be the construction site.

59. The assessee stated that it is well settled law that documents such as Lorry Receipts or consignment notes are the documents of title to the goods meaning thereby that Lorry Receipt are documents which legally represent the goods and mentioning the buyer as the consignee in the Lorry Receipt, operates as transfer of property in the goods. The said documents are proof of possession and control of the goods mentioned therein. After the Lorry Receipt are prepared, the Noticees reserve no right to dispose/divert/re-route the goods. However, in the present case neither lorry receipt nor consignment note has been issued by the Noticees. The assessee submitted that the title of the goods are still with the Noticees till the goods were handed over to the customer at the site of construction. Therefore, the place of removal in the present case shall be the site of construction and the Noticees are eligible to take the credit of the tax paid on hiring charges.

60. The assessee submitted that the place of removal is not relevant if the services are directly used in the manufacture activity. If the services were used in or in relation to production activity or business activity of the Noticees then the place of removal is not relevant for treating any service as input service for eligibility of credit. They relied the case of ***Deepak Fertilizers & Petrochemicals Cor. Ltd. v. CCE, Belapur 2013 (288) E.L.T. 316 (Tri. - Mumbai)***wherein the tribunal has held that there is no restriction about the use of input services outside the factory. Since, the services of transit mixers are directly for the manufacturing activity. Therefore, they are eligible to take the Cenvat credit. The assessee stated that the CBEC vide Circular No. 988/12/2014-CX dated 20.10.2014 has clarified the aspect of place of removal. Subsequently, the CBEC vide circular no. 999/6/2015 – CX dated 28.02.2015 has also further clarified the issue. The assessee further stated that after the decision of Hon'ble Supreme Court in the case of CCE vs M/s Roofit Industries Ltd. 2015(319) ELT 221 (SC) and CCE vs Ispat Industries Ltd 2015(324) ELT670 (SC), the issue was raised about the

implementation of previous circular with respect to the supreme court judgement. Therefore, the CBIC further issued the clarification vide Circular No.1065/4/2018-CX dated 8th June, 2018. All the services availed before the completion of manufacturing shall be treated as input services as defined under 2 (l) of the Cenvat Credit Rules, 2004. Therefore, they have rightly availed the credit of service tax paid for the hiring charges.

61. The assessee stated that the present SCN was issued on 25.02.2020 i.e. beyond the period of one year. Therefore, the present SCN cannot be adjudicated by the department at this stage as the time period of 1 year has already been lapsed. They placed reliance on the case of ***Sunder System Pvt. Ltd. v. UOI &Ors. 2020 (1) TMI 199*** wherein the Hon'ble High Court has held that as per sub-section (4B) of Section 73 of the Finance Act, 1994, the statutory authority has to decide the show-cause notice within the time prescribed. The similar view are also taken in the case of ***National Building Construction Co. Ltd. Vs. Union of India; 2019 (20) G.S.T.L. 515 (Del.).***

62. The assessee submitted that in the present case there was no suppression of facts with intention to evade payment of duty or wrongly availed Cenvat credit. They submitted that the extended period of limitation can be invoked if and only if the department produces any evidence as to the suppression of facts with an intention to evade payment of duty. If all the details are already taken note of by the department, there cannot be any suppression of facts on their part. The assessee stated that they were under bonafide belief that they are not liable to pay service tax on pumping provided at the time of sale of goods and further duly recorded the Cenvat credit with respect to service tax paid on hiring charges. The bonafide of the Noticees are also substantiated from the submissions made above as well as various judicial pronouncements in their favour. They submitted that under such circumstances there cannot be any suppression and misstatement of facts on their part. Hence, the extended period of limitation is not invokable. The assessee relied upon the following decisions in support of their contention that in case the assessee was under a bona-fide belief, then extended period of limitation is not invokable:

(i) **CCE Vs. Vineet Electrical – 2002 (144) ELT A292 (SC)**

(ii) **CCE Vs. Raptakos Brett – 2006 (194) ELT 101 (T)**

(iii) **CCE Vs. RishabhVelveleen – 1999 (114) ELT 839 (T)**

(iv) **Pee Jay Apparels Vs. CCE – 2001 (135) ELT 842 (T)**

(v) **Cosmic Dye Chemical Vs. CCE – 1995 (75) ELT 721 (SC).**

63. The assessee stated that the entire dispute in the present case is one of pure interpretation. The issue involved is of interpretation of law of the land. It is well settled that the extended period is not invokable in the cases involving interpretation of statutory provisions. In support of their contention, they relied on the case of **Comm. Vs. Gandhar Oil Refinery (I) Ltd. – 2018 (360) ELT A177 (SC)**, the Hon'ble Apex Court held that period of limitation was not invokable when the issue involved was of interpretation of law.

64. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of **Pahwa Chemicals Vs. CCE – 2005 (189) ELT 257 (SC)** wherein the Hon'ble Supreme Court held that mere failure to declare does not amount to mis-declaration or wilful suppression. There must be some positive act on part of party to establish either wilfulmis-declaration or wilful suppression. When all the facts were within knowledge of department and all the statutory returns were being regularly filed, there is no question of wilfulmis-declaration or will-full suppression.

65. The assessee stated that their records are made subject of internal and statutory audit every year. They maintained all the requisite records necessary for compliance of internal and statutory audit. Also, they have duly maintained all records in accordance with the various laws time being in force. Under such circumstances, there cannot be any suppression or misstatements on the part of the Noticees. Moreover, there being no positive act on their part to suppress any facts from the department, therefore, they submitted that the extended period of limitation is not invokable. In support of the above submission, they relied upon decision of the Hon'ble Supreme Court in the case of **Continental Foundation Vs. CCE – 2007 (216) ELT 177 (SC)**. The assessee stated that it is well settled that where particular information is not required to be supplied under law, if not supplied does not amount to suppression. They referred to the following case laws.

(a) **Apex Electricals Vs. Union of India – 1992 (61) ELT 413 (Guj);**

(b) **Unique Resin Industries Vs. CCE – 1995 (75) ELT 861 (T);**

(c) **Gufic Pharma Vs. CCE – 1996 (85) ELT 67 (T);**
Affirmed by Supreme Court at **1997 (93) ELT A186.**

66. The assessee submitted that they have always acted in good faith and in bona fide belief that the service tax is not payable. Therefore, the proposal for imposition of penalty is not sustainable. They were always and still are under the *bona fide* belief that they have correctly not paid the service tax. It is submitted that in case of *bona fide* belief no penalty is imposable. In the case of **Hindustan Steel Ltd. v. State of Orissa, 1978 (2) ELT (J159) (SC)**, Hon'ble Supreme Court held that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona fide belief. They have provided all the details as and when desired by the Department vide the letters to the Department and they at no point of time had the intention to evade service tax or suppressed any fact wilfully from the knowledge of the Department. They submitted that penalty under Section 78 of the Act can be imposed only if the assessee suppresses any information from the Department. However, they have not suppressed any fact with an intention to evade payment of service tax. They placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Akbar BadruddinJiwani v. Collector of Customs*reported at **1990 (047) ELT 0161 SC.**

67. The assessee stated that section 80 of the Act provides that no penalty shall be imposed on the Noticees for any failure referred to in Section 76, 77 and 78 of the Act, if the Noticees prove that there was reasonable cause for the said failure. Thus, the Act statutorily provides for waiver of penalty. In the present case, there was a reasonable cause as the Noticees were under a serious financial crunch. Therefore, there was reasonable cause for failure, if any, on part of the Noticees to pay service

tax and to file service tax returns in proper format. Hence, in terms of section 80 of the Act, penalty cannot be imposed under section 76 and 78 of the Act. They relied the following judgments:

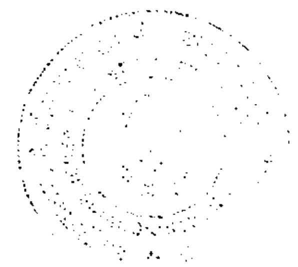
- *ETA Engineering Ltd. vs. CCE, Chennai, 2004 (174) E.L.T 19 (Tri-LB)*
- *Flyingman Air Courier Pvt. Ltd. vs. CCE 2004 (170) ELT 417 (Tri.- Del.)*
- *Star Neon Singh vs. CCE, Chandigarh, 2002 (141) ELT 770 (Tri. - Del)*
- *C.N. Nayak v. CCE- [2010] 21 STJ 236 (Tri-Bangalore)*

68. They stated that the present SCN has proposed penalty under Rule 15 (2) of the Cenvat credit rules, 2004 read with Section 11AC of the Central Excise Act. Penalty under Section 11AC can be imposed only when there is suppression of fact. In other words, only when ingredients of proviso to Section 11A(1)/Section 11A(4) of the Central Excise Act are applicable, penalty under Section 11AC of the Central Excise Act, 1944 can be imposed. In view of the submissions made in the foregoing paragraphs, they submitted that the finding of suppression with intent to evade payment of duty or avail the wrongful credit is not sustainable. The assessee submitted that in the preceding paras they were under bonafide belief that they are eligible to take the Cenvat credit of service tax paid on hiring charges. They relied the case of ***Hindustan Steel Ltd. v. State of Orissa – 1969 (2) SCC 627*** of the Hon'ble Apex Court.

69. The assessee has submitted that it is a settled principle of law that in cases where the demand is not sustainable, interest cannot be levied. In view of the aforesaid submissions, it is clear that the demand itself is not sustainable and hence, the question of recovering interest does not arise. They placed reliance in this regard on the decision of the Hon'ble Supreme Court of India in the case of ***Pratibha Processors vs. Union of India [1996 (88) ELT 12 (SC)] and*** in the case of ***Commissioner of Customs, Chennai vs Jayathi Krishna & Co. [2000 (119) E.L.T. 4 (S.C.)].*** The assessee stated that since the demand itself is unsustainable, there is no question of imposition of interest in the present case. Hence, interest under Section 75 of the Finance Act, 1994 and under Section 11AA of the Central Excise Act, 1944 is also not payable. Finally,they requested to drop the proceedings and also desired for a personal hearing.

PERSONAL HEARING.

Shri Sanket Gupta, Advocate, duly authorised by the assessee appeared for the virtual mode of hearing on 07.04.2021. He reiterated the contents of the written reply filed by them on 06.04.2021. He stated that there is neither short payment of Service Tax nor any wrong availment of Cenvat Credit in the present case. He requested to take into consideration of circulars and case laws cited in their written reply.



Discussion and Findings:

70. I have carefully gone through the records of the case, written submission made by the assessee and also submissions made during the course of personal hearing. The issues to be decided in the present case are-

i) Whether pumping services on which the assessee received consideration from their customers are liable to Service Tax involving Service tax of Rs.1074974/-

ii) Whether the demand raised for wrong availment of Cenvat Credit to the tune of Rs.45,70,215/- on service tax paid on hiring charges of transit mixers are recoverable from the assessee or otherwise.

71. The assessee has questioned the authority for issuance of the present show cause notice. Therefore, it is appropriate to discuss the fundamental argument raised by the assessee in their written submissions with regard to maintainability of the show cause notice in the wake of repeal of Central Excise Act, 1944/Finance Act, 1994 with effect from 01-07-2017, quoting the provisions of Sec 174(2)(a) of the CGST Act, 2017. The assessee has also quoted decisions of various forums in support of their arguments.

72. In order to examine the issue in detail, let me quote the provisions of sub-sec (2) and (3) of Sec 174 of the CGST Act, 2017 here:

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

a) revive anything not in force or existing at the time of such amendment or repeal; or

b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:
Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

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

f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

73. It is also important to look into the provisions of Sec 6 of the General Clauses Act, 1897, referred in Sec 174(3) of the CGST Act, 2017. Sec 6 of the General Clauses Act, 1897 states that,

6. Effect of repeal.—Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

a) revive anything not in force or existing at the time at which the repeal takes effect; or

b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

74. Here, I find that clause (d) of Sec 174 of the CGST Act, 2017 saves any duty, tax, surcharge, fine, penalty, interest as are due or may become due, or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts. There is nothing to suggest that the "duty, tax, surcharge" etc. should relate to proceedings initiated under, inter alia, Chapter V of the Finance Act, 1994 before the coming into force of the CGST Act, and not to proceedings initiated under the enactments after the coming into force of the CGST Act. Clause (e) expressly empowers the Competent authorities to initiate and institute even fresh proceedings under the omitted chapter V of the Finance Act, 1994 and the rules framed thereunder. Clearly, the intention of the Parliament was to save not only ongoing investigation, inquiry, verification etc. but also to specifically enable the initiation of fresh verification such as audit in respect of acts and omissions relating to the erstwhile service tax regime.

75. Further, as per clause (b) of Section 6 of the General Clauses Act, 1897 also, the "effect of repeal" shall not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder.

76. I also find that the assessee has relied upon what is mentioned at clause (a) sub-section (2) given above. They have also relied on the judgment of the Apex Court in the case of 1969(2) (SCC) 412-Rayala Corporation Vs. Directorate of Enforcement.

- The Constitution Bench judgment of Rayala Corporation Vs. Director of Enforcement, New Delhi, AIR (1970) SC 494:1970 Cri LJ 588, wherein it was said that "Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule".
- Since there was no saving provision in favour of pending proceedings, the Court held that the realization of refund can be taken under the new provision in accordance with the terms thereof.
- Section 6 of General Clauses Act was held to be inapplicable as it was a case of omission and not repeal.

.77. Here, I would like to refer to a recent judgment passed on 03-11-2020 by the Hon'ble Delhi High Court in the case of Vianaar Homes Private Limited Vs Assistant Commissioner CGST in Appeal Number : W.P. (C) 2245/2020, wherein a similar view has been taken. The Court in its judgment stated in para-34 that:

"*The obligation to pay service tax arose at the time of rendering taxable service, which fell during the disputed period, at which time Chapter V was very much in force. The service tax is levied on providing of taxable service and is paid by the assessee on self-assessment basis. Therefore, the liability and obligation to pay tax accrued in terms of the provisions of the Finance Act whenever a taxable event occurred. If service tax has not been paid or short paid, the Service Tax Department would acquire the right to recover the said tax. This is done inter alia on the basis of the best judgment assessment under section 72, and by initiating recovery proceedings under section 73 of the Finance Act, 1994. Therefore, 'such duty' cannot be construed to mean only that which forms the subject matter of proceedings under section 72 and 73 of the Finance Act. The necessary corollary is that the investigation, inquiry, verification (including scrutiny and audit) that falls within the ambit of section 174(2) of the Act would include proceedings that were initiated prior to action under section 72 and 73 of the Finance Act, 1994. We also find merit in the submission of Mr. Harpreet Singh that a contrary interpretation would mean that all cases of duty evasion, where the adjudicatory process has not commenced, have to be ignored. That is clearly not the intent of the saving clause.*"

78. Therefore, I find that there is no merit in the arguments raised by the assessee in their written submission questioning the maintainability of the show cause notice in the wake of repeal of Central Excise Act, 1944 with effect from 01-07-2017.

79. The assessee in their reply dated 06.04.2021 to the show cause notice stated that the show cause notice is not proper and issued without examining the facts of the case and the show cause notice is not sustainable in law. They have also relied following case laws-

i) CCE v. Brindavan Beverages 2007 (213) E.L.T. 487 (S.C.)

ii) Royal Oil Field Pvt. Ltd. V. UOI 2006 (194) E.L.T. 385 (Bom.)

iii) B. Lakshmichand Vs. Government of India 1983 (12) ELT 322.

iv) Collector of Central excise Vs. H.M.M Ltd. 1995 (76) ELT 497 (SC)

v) Amrit Foods Vs. CCE 2005 (190) ELT 433 (SC)

vi) Madhur Hosiery INDS. Vs. CCE 2006 (200) ELT 147

80. On going through the said case laws, I find that the issues involved in those cases vary on case to case basis such as SSI exemption, related to import, issues related to Customs Act, imposition of penalty under Central Excise Act etc. Therefore, the said case laws are distinguishable with the present case.

81. Regarding the issue of non-payment of Service Tax on pumping charges to the tune of Rs.10,74,974, I find that during verification of records by Audit, it was noticed that in addition to supply of Ready Mix Concrete, the assessee had also provided services of pumping of such Ready Mix Concrete to certain customers. They had charged for such pumping services in the invoices issued to their customers. Wherever the customer had not availed such pumping services, the assessee had reduced such charges from the total supply price of the Ready Mix Concrete. In case the supply of Ready Mix Concrete is without pumping, a deduction @150/- per cubic meter has been allowed to the customer as per the Purchase Orders. Illustration has been given in para 3.2 and para 3.3 of the show cause notice.

82. I find that on the basis of verification of documents, it was revealed that the assessee had provided ready mix concrete along with pumping services to customers who require it and had also recovered consideration from their customers but had failed to discharge Service Tax on such pumping services and during the period from February 2015 to June 2017 the assessee has not paid service tax to the tune of Rs.10,74,974/- on such pumping services provided by the assessee to their customers for a consideration. Further, I find that such service provided by the assessee comes under the purview of *'Taxable Service'* is defined under Section 65B(51) as any service on which service tax is leviable under Section 66B. Also, from the documentary evidences, it was noticed that an activity of pumping has been carried out by the assessee for their customers for consideration and therefore such an activity carried out by the assessee for their customers, falls within the meaning of *'service'* as defined under Section 65B(44) of the Act. Such pumping services do not find mention in the list of services numbered as (a) to (q) under Section 66D of the Finance Act, 1994 and hence, do not fall under the Negative List and are therefore, taxable services. Pumping services are also not exempted under Mega Exemption Notification No 25/2012-ST dated 20.6.2012, as amended or any other Notification issued under the Act. Therefore, it appeared that the services provided by the assessee are taxable as defined under Section 65B(51) of the Act and are liable for payment of service tax.

83. The assessee stated that the Department has arrived at the Service Tax liability on the value of Rs.150/- per cubic meter i.e. deduction amount provided by them which is wrong. They argued that they are not liable to pay any Service Tax such. They also stated that they have not received any consideration and therefore, no Service Tax is payable. In their defence reply, they submitted a lengthy reply quoting various case laws stating that they are not liable to pay the Service Tax on

pumping charges. Instead of giving clear cut reply regarding reason for non-payment, they chose the opportunity to criticize the show cause notice hiding the facts of non-payment.. They cited various case laws to show that the show cause notice is not proper. I find that the said case laws are not relevant to the present case and distinguishable as the facts of the cases are varied. Therefore, I find that their argument is not tenable. I find that the Service Tax amount has been arrived at by the Audit based on the documents provided by the assessee and the Service Tax amounting to Rs.10,74,974/- on pumping services provided by the assessee to their various customers on which consideration has been received by them is recoverable from the assessee in terms of Section 73(1) of the Finance Act, 1994 along with interest and penalty. Further, the Service Tax has been demanded in cases where they received consideration. Therefore, their plea that they are not liable to pay Service Tax on Pumping Service is not maintainable

84. In view of the above, it is clear that the assessee had contravened the provisions of:

- Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ('Rules') as they have failed to pay service tax at the rate specified in Section 66B in such manner and within such period as may be prescribed;
- Section 70 of the Act read with Rule 7 of the Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed.

85. I also find that the assessee had failed to disclose to the Department that they had provided services of pumping of Ready Mix Concrete to their customers on which consideration was received by them. They also failed to reflect the consideration as receipt in the ST3 returns filed by them before the department, until the audit objection was raised. Therefore, they have suppressed the material facts from the department, with an intent to evade the payment of Service Tax. Accordingly, unpaid Service Tax of Rs.10,74,974/- is to be recovered from the assessee, under the proviso to Section 73(1) of the Finance Act, 1994 by invoking the extended period of time of five years as there is a case of suppression of facts with an intent to evade the payment of service tax. As the assessee had not paid the Service Tax, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act. By the act of contravention of the various provisions of the Act and the rules made thereunder and by not disclosing the amount of consideration received against services provided, the assessee had rendered themselves liable to penalty under Section 78(1) of the Act.

86. The assessee has submitted a lengthy submission in their written reply wherein they submitted a host of case laws. Some of them are not relevant to the present cases. Therefore, the said case laws are not discussed separately.

87. Regarding wrong availment of Cenvat Credit on Service Tax paid on hiring charges of transit mixtures to the tune of Rs. 45,70,215/-, the show cause notice has alleged that the assessee had hired Transit Mixers on rent and had availed Cenvat Credit of Service Tax on hiring charges of transit mixtures which is contrary to the definition of 'input service' as defined under Rule 2(l) of the Cenvat Credit Rules, 2004. They are also not eligible for the said Cenvat in view of the definition of 'place of removal' as per Section 4(3) (c) of the Central Excise Act, 1944.

88. As per the show cause notice, the assessee had hired Transit Mixers for delivery of Ready Mix Concrete to the sites of their customers. The assessee had delivered the goods to the carrier (Transit Mixers) for the purpose of transmission to the buyer, and therefore, the property in the goods would thereupon pass to the buyer. Any delivery of the goods to a carrier, whether named by the buyer or not for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer. Therefore, in the present case, the assessee had loaded the ready mix concrete in the transit mixers for transportation to their buyers and hence, '*place of removal*' of goods is their factory premises. Further, the services of Transit Mixers have been used after the goods have been cleared from their factory gate and therefore it appeared that such services have been used for transportation of final products beyond the place of removal and after sale has taken place. Since such services have been received after the clearance of goods from their manufacturing premises, it appeared that the Credit of Service Tax paid on hiring charges of transit mixers would not be admissible to them.

89. The '*Input service*' is defined under Rule 2(l) of the Cenvat Credit Rules, 2004 (*hereinafter referred to as the 'Cenvat Rules'*) as under:

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

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

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

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

'*Place of removal*' is defined under Section 4(3)(c) of the Central Excise Act, 1944 (*hereinafter referred to as the 'Act'*) as under:

"(c) "place of removal" means -

(i) a factory or any other place or premises of production or manufacture of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;

from where such goods are removed.

90. I find that the assesse had availed the Cenvat Credit of Service Tax paid on hiring of transit mixers. The services of transit mixers have been used after the sale of goods from the factory gate

which is the *place of removal.* As per the definition of *'input service'* under Rule 2(l) of the Cenvat Rules read with the definition of *'place of removal'* under Rule 4(3)(c) of the Act, it is seen that Cenvat Credit is only available on services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal. Therefore, the Cenvat Credit of tax paid on hiring charges of Transit Mixers, whose services were utilized beyond the place of removal would not be admissible to the assessee, as such services are not covered under *'input service'* as defined under Rule 2(l) of the Cenvat Rules. Therefore, the Cenvat Credit of Rs.45,70,215/- of tax paid on hiring of transit mixers used after the sale of goods and beyond the place of removal is inadmissible to the assese.

91. The inadmissible Cenvat Credit of Rs.45,70,215/-, wrongly availed and utilized by the assessee, and required to be reversed by them. The assessee stated that the customers place order to supply RMC with a condition to discharge at the place of construction, i..e., required floor of building. The FOR price quoted includes discharge of RMC at construction site. They hire such Transit Mixer Vehicles on rental basis at the rate with combination of minimum guaranteed rent and usage in kms of movement and fuel. They have taken Credit of tangible goods (Transit Mixers) hired. They have not engaged any trucks or GTA to transport the goods and no consignment notes have been issued. The Transit Mixers are specially designed for transportation of Ready Mix Concrete so that the concrete should not settle during transportation. Their contention is that they have availed credit on hiring of tangible goods and not on transportation services. The contention of the assessee cannot be accepted as they have availed Credit on input services utilized beyond the place of removal. As per the definition of input services provided under Rules 2(l) of Cenvat Rules, only input services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, is admissible. Since the Credit of input services have been utilized beyond the factory premises of the assessee, i.e. place of removal, such credit of tax paid on hiring charges of Transit Mixes used for transportation of final products, cannot be allowed to the assessee.

92. The assessee in their defence reply stated that on hiring of Transit Mixers, the services were used directly in relation to the manufacture and clearance of final products. Hence, they are eligible to take the credit of service tax paid on hiring of tangible goods i.e. transit Mixers which is covered under the definition of "input service" in Rule 2(l) of Cenvat Credit Rules, 2004 as amended with effect from 1.4.2012.

93. The assessee submitted that they hired transit mixers on hire not only to transport of RMC but also to complete the incomplete process of RMC by continuous mixing process of RMC to maintain the goods and extend the life span till RMC reaches the place of removal. The transit mixer was special purpose vehicle which is specially designed for manufacturing of RMC during the transportation as well and that the present situation is one such situation where the finished goods i.e. RMC were manufactured at the site of construction of the customer therefore, the hiring charges paid by them for the completion of manufacturing process shall form part of the manufacturing of RMC only. Therefore, the credit of the same will be available to them.

94. The assessee submitted that in the present case there is clear understanding between the parties that the expenditure towards hiring charges shall form part of the price for the goods. Therefore, the hiring charges shall be part and parcel of the manufacturing cost of RMC and hence credit of the tax paid on hiring charges shall be available to them. They referred to Sections 23(1) and 23(2) of the Sale of Goods Act, section 39(1) of the Sale of Goods Act, and Section 2(2) of Sale of Goods Act. The non-issuance of consignment note clarifies that the Noticees have not availed GTA or transportation services but availed the hiring services. Since, transit mixers are specifically designed vehicle for RMC so that concrete should not settle during the transportation. Therefore, the place of removal shall be the construction site.

95. The assessee stated that it is well settled law that documents such as Lorry Receipts or consignment notes are the documents of title to the goods meaning thereby that Lorry Receipt are documents which legally represent the goods and mentioning the buyer as the consignee in the Lorry Receipt, operates as transfer of property in the goods. The said documents are proof of possession and control of the goods mentioned therein. After the Lorry Receipt are prepared, the Noticees reserve no right to dispose/divert/re-route the goods. However, in the present case neither lorry receipt nor consignment note has been issued by the Noticees. The assessee submitted that the title of the goods are still with the Noticees till the goods were handed over to the customer at the site of construction. Therefore, the place of removal in the present case shall be the site of construction and the Noticees are eligible to take the credit of the tax paid on hiring charges.

96. The assessee relied the case of ***Deepak Fertilizers & Petrochemicals Cor. Ltd. v. CCE, Belapur 2013 (288) E.L.T. 316 (Tri. - Mumbai)***wherein the tribunal has held that there is no restriction about the use of input services outside the factory. The assessee also relied CBEC vide Circular No. 988/12/2014-CX dated 20.10.2014 has clarified the aspect of place of removal. Subsequently, the CBEC vide circular no. 999/6/2015 – CX dated 28.02.2015 has also further clarified the issue. The assessee further stated that after the decision of Hon'ble Supreme Court in the case of CCE vs M/s Roofit Industries Ltd. 2015(319) ELT 221 (SC) and CCE vs Ispat Industries Ltd 2015(324) ELT670 (SC), the issue was raised about the implementation of previous circular with respect to the supreme court judgement. Therefore, the CBIC further issued the clarification vide Circular No.1065/4/2018-CX dated 8thJune, 2018.

97. The assessee stated that in the present case the RMC was supplied by them at the site of the construction and the manufacturing process was completed at that point only. Therefore, all the services availed before the completion of manufacturing shall be treated as input services as defined under 2 (l) of the Cenvat Credit Rules, 2004. Therefore, they have rightly availed the credit of service tax paid for the hiring charges.

98. I find that in the present case, the assessee and the Department can not travel beyond the scope of definition of input Services as provided under Rule 2(l) of the Cenvat Credit Rules, 2004 and the definition of 'place of removal' as defined under Section 4(3)(c) of the Central Excise Act, 1944. The assessee has not denied the fact that Transit Mixers have been used after the goods have been cleared from their factory gate. Therefore, it is beyond doubt that the services have been used

for transportation of final products beyond the place of removal and after sale has taken place. Therefore, I am of the view that the service of used for transportation of ready mix concrete in the transit mixers for transportation to their buyers place have been made after the clearance of goods from their manufacturing premises. Therefore, they are not eligible for the Cenvat Credit of Service Tax paid on hiring charges of transit mixers as it is not covered under the definition of input service. Therefore I am not in agreement with the assessee's argument that they are eligible for the Cenvat Credit of the Service Tax paid on hiring charges of transit mixers. Therefore, the wrongly availed Cenvat Credit to the tune of Rs. 45,70,215/- is required to be recovered from the assessee in terms of Section 73(1) of the Finance Act, 1994 along with applicable interest and penalty.

99. The assessee also cited the case of ***Sunder System Pvt. Ltd. v. UOI &Ors. 2020 (1) TMI 199*** wherein the Hon'ble High Court has held that as per sub-section (4B) of Section 73 of the Finance Act, 1994, the statutory authority has to decide the show-cause notice within the time prescribed. The similar view are also taken in the case of ***National Building Construction Co. Ltd. Vs. Union of India; 2019 (20) G.S.T.L. 515 (Del.).***

100. I find that in the case of Sunder System Pvt.Ltd Vs UOI & Others 2020 (33) GSTL 621(Del), in para 12, the Hon'ble High Court of Delhi has held that –

"12. In the present case, from the respondents' list of dates, it is apparent that it was certainly possible for the adjudicating authority to adjudicate upon the show cause notice issued to the petitioner within a period of one year at least from the conclusion of arguments on 3rd February, 2015, if not earlier."

101. Further, in the said case, the personal hearing was held in the year 2015 and file was reassigned in 2017 to another adjudicating authority due to change of adjudicating authority. Since the facts of the present case is different, the case relied by the assessee can not be compared. I also find that in the present case, personal hearing was fixed on 05.01.2021 but the assessee sought adjournment vide their letter dated 04.01.2021 on the pretext of Covid 19 even though virtual hearing was offered. Their request was considered by the Department and further hearings were fixed on 03.02.2021 and 07.04.2021. Therefore, the assessee themselves have delayed the adjudication proceedings to show that the time limit has crossed beyond one year. In view of the above, I advise the assessee from refraining making such false allegations.

102. The assessee submitted that in the present case there was no suppression of facts with intention to evade payment of duty or wrongly availed Cenvat credit. They submitted that the extended period of limitation can be invoked if and only if the department produces any evidence as to the suppression of facts with an intention to evade payment of duty. If all the details are already taken note of by the department, there cannot be any suppression of facts on their part.

103. The assessee stated that they were under bonafide belief that they are not liable to pay service tax on pumping provided at the time of sale of goods and further duly recorded the Cenvat credit with respect to service tax paid on hiring charges. The bonafide of the Noticees are also substantiated from the submissions made above as well as various judicial pronouncements in their favour. They

submitted that under such circumstances there cannot be any suppression and misstatement of facts on their part. Hence, the extended period of limitation is not invokable.

104. The assessee relied upon the following decisions in support of their contention that in case the assessee was under a bona-fide belief, then extended period of limitation is not invokable:

(i) **CCE Vs. Vineet Electrical – 2002 (144) ELT A292 (SC)**

(ii) **CCE Vs. Raptakos Brett – 2006 (194) ELT 101 (T)**

(iii) **CCE Vs. RishabhVelveleen – 1999 (114) ELT 839 (T)**

(iv) **Pee Jay Apparels Vs. CCE – 2001 (135) ELT 842 (T)**

(v) **Cosmic Dye Chemical Vs. CCE – 1995 (75) ELT 721 (SC).**

105. The assessee stated that the entire dispute in the present case is one of pure interpretation. The issue involved is of interpretation of law of the land. It is well settled that the extended period is not invokable in the cases involving interpretation of statutory provisions. In support of their contention, they relied on the case of **Comm. Vs. Gandhar Oil Refinery (I) Ltd. – 2018 (360) ELT A177 (SC),** the Hon'ble Apex Court held that period of limitation was not invokable when the issue involved was of interpretation of law.

106. I find that the assessee was fully aware that the goods have been cleared from the place of removal, i.e., their factory gate, and that the credit of tax paid on services availed beyond the place of removal was inadmissible as per the definition of 'input services' provided in Rule 2(l) of the Cenvat Rules read with the definition of *'place of removal'* under Section 4(3)(c) of the Act. Hence it clear that the assessee had willfully availed Cenvat Credit on hiring services which they knew were ineligible to them, as envisaged in the definition of *'input service'* under Rule 2(l) of the Cenvat Rules. Therefore, by the act of wrong availment of Cenvat Credit on such services, in contravention of the provisions of Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(l) of the Cenvat Rules and by non-disclosure of availment of Cenvat Credit in the ST-3 returns filed by them, the assessee had suppressed the material facts with an intent to avail ineligible Cenvat Credit. Therefore, the wrongly availed and utilized Cenvat Credit of tax paid on hiring services is to be demanded and recovered from the assessee under the provisions of Section 11A(4) of the Central Excise Act, 1944/proviso to Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Rules, 2004 by invoking the extended period. The assesse is liable to pay interest under the provisions of Section 11AA of the Central Excise Act, 1944/Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Rules, 2004. Further the assessee had suppressed the material facts and have wrongly availed the Cenvat Credit on the hiring charges services and therefore, the assessee would also be liable for penal action under the provisions of Section 11AC(1)(c) of the Central Excise Act, 1944/Section 78(1) of the Finance Act, 1994 read with the provisions of Rule 15(2)/15(3) of the Cenvat Rules.

107. From the discussion above, it is evident that the assessee had contravened the provisions of Rule 3(1) of the Cenvat Rules read with the provisions of Rule 2(l) of the Cenvat Rules as they have

wrongly availed and utilized the Cenvat Credit amounting to Rs 45,70,215/- on tax paid on hiring charges, which were ineligible.

108. In their defence reply the assessee has relied large number of case laws in their defence with reference to payment of Service Tax, availment of Cenvat Credit, invocation of extended period, payment of interest and penalty. I find that the facts and circumstances are different in the present case. Therefore, the said case laws are not discussed individually.

109. In the present regime of liberalization, self-assessment and filing of returns online, no documents are submitted by the assessee to the department and therefore, the department would only come to know about such non-payment of Service Tax during audit or preventive/other checks. The deliberate non-payment of tax and wrong availment of Cenvat Credit would have remained undetected if audit had not been carried out. From the evidences, it is clear that the assessee had knowingly evaded payment of Service Tax/wrongly availed and utilized inadmissible Cenvat Credit with intent to evade the payment of Service Tax/wrongly avail inadmissible Cenvat Credit. All the above mentioned acts of contravention of the provisions of the Central Excise Act, 1944, Finance Act, 1994 and Cenvat Credit Rules, 2004 on the part of the assessee have been committed with intent to evade the payment of Service Tax and they have, therefore, rendered themselves liable to penalty under the provisions of Section 11AC of the Central Excise Act, 1944/Section 78(1) of the Finance Act, 1994.

110. In view of my discussion above, I pass the following orders-

ORDER

i. I confirm the Service tax amounting to Rs 10,74,974/- (Rupees Ten lakhs seventy four thousand nine hundred and seventy four only) under Section 73(1) of the Finance Act, 1994 and order M/s.Sanghi Industries Ltd (RMC Plant), Ahmedabad to pay the said Service Tax amount immediately.

ii. I impose a penalty of Rs.10,74,974/- (Rupees Ten Lakhs Seventy Four thousand nine hundred and seventy four only) on M/s.Sanghi Industries Ltd (RMC Plant), Ahmedabad under Section 78(1) of the Finance Act, 1994 on the Service Tax confirmed at (i) above;

iii. I order that interest at the appropriate rate be charged and recovered from M/s.Sanghi Industries Ltd (RMC Plant), Ahmedabad, under Section 75 of the Finance Act, 1994 on the demand at (i) above;

iv. I disallow the wrongly availed and utilised Cenvat Credit amounting to Rs 45,70,215/- (Rupees Forty five lakhs seventy thousand two hundred and fifteen only) by the M/s.Sanghi Industries Ltd (RMC Plant), Ahmedabad, and order for recovery of the same under Section 11A(4) of the Central Excise Act,1944/proviso to Section 73(1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules, 2004;

v. I impose a penalty of Rs.45,70,215/- (Rupees forty five lakhs seventy thousand two hundred and fifteen only) on M/s.Sanghi Industries Ltd (RMC Plant), Ahmedabad under Section 11AC(1)(c) of the Central Excise Act, 1944/Section 78(1) of the Finance Act, 1994 read with the provisions of Rule 15(2)/15(3) of the Cenvat Credit Rules, 2004 on the demand at (iv) above;

vi. I order that interest be charged and recovered from M/s. Sanghi Industries Ltd (RMC Plant), Ahmedabad under Section 11AA of the Central Excise Act, 1944/Section 75 of the Finance Act, 1994 on the amount confirmed at (iv) above.

vii. I further order that in the event the entire amount confirmed as above is paid within thirty days from the receipt of this Order along with applicable interest, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the penalty imposed at Sr. No. (ii & v) above, subject to the condition that such reduced penalty is also paid within the said period of 30 days (thirty days) in terms of clause (ii) of Section 78(1) of the Finance Act, 1994.

111. Show Cause Notice No.VI/1(b)/Tech-60/SCN/Sanghi Industries/2019-20 dated 25.02.2020 issued to M/s.Sanghi Industries Ltd (RMC Plant), Plot No.215, Naroda Industrial Estate, GIDC, Naroda, Ahmedabad is disposed-of in the above manner.

(M.L. Meena)
Additional Commissioner

Date: 29.04.2021

F. No.STC/15-13/OA/2020
By Registered Post AD
To,

1) M/s.Sanghi Industries Ltd (RMC Plant)
Corporate Office
10th Floor, Kataria Arcade
Nr. Adani Vidyamandir, Off: SG Highway
Makarba, Ahmedabad 380 051.

2) M/s. Sanghi Industries Limited (RMC Plant)
Plot No 215, Naroda Industrial Estate
GIDC, Naroda
Ahmedabad 382 330

Copy to:

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. Deputy/Assistant, Central GST and Central Excise Naroda Division-I, Ahmedabad North
3. The Superintendent of Central GST & Central Excise Range I, Division Naroda-I, Ahmedabad North.
4. Guard File