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

F.No:- V.30/15-39/OA/2018

आदेश की तारीख़/Date of Order : - 31.05.2021

जारी करने की तारीख़/Date of Issue :- 01.06.2021

DIN No.:20210664WT0000332872

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

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 05/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 इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

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

उक्त अपील की प्रति।

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

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

Copy of accompanied Appeal. and

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

विषय:- कारण बताओ सूचना/ Show Cause Notice No.V.30/15-39/OA/2018 dated 25.03.2019 issued to M/s. Aculife Healthcare Pvt. Ltd., at Survey No.358 to 369, 383 to 399, 401 and 402, Village-Sachana, Tal. Viramgam, District Ahmedabad

Brief facts of the Case -

M/s. Nirma Ltd., Survey No.358 to 369, 383 to 399, 401 and 402, Village Sachana, Tal.Viramgam, District Ahmedabad, were registered under Central Excise and holding registration numbered ECC No.AAACN5350KXM008 for manufacture of excisable goods and engaged in the manufacture of Pharmaceutical products/PP Medicines falling under Chapter 30 of Central Excise Tariff Act, 1985. They were also registered under Service Tax and possessed registration No.AAACN5350KST008.

2. In pursuance of Order dated 20-4-2015 passed by Hon'ble High Court of Gujarat, the Healthcare Division of M/s. Nirma Ltd. was demerged from M/s. Nirma Ltd. and started functioning in the name and style of M/s. Aculife Healthcare Pvt. Ltd., at Survey No.358 to 369, 383 to 399, 401 and 402, Village-Sachana, Tal. Viramgam, District Ahmedabad with effect from 10-6-2014. Consequent to the demerger of M/s.Nirma Ltd, (Healthcare Division) from M/s.Nirma Ltd., the rechristened company M/s. Aculife Healthcare Pvt. Ltd., all liabilities of duties, obligations and undertakings including liabilities of excise duty, service tax, customs duty or liability of any nature whatsoever prior to the de-merger and thereafter were transferred and vested with M/s. Aculife Healthcare Pvt. Ltd., M/s. Aculife Healthcare Pvt. Ltd. had also obtained Central Excise Registration No.AAMCA8542QEM001 and Service Tax Registration No.AAMCA8542QSD001

3. The EA 2000 audit of records of M/s. Nirma Ltd (Healthcare Division) and M/s. Aculife Healthcare Pvt. Ltd. (collectively referred to as `the assessee') for the period April 2014 to March 2016 was conducted by the officers of erstwhile Audit Commissionerate II, Ahmedabad and as per Final Audit Report No.1084/2016-2017 dated 14-6-2017, the following SCN was issued by the Commissioner of CGST, Audit, Ahmedabad:-

Sr. No	SCN File No./Date	Issuing Authority	Adjudication to be done by
1.	F. No. VI/1(d)/CTA/05/Cir-VI/Nirma-SCN/17-18/2311 dated 29.09.2017	The Commissioner of CGST, Audit, Ahmedabad	The Commissioner of CGST, Ahmedabad North

4. Further, in regard to subsequent period i.e. for the Financial Year 2016-17 and 2017-18, information was called for from the said assessee, who vide their letter dated 09.02.2018, 08.06.2018 and 03.07.2018 submitted the required information. On scrutiny of the information submitted by the assessee, it appeared as under:-

5. **Revenue Para 2: Wrong availment and utilization of Cenvat credit on inputs exclusively used for the manufacture of exempted goods.**

5.1 In regard to Revenue Para 2 of the above said Audit Report, the assessee vide their letter dated 09.02.2018 submitted the details of credit taken on inputs exclusively used in exempted products for the financial year 2016-17 shown as Annexure-"C-1", "C-2" and "C-3" and their details are as under:-

SN	Annexure	Amount	Credit Pertaining to	Credit reversal details
1	C-1	29,62,620/-	Exempted goods which are to be domestically cleared	Reversed as ineligible credit
2.	C-2	59,60,955/-	Exempted goods which are to be exported as well as domestically cleared	Considered as common credit in formula reversal
3.	C-3	4,51,646/-	Exempted goods which are to be exported	Considered eligible

Further, they also submitted that in the financial year 2017-18 they had reversed 6% of exempted goods cleared for domestic clearance.

5.2 From the above details, it appeared that the assessee had reversed the input credits of Rs. 29,62,620/- considering as ineligible credit, however they have not reversed the input credit of Rs. 59,60,955/- used exclusively in exempted goods that are cleared under export as well as domestic clearance, considering as common credit and input credit of Rs. 4,51,646/- used exclusively in exempted goods that are cleared under export, considering eligible credit. In short the assessee had not reversed the input credit of **Rs.64,12,601/- (Rs. 59,60,955/-+ Rs. 4,51,646/-)** exclusively used in exempted goods.

5.3 It also appeared that the assessee is engaged in manufacture of both non-exempted and exempted goods and in the financial year 2016-17 has exercised the option (ii) under Rule 6(3) for payment/reversal of proportionate amount of CENVAT credit on input/input services involved in non-exempted and exempted goods under Rule 6 (3A) of Cenvat Credit Rules, 2004.

5.4 Rule 6 (1) of CENVAT Credit Rules, 2004 is reproduced below :

> *"The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for the provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of the output service, in terms of the provisions of sub rule (2) or sub rule (3), as the case may be.*

5.5 From the above provisions of CENVAT Credit Rules, it is clear that provisions of sub rule (3) of Rule (6) of CENVAT Credit Rules, 2004 shall not applicable on such quantity of input as is used in or in relation to the manufacture of exempted goods.

5.6 From the forgoing paras, it appeared that the input credit of Rs. **Rs.64,12,601/- (Rs. 59,60,955/-+ Rs. 4,51,646/-)** exclusively used in manufacture of exempted goods is not admissible to the said assessee in terms of the provisions of Rule 6(1) of CENVAT Credit Rules, 2004, however the assessee has taken and utilized such credit. Therefore, it appeared that the assessee has wrongly taken and utilzied CENVAT Credit of **Rs.64,12,601/- (Rs. Sixty Four Lakhs Twelve Thousand and Six Hundred and one Only) for the period from April 2016 to**

March 2017 in contravention of the provisions of Rule 6(1) of CENVAT Credit Rules, 2004 and such CENVAT Credit is required to be demanded and recovered in terms of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(1) of CEA 1944 along with interest under Section 11AA of CEA 1944.

5.7 It appeared that the facts, circumstances and contraventions of the provisions of the CENVAT Credit Rules, 2004 read with Central Excise Act, 1944 and the rules made there under, as well as the grounds relied upon in the present notice are similar to those discussed in the earlier Show Cause Notice mentioned at para 3 above and therefore, this notice is being issued in terms of Section 11(7A) of the Central Excise Act, 1944 as amended.

5.8 Further, the assessee had contravened the provision of CENVAT Credit Rules, 2004 read with Central Excise Act, 1944 in determining the correct amount of credit to be reversed taken for manufacturing of exclusively exempted goods rendered themselves liable for penalty under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

6. Revenue Para 3) Non-payment of amount equal to 6% on value of traded goods under Rule 6 (2) of CCR 2004 on account of availing of Cenvat credit on common input services.

6.1 In regard to Revenue Para 3 of the above said Audit Report, the assessee vide their letter dated 09.02.2018 submitted that they had reversed the amount on value of traded goods considered as exempted service for the FY 2016-17. However they did not pay the amount for FY 2017-18 and they will pay the same. Further, vide their letter dated 08.06.2018, they provided the payment details for FY 2017-18 (April to Jun 2017) as under:-

Sl No	Month	Reversal Amount	Date of Payment/Challan No.
1	April'2017	50,813/-	23.05.2018 vide Challan No. 03500682305201800009
2	May'2017	45,900/-	
3	June'2017	927/-	
	Total	97,640/-	

6.2 As per Explanation II to Rule 6 (3D) of CCR 2004, the amount mentioned in sub rule (3), (3A) and 3(B) unless specified otherwise shall be paid by the manufacturer of goods or the provider of output service by debiting the Cenvat credit or otherwise on or before the 5th day of following month except for the month of March when such payment shall be made on or before the 31st day of the month of March. As per Explanation III to Rule 6 (3D) of CCR 2004, if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub rules (3) (3A) and (3B), it shall be recovered, in the manner as provided in Rule 14 for recovery of Cenvat Credit wrongly taken.

6.3 In view of above, it appeared that during the period from April 2017 to June 2017, the assessee failed to pay an amount of Rs. 97,640/- by the due date specified under Explanation II

to Rule 6 (3D) of CCR 2004 and the interest on the same is required to be recovered from the assesse under Rule 14 of CCR 2004 read with Section 11A of CEA 1944 at appropriate rate under Section 11AA of CEA 1944.

6.4 Calculation of interest on delayed payment of CENVAT Credit is as under:-

Month	Amount Reversed	Due Date	Date of reversal	Delays	Interest @ 15%
April-17	50,813/-	05.05.2017	23.05.2018	383	7998/-
May-17	45,900/-	05.06.2017	23.05.2018	352	6640/-
June-17	927/-	05.07.2017	23.05.2018	322	123/-
Total	97,640/-				14,761/-

6.5 In view of above, it appeared that during the period from April 2017 to June 2017, the assessee has not paid an amount equal to 6% of value of traded goods even though they had taken CENVAT Credit on input services used in manufacture of dutiable goods, exempted goods and trading activity and was exercising option to pay 6% on value of exempted goods/exempted services under Rule 6(3) (i) of CCR, 2004. Therefore, the assessee has failed to pay amount of Rs. 97,640/- by the due date specified under Explanation II to Rule 6(3D) of CCR, 2004 and hence in terms of Explanation III to Rule 6 (3D) of CCR, 2004, amount of Rs. 97,640/- not paid by the assessee @ 6% on value of traded goods by due date is required to be recovered from the assessee under Rule 14 of CCR, 2004 read with Section 11A of CEA, 1944 along with interest at appropriate rate under Section 11AA of CEA, 1944 comes to amount of Rs. 14,761/- . Further amount of Rs. 97,640/- already reversed by the assessee is required to be appropriated towards their liability for the period April 2017 to June 2017.

6.6 From the foregoing paras, it also appeared that the assessee had contravened of the provisions of CENVAT Credit Rules, 2004 in as much as they have failed to pay their duty liability by due date rendered themselves liable to pay penalty under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

7. **Revenue para 9 :Non Payment of Service Tax on amount recovered from employees under head Notice salary recovery / Indemnity bond recovery :**

7.1 CERA audit was conducted in the month of August-2017 and CERA officers raised the same objection as was raised in Revenue Para 9 of the said Audit Report. In Half Margin Memo No. 08 dated 04.08.2017, the CERA officers has raised the objection that in the financial year 2016-17, the assessee had recovered Rs. 34,44,747/- form their employees on account of "Notice Salary Recover/Indemnity Bond Recovery". On this account the assessee has also recovered Service Tax from their employees amounting to Rs. 5,13,524/-. Further, in the Half Margin Memo No. 07 dated 04.08.2017, the CERA officer has raised the objection that in the financial year 2017-18 (upto June 2017), the assessee has recovered Rs. 10,17,806/- including Service tax form their employees under head Salary Recovery/ Indemnity bond recovery and has failed to pay service tax amounting to Rs. 1,32,757/-.

7.2 In this regard, Jurisdictional Range Superintendent vide their letter dated 27.09.2017 informed and asked the assessee to pay the above detailed service tax amount along with interest as the objection raised by the CERA.

7.3 The assessee vide their letter dated 08.11.2017 informed that this is not the case wherein they recovered service tax amount from employees; in fact, they had not charged service tax to employees; since they had not charged service tax to employees, the amount of service tax is calculated considering receipt amount as grossed up; calculating service tax considering recovery amount as grossed up does not mean that they have recovered service tax from employees. Further they have mentioned in the said letter that notice pay recovery is not a service and hence not liable to service tax; therefore, they have paid service tax of Rs. 5,13,524/- under protest for Financial Year 2016-17; since service tax is not payable interest is also not to be paid.

7.4. From the foregoing paras, it appeared that service tax liability on the assessee came as under:-

Sl. No.	Period	Value of Recovery including service tax	Service tax	Whether paid
1	April 2016 to March 2017	34,44,747/-	ST. -4,82,265/- +SBC-17224/- +KKC-14035/- +Interest – 57359/-	Service tax Paid under protest on 05.06.2017 Interest not paid
2	April 2017 to June 2017	10,17,806/-	ST. -1,23,907/- +SBC-4425/- +KKC-4425/-	Service tax not paid.

7.5 The facts, circumstances and contraventions of the provisions of the Finance Act, 1994 as amended and the rules made there under, as well as the grounds relied upon in the notice are similar to those discussed in the earlier Show Cause Notice mentioned at para 3 above and therefore, this notice is being issued in terms of Section 73(1A) of the Finance Act, 1994 as amended vide Finance Act, 2012.

7.6. In view of above, service tax of Rs. 6,46,281/- (Rs. 5,13,524/- for the FY 2016-17 and Rs. 1,32,757/- for the period April-2017 to June-2017) on the amount recovered towards notice pay, is liable for recovery under Section 73 of Finance Act, 1994 along with interest under Section 75 of Finance Act, 1994. Since, the assessee has already paid service tax of Rs.5,13,524/- **under protest** the said payment of service tax is required to be appropriated towards their service tax liability by vacating the protest.

7.7 It also appeared that the assessee had rendered themselves for the penal action under the provisions of Section 76 & 77 of the Finance Act, 1994 for their acts of contravention of the provisions of the Finance Act, 1994 in as much as they have not paid the service tax and they failed to submit a correct half-yearly return incorporating the details of service tax payable.

8. Therefore, M/s.Aculife Healthcare P.Ltd., Survey No.358 to 369, 383 to 399, 401 and 402, Village Sachana, Tal. Viramgam, District Ahmedabad, was called upon to show cause

before the Additional Commissioner of Central Goods and Service Tax, Ahmedabad North, Ist Floor, Customs House, Navarangpura, Ahmedabad as to why :

i. Cenvat credit amounting to Rs.64,12,601/- **(Rs. Sixty Four Lakhs Twelve Thousand Six Hundred and One Only)** (Revenue Para 02) taken on inputs used exclusively in the manufacture of exempted goods and utilized for payment of duty should not be disallowed under Rule 3 of CCR 2004 read with Rule 6 (1) of CCR 2004and said amount should not be demanded & recovered from them under Rule 14 of CCR 2004 read with Section 11A (i) of CEA 1944 :

ii. Interest at appropriate rate should not be charged and recovered from them on **Rs.** 64,12,601/- under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of the CEA 1944 ;

iii. Penalty should not be imposed upon them for wrong availment and utilization of Cenvat credit as above, under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of CEA 1944 for contraventions as mentioned at point (i)

iv. Amount of **Rs.97,640/-(Rupees Ninety Seven Thousands Six Hundred and Forty Only)** (Revenue Para 3)) equal to 6% on value of traded goods should not be recovered from them under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A (i) of CEA, 1944 and amount of **Rs. 97,640/-**already paid by them should not be appropriated towards the said demand ;

v. Interest amounting to Rs.14,761/- (Rupees Fourteen Thousand Seven Hundred and Sixty One Only) should not be charged at appropriate rate and recovered from them on the above demand of **Rs. 97,640/-** under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of CEA 1944 ;

vi. Penalty should not be imposed upon them for under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1994 for late payment as mentioned in point (iv).

vii. Service tax amounting to Rs. 6,46,281/- (Rs. 5,13,524/- for the FY 2016-17 and Rs. 1,32,757/- for the period April-2017 to June-2017) on consideration received for providing declared service should not be recovered from them under proviso to Section 73 of Finance Act, 1994 and an amount of Rs. 5,13,524/- already paid by the assessee under protest should not be appropriated towards the said demand by vacating protest.

viii. Interest at appropriate rate on Rs. 6,46,281/- should not charged and recovered from them under Section 75 of Finance Act, 1994 ;

ix. Penalty should not be imposed upon under Section 76 and 77 of Finance Act, 1994 for contravention mentioned at point (vii).

Defence reply -

9. The assessee have filed their defence reply vide letter dated 18.05.2019 and additional submissions dated 15.04.2021 wherein they have refuted charges levelled against them. They have also given written submission dated 16.04.2021 after the personal hearing wherein they have submitted two case laws on notice pay recovery in form of orders pronounced by Madras High Court and CESTAT Allahabad which will be dealt in detail. Relevant paras of their detailed reply to the SCN dated 18.05.2019 is reproduced below –

" 4. At the outset we deny all the allegations and averments made in the subject SCN.

A. <u>As regard to the proposed demand of Cenvat credit as per the Revenue Para-2: wrong availment and utilization of Cenvat credit on inputs exclusively used for the manufacture of exempted goods.</u>

<u>Allegations made in the SCN</u>

1. It is alleged that as per the letter dtd.09.2.18, noticee submitted the details of credit taken on inputs exclusively used in exempted goods for the financial **year 2016-17,** the details are as under:

Sr. No.	Annexure	Amount	Credit pertaining to	Credit reversal details
1	C-1	29,62,620/-	Exempted goods which are to be domestically cleared	Reversed as ineligible credit
2	C-2	59,60,955/-	Exempted goods which are to be exported as well as domestically cleared	Considered as common credit in formula reversal
3	C-3	4,51,646/-	Exempted goods which are to be exported	Considered eligible

2. For the financial year 2017-18, noticee has reversed 6% of exempted goods cleared for domestic clearance.

3. It appears that the assessee has reversed the input credits of **Rs.29,62,620/-** considering the as ineligible credit, however, they have not reversed the input credit of **Rs.59,60,955/-** used exclusively in exempted goods that are cleared under export as well as domestic clearance, considering as common credit and input credit of **Rs.4,51,646/-** used exclusively in exempted goods that are cleared under export. In total they have not reversed the input credit of **Rs.64,12,601/-**

4. It is alleged that in terms of Rule 6(1) of Cenvat credit Rules, 2004, it is clear that provisions of sub-Rule (3) of Rule (6) of CCR, 2004 shall not be applicable on such quantity of input as is used in or in relation to the manufacture of exempted goods. The input credit of Rs.64,12,601/- exclusively used in manufacture of exempted goods is not admissible to the said assessee in terms of the provisions of Rule 6(1) of Cenvat credit Rules. The said credit is required to be demanded and recovered in terms of Rule 14 of CCR, 2004 read with section 11A(1) of CEA along with interest. The assessee has contravened the provisions of CCR, 04 and so rendered themselves liable for penalty under Rule 15 of CCR, 04 read with section 11AC of the CEA, 1944.

<u>Submissions</u>

1. As per the objection/ revenue para raised under the Audit Report No.1084/2016-17 dtd.14.06.17. in respect of the Revenue para 2, 3 and 9, the Jurisdictional Range office under various letters asked us to submit the details about availment of credit and reversal thereof pertaining to the subsequent**period 2016-17** and for the period **Apr-17 to June-17 (2017-18).** The details and explanation were provided under our letters dated 08.06.18, 03.07.18, 09.02.18 and 08.11.17& 08.11.17. The copies of the said reply are enclosed and marked as **Annexure-A.**

2. During the period **2016-17** since, we manufacture both exempted and non-exempted goods, and both exempted and dutiable goods were cleared home consumption as well as exported. Therefore, in terms of the provision made under Rule 6 of CCR, 2004, we have

followed the procedure prescribed under Rule 6 for the attribution of cenvat credit pertaining to exempted goods and dutiable good. We have provisionally determined the amount of Cenvat credit on inputs and input services attributable to exempted goods as per the manner and formula prescribed therein and paid the amount every month. Thereafter, at the end of the financial year, as required under Rule 6 as per the formula prescribed therein, we have again finally determined the amount of actual Cenvat credit which is required to be reversed basis on the total amount of credit availed during the financial year and the actual value of exempted goods and dutiable goods cleared during the financial year. The detailed working sheet on the basis of which final figures were derived was intimated to the Jurisdictional officer under our **letter dtd. 03.07.17.** Copy of the said letter is enclosed and marked as **Annexure-B.**

3. For the period **2017-18 (April, 17 to June, 17)** we have opted for payment of 6% in terms ofRule 6 (3) (a) (i) of CCR, 04 and therefore, we have paid 6% of value of exempted goods cleared for home consumption. For this period the department has not disputed about the availment of credit.

4. We have already made submissions at length under our reply **dtd. 18.03.19** to the previous SCN dtd.29.09.17 on the subject issue. And therefore, we request your honor to consider the same while deciding the present Show Cause notice.

5. In the reply dtd.18.03.19, we have explained the eligibility of cenvat credit on input and input service under Rule 6, in a situation when both exempted and dutiable goods are manufactured and the common inputs and input service are used in the manufacture of such goods. The attribution of cenvat credit out of the common cenvat credit towards value of exempted clearance and the value of non-exempted clearance during the financial year as per the formula prescribed under Rule 6.It was also explained in details that the reversal of cenvat credit is not required in case of excisable goods which are exported by virtue of Rule 6(6) of CCR, 04 irrespective of the fact that the goods are exempted. The period covered in the present SCN is **2016-17 and 2017-18**,during the said period, the Scheme under Rule 6 of CCR, 04, moreover remains same. However, certain changes in respect of manner to determine the ineligible credit attributable to clearance of exempted goods under Rule 6(1), (2), (3) has been changed w.e.f. 01.04.16. Therefore, the manner and mechanism to determine the ineligible credit attributable to exempt goods is explained as under:

6. In terms of Rule 6(1), the Cenvat credit is not admissible on such quantity of input which are used in or in relation to manufacture of exempted goods or for provision of exempt services and input service used in or in relation to manufacture of exempt service and in provision of exempt service.

7. Rule 6 (2) further provides that a manufacturer who exclusively manufactures exempted goods or a service provider who exclusively provides exempted services shall pay the whole amount of credit of input and input services and shall, in effect, not be eligible for credit of any inputs and inputs services.

8. Further Rule 6 (3) (a) and (b) provides that a manufacture, or output service provider, who manufacture two classes of goods i.e. non-exempted goods and exempted goods and a service provider provide output service of two classes i.e. non-exempted service and exempted service, shall follow any one of the following options applicable to him namely:

(i) pay an amount equal to *Six per cent* of value of the exempted goods and *seven per cent.* of value of the exempted services subject to the total credit available in the account of the assessee at the end of the period to which the payment relates; or

(ii) pay an amount as determined under sub-Rule (3A). Rule (3A) provides for the determination of amount required to be paid under clause (ii) of sub-Rule (3) and the

manufacture of goods and provider of service shall follow the procedure namely, (a) the manufacturer or the provider of service shall intimate to the jurisdictional Central Excise office for exercising the option (b) the manufacturer and service provider shall determine the credit required to be paid out of this total credit of input and input services taken during the months, denoted as T. in the following sequential steps and provisionally pay every month, the amount determined under sub-clauses (i) and (iv), namely:

(i)	The amount of CENVAT credit attributable to **inputs and input services** used exclusively in or in relation to the manufacture of **exempted goods** removed or for provisions of **exempted services** shall be called **ineligible credit**, denoted as **A**. and shall be paid	A- Is required to be paid
(ii)	The amount of Cenvat credit attributable to **inputs and input services** used exclusively in or in relation to the manufacture of **non-exempted goods** removed or for the provision of **non-exempted services** shall be called **eligible credit**, denoted as **B**, and shall not be required to be paid.	B- Not required to be paid
(iii)	Credit left after attribution of credit under sub-clauses **(i) and (ii)** shall be called **Common credit**, denoted as **C** and Calculated as: **C = T (A+ B)**	C- Common credit
(iv)	The amount of **Common credit** attributable towards **exempted goods** or for provision of **exempted services** shall be called **ineligible Common credit**, denoted as **D** and calculated as Follows and shall be paid. **D= (E/F) X C**	D- Ineligible common credit
	Where **E** is sum-total of: (a) Value of **exempted services** provided (b) Value of **exempted goods** removed, during the preceding financial year Where **F** is the sum total of: (a) Value of **non-exempted services** provided (b) Value of **exempted service** provided (c) Value of **non-exempted goods** removed (d) Value of **exempted goods** removed, during the preceding year	
(v)	Remainder of the common credit shall be called eligible common credit and denoted as G, where, G =C-D.	G- common credit eligible
T = total credit, which is sum total of A, B, C, D, and G.		

9. In terms of Rule 6 (3A) (c), the manufacturer, or the service provider has to determine the amount of credit for the whole of the Financial year after the financial year ends in the manner provided therein. Sub Rule (d), (e) and (f) of Rule 6 (3A) provides manner to pay difference between provisional and final reversal and re-credit in case of excess payment and in recovery in case of short payment.

10. Accordingly, for the year **2016-17**, we determined the amount as per formula and reversed the amount every month in terms of Rule 6 and at the end of the financial year, we finally again determined the amount as per the formula. Therefore, we have correctly followed the procedure prescribed under Rule 6 of CCR, 2004 as envisaged therein and also the final reversal figures as per the formula and the detailed working was intimated to the Jurisdictional Range office under our letter dated 03.07.17 (refer Annexure-B).

11. As regard to the allegation that we have not reversed the input credit of **Rs. 59,60,955/-** used exclusively in exempted goods that are cleared under export as well as domestic clearance,

considering as common credit and input credit of **Rs.4,51,646/-**used exclusively in exempted goods that are cleared under export.

12. In this regard it is submitted that in response to the letter dtd.29.12.17, issued by the Superintendent Audit-II, under our letter dtd.09. 02.18 for the financial year 2016-17, we have furnished the detail of credit taken on exempted products and the working thereof in Annexure-C-1, C-2, C-3 and the reversal of credit is explained. The credit of Rs.29,62,620/- is pertaining to Exempted goods which are to be domestically cleared, and therefore, this credit is entirely reversed as ineligible credit. The credit of Rs.59,60,955/- is pertaining to Exempted goods, which are exported as well as domestically cleared for home consumption by availing the exemption Notification. Therefore, this is considered as common credit in the formula. Accordingly, to the extent of exempted goods which are cleared domestically for home consumption availing an exemption Notification, the credit is reversed as per the formula. The credit of Rs.4,51,646/- is pertaining to Exempted goods which are exported,therefore, this is considered as eligible credit.

13. As per the provisions of Rule 6(6) of CCR, 04, in case of goods which are exported, the credit is fully allowed and appropriation as per Rule 6(3) is not required. The Rule 6(6) craves out exception for non-reversal of cenvat credit in certain types of clearances mentioned therein and therefore, by virtue of said Rule 6(6) the provisions of Rule 6(1) (2) (3) and (4) do not apply for the types of clearances mentioned therein .In short by virtue of Rule 6(6), the credit availed on inputs and input services used exclusively or commonly for the manufacture and clearance of goods meant for SEZ, or developer of SEZ for their authorized operation, or cleared to EOU or, cleared to EHTP or STP or, supplied to UN or their agencies, supplied for use of foreign diplomatic missions, or cleared for export etc. the provision of Rule 6(1), (2), (3) do not apply, thereby meaning no attribution and reversal as envisaged in the Rule 6 is required.

14. Therefore, as per Rule 6 (6) of CCR, 2004, the provisions of Rule 6(1), (2) (3) and (4) are not applicable in case of excisable goods removed without payment of duty One such type of clearance mentioned at clause (v) of Rule 6(6) is excisable goods cleared for export in terms of the provisions of the Central Excise Rules, 2002. In the present case the exempted goods are cleared for export and it is an admitted fact that said goods are exported out of India. Therefore, by virtue of Rule 6(6) (v), the provisions of Rule (6(1), (2) (3) and (4) are not applicable and therefore, the credit on inputs and input services used to the extent of manufacture and clearance of goods meant for export, the total credit is admissible and there is no requirement of any credit reversal to that extent. However, the credit pertaining to exempted goods cleared domestically for home consumption availing the exemption notification, the credit is required to be reversed in terms of Rule 6(3) of CCR, 2004 and in compliance to the said requirement, we have already reversed the credit on input and input service exclusively used for manufacture and clearance of exempted goods amounting to **Rs.29,62,620/-** treating the same as ineligible. Further out of the common credit availed on inputs and input service amounting to **Rs.59,60,955/-**which is commonly used in manufacture and clearance of exempted goods which are exported and also cleared domestically for home consumption availing the exemption Notification and therefore, the said credit is treated as common credit and to the extent used in manufacture and clearance for home consumption availing the exemption notification, the credit is reversed as per the formula. The credit availed on input and input service amounting to **Rs.4,51,646/-** is used in manufacture and clearance of exempted goods for export and so the entire credit is eligible and therefore considered as eligible credit. Therefore, the allegations that the entire credit is used exclusively in the manufacture of exempted goods and therefore, by virtue of Rule 6(1) the credit used in exempted goods is not admissible is not correct legal and proper.

15. Now, the next question which comes to the mind is whether the goods which are exported can be treated as exempted goods for the purposes of reversal of credit under Rule 6(3) of CCR, 04. The answer is no, on the grounds that for the clearance made for export, SEZ/EOU or EHTP and STP or to UN agencies etc as listed under Rule 6(6), all these clearances are exempt,

however, by virtue of special provisions enacted under Rule 6(6), the provisions of Rule 6 (1), (2), (3) and (4) are not applicable and no reversal is required. The Excisable goods include both dutiable goods as well as exempt goods. Moreover, the export goods are not exempted goods, but export goods are zero rated, thereby, meaning they are not exempted goods but they are Excisable Goods. The issue as what is excisable goods has been settled by the Hon'ble High Court of Madras in case of Tamil Nadu (Madras State) Handloom Weavers Cooperative Society Ltd reported in 1978 ELT (J.57) and expressly held that goods figuring in the Schedule to Central Excise Tariff Act for which duty specified is NIL are also excisable goods. This view has been approved by the Hon'ble Supreme Court in case of Wallace Flour Mills reported in 1989 (004) ELT 0598 (S.C.)

16. Therefore, though some of the final goods which are exempted by virtue of exemption Notification issued under section 5 of the Excise Act, for clearance made for home consumptions, but are indeed excisable goods and so when exported, the provisions of Rule 6 (1) (2) (3) is not applicable and resultantly credit pertaining to goods which are exported, the credit need not to be reversed.

17. In case of export of excisable goods. The ban created under Rule 6 (1) is not applicable and the liability to reverse proportionate credit under Rule 6 (3) of Cenvat Credit Rules are only attracted in case of goods which are exempt by way of Notification when cleared for Home consumption and proportionate credit reversal is not attracted in case of excisable goods exported. Even though Rule 6 (1) of the Cenvat Credit Rules, 2004 provides that no Cenvat credit will be available in respect of the inputs used in the manufacture of exempted products, Rule 6 (6) (v) of the Cenvat Credit Rules creates an exemption inter alia in respect of the excisable goods removed without payment of duty for export under bond in terms of Central Excise Rules, 2002. Considering the language of Rules 6 (6) (v) of the Cenvat Credit Rules, 2004, we are entitled to avail Cenvat Credit in respect of the Inputs used in the manufacture of the final products being exported.

18. The Scheme under Rule 6 form the Department and assessee prospective is to restrict the credit pertaining to the exempt goods only. However, in case of export such restriction is not envisaged. As per Rule 5 of CCR, 2004 the credit on the inputs used in the export products are allowed to adjusted against for payment of duty on other products and if the adjustment is not possible, Cenvat credit is refunded in cash. With a view to achieve this object; the Central government has specifically enacted Rule 6 (6) (v) of the Cenvat credit Rules to the effect that the bar created by Rule 6 (1) will not apply to the goods exported. Considering the conscious and express provision contained in Rule 6 (6) (v) for export goods, to deny the Cenvat or to levy 6% on the value of the exported goods under Rule 6 (3) on the grounds that Pharmaceutical products exported by us are exempted, and therefore, attract Rule 6 (1) would be incorrect and completely nullify and frustrate Rule 6 (6) (v) of Credit Rules.

19. The issue is finally settled by various decisions of the higher Appellate authorities and Courts. The decisions are discussed in our reply dtd. 18.03.19 and for the sake of brevity same are not repeated here again and your honor is requested to consider the same while deciding the present Show Cause notice.

20. Therefore, from all the above submissions made your Honour will be fully satisfied that we have correctly considered the credit amounting to **Rs.59,60,955/-**as common credit as the said credit is used commonly in exempted goods that are cleared under export as well as domestic clearance. Out of the said common credit, the credit pertaining to exempted goods which are cleared for domestic clearance under the exemption Notification is reversed as per formula. The Cenvat Input credit of **Rs.4,51,646/-**is pertaining to used exclusively in exempted goods that are cleared for export and therefore, said credit is eligible credit and shown as eligible. Therefore, the allegations that input credit totaling to **Rs. 64,12,601/-** exclusively used in manufacture of

exempted goods is not admissible in terms of Rule 6(1) of CCR, 2004 is not only incorrect, illegal, but contrary to the provisions made under Rule 6 of CCR, 04 and so without authority and Jurisdiction and so not sustainable in law and therefore, your Honour may be kind to drop the proposed recovery proceedings under the said SCN and oblige.

B. <u>As regard to the proposed demand of Cenvat credit as per the Revenue Para-3: Non-Payment of amount equal to 6% on value of traded goods under Rule 6 (2) of CCR, 2004 on account of availing of Cenvat credit on common input services</u>

1. As regard to the proposed demand equal to 6% on value of traded goods, it is submitted that for the year **2016-17**, the value of traded goods is considered as exempt service for reversal of Cenvat credit of inputs and input services. Hence, reversal with respect to traded goods is complied.

2. As regard to the proposed demand equal to 6% on the value of traded goods for the period **2017-18 (April,17 to June, 17)**. We are not contesting the demand on merits. It is submitted that w.e.f. from 01.04.17 we have opted to pay an amount equal to 6% of the value of exempted goods in terms of Rule 6(3) (a) (i) in respected of clearance of exempted goods and not opted for formula based reversal in terms of Rule 6(3A) and Accordingly, paid the amount @ 6% on the value of exempted Goods. However, due to this changeover in the option, dueto oversight and bona fide mistake we have not reversed 6% of value of trading good. However, we have calculated the amount of reversal on account of trading for the period 2017-18 and an amount of **Rs.97,640/-** is already paid vide challan No. 03500682305201800009 dtd. 23.05.18 and the payment particular was intimated to the department under our letter dtd. 08.06.18. As regard to the interest liability on this payment, the total interest amount payable is **Rs. 14,761/-** we have now paid the interest vide challan No. CIN-63905042604201900046 dtd. 26.04.19. Copies of both the challan are enclosed and marked as **Annexure-C.**

3. Therefore ,considering the above submissions and payment of amount along with interest nothing more is required to be done and therefore,your honour may drop the proceedings.

C. <u>As regard to the proposed demand of Service tax as per the Revenue Para-9: Non Payment of Service Tax on amount recovered from employee under head Notice salary recovery/Indemnity bond recovery</u>

1. It is alleged that for the financial year 2016-17, the assessee had recovered Rs.34,44,747/- from their employee on account of "Notice Salary recover/Indemnity Bond Recovery". It is alleged that we have also recovered Service tax from employee amounting to Rs. 5,13,524/. In the financial year 2017-18 (upto June, 2017) the assessee has recovered Rs.10,17,806/- including Service tax from their employee under the head salary. The Notice pay recovery made from the employee is a declared service as per section 66E of the finance Act, 1994.Therefore, for the period **April, 2016 to March, 2017**, the service tax totaling to **Rs. 5,13,524/-** is payable along with interest of **Rs. 57,359/-**. For the period **April,17 to June, 17**, the service tax amounting to Rs.1,32,757/- is payable along with interest.

1.1 In this regard it is submitted that during the course of EA 2000 Audit, conducted for the period **April,14 to March 15 and April,15 to March, 16**, the officers objected non-payment of service tax on the amount recovered form employee as notice salary recover/ indemnity Bond recovery. Under our letter dtd 19.05.17. We explained to the Audit that the service tax is not payable on the notice pay recovery on the grounds that services provided during the course of employment is out- side the ambit of service tax as per the definition of Service provided under the finance Act. it was also informed that in case of two group companies, the said issue was raised by the department and the Show Cause notice was issued and demand of service tax was confirmed against the said confirmation of demand, we preferred an Appeal before the Appellate commissioner, at Vadodara and Ahmedabad and in the decision it was held that Service tax is not payable and Adjudication orders were set- aside. Therefore, it was requested that the issue may be dropped. However, the said explanation was not accepted by the Audit therefore, we paid the service tax amount of **Rs.7,35,926/-** under protest under **challan No.00009 & 00010**

dtd.19.05.17. The show cause is already issued and we have already filed our defense reply under our letter dtd. 18.03.19 explaining the legality on the issued. The present Show cause notice is issued for the subsequent period, however, the issued is same, therefore, the submission made in our letter dtd. 18.03.19 may kindly be considered while deciding the present SCN.

In addition to the above, we submit that the in the present Show Cause notice period covered is for **2016-17 & 2017-18 (April, 17 to June,17).** In this regard it is submitted that for the period 2016-17, the amount involved is Rs.5,13,524/-. Under our letter dated 08.11.17, we have explained that service tax is not payable on the notice pay recovery as per the grounds stated therein in the said letter. For the sake of brevity, same is not repeated herein again and the letter attached and marked as **Annexure-A**, may kindly be considered. We have paid the service tax amounting to Rs. 5,16,713/- under protest vide challan No.00803 dtd 05.06.17Copy enclosed and marked as **Annexure-D.**

As regard to the period **2017-18 (April, 17 to June, 17),** the amount involved is **Rs.1,32,757/-,** under our letter dtd. 08.11.17, we have explained that service tax is not payable on the notice recovery as per the grounds stated therein in the said letter for the sake of brevity, same is not repeated herein again and the letter is attached and marked as **Annexure-A**, may kindly be considered. We have paid the service tax amounting to Rs.1,32,757/- vide challan **No.63904812604201900048 dtd.26.04.19 under protest.**Copy enclosed and marked as **Annexure-E.**

We have already made the submissions on merits of the case under our reply dtd. 18.03.19 and the same held good while deciding the present Show cause notice.

We request that the present Show cause notice may be tagged along with SCN No.VI 1(d)CTA /05 /Cir-VI/ Nirma-SCN/ 17-18 dtd.29.09.17 as the issue is same but for different period. ''}

Further in additional submissions dated 15.04.2021 their grounds of defence are same but they have discussed some more case laws .

Personal Hearing-

10. Personal hearing in the matter was attended by Shri Vikram Singh Jhala, AGM (Indirect tax) of the company through virtual mode on 16.04.2021. He referred to their written reply dated 18.05.2019 and additional written submission dated 15.04.2021 wherein the issue had been discussed at length. He stated that some of the final goods which are exempted by virtue of Notification issued under Section 5 of the central Excise Act, for clearance made for home consumptions, but are indeed excisable goods and so when exported, the provisions of Rule 6(1) (2) (3) is not applicable and resultantly credit pertaining to goods which are exported, the credit need not be reversed. Regarding demand for traded goods to the tune of Rs.97640/-, he stated that the amount of Rs.97,640/- along with interest of Rs.14761/- has been paid by them within 30 days of issuance of SCN. Therefore, no penalty is imposable in terms of Section 11AC(a) of the Central Excise Act. He also relied case laws HCL Ltd Vs Commissioner of Central Goods & Service Tax, Noida (CESTAT final order No.71950/2019) and GE T&D India Ltd Vs Deputy Commissioner of C.Ex, Chennai reported in 2020(35) GSTL 89 (Mad) and requested to drop the demand.

Discussion and findings-

11. I have carefully gone through the records of the case, submission made in their written reply and during the course of personal hearing.

11.1 I find that this SCN is periodical in nature in respect of the previous SCN issued to them on 29.09.2017 by the Commissioner,Audit. It is pertinent to mention that the noticee have opted for SVLDRS Scheme-2019 for the previous SCN dated 29.09.2019 and discharge certificate in form SVLDRS-4 was issued to them after finding them eligible for the scheme by designated

committee. It may be deducted that the assessee has partially agreed with the charges in the SCN dated 29.09.2017 so they have opted for dispute resolution scheme and not contested the notice. This notice is based on three revenue paras issued by Audit Commissionerate through Final Audit report dated 14.06.2017 covering the further period. I will discuss each revenue para one by one with my findings in the matter.

12. **Revenue Para 2: Wrong availment and utilization of Cenvat credit on inputs exclusively used for the manufacture of exempted goods. –**

12.1 I find that the assessee is engaged in manufacture of both non- exempted and exempted goods and in the financial year 2016-17 has exercised the option (ii) under Rule 6(3) for payment/reversal of proportionate amount of CENVAT credit on input/input services involved in non-exempted and exempted goods under Rule 6 (3A) of Cenvat Credit Rules, 2004. Rule 6 (1) of CENVAT Credit Rules, 2004 is reproduced below :

> *"The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for the provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of the output service, in terms of the provisions of sub rule (2) or sub rule (3), as the case may be.*

From the above provisions of CENVAT Credit Rules, it is clear that provisions of sub rule (3) of Rule (6) of CENVAT Credit Rules, 2004 shall not be applicable on such quantity of input as is used in or in relation to the manufacture of exempted goods.

12.2 I find that the input credit of Rs. **Rs.64,12,601/- (Rs.59,60,955/- + Rs. 4,51,646/-)** exclusively used in manufacture of exempted goods is not admissible to the said assessee in terms of the provisions of Rule 6(1) of CENVAT Credit Rules, 2004, however the assessee has taken and utilized such credit. Therefore, the assessee has wrongly taken and utilzied CENVAT Credit of **Rs.64,12,601/- (Rs. Sixty Four Lakhs Twelve Thousand and Six Hundred and one Only) for the period from April 2016 to March 2017** in contravention of the provisions of Rule 6(1) of CENVAT Credit Rules, 2004 and such CENVAT Credit is required to be recovered in terms of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(1) of Central Excise Act, 1944 along with interest under Section 11AA of Central Excise Act, 1944.

12.3 The noticee in their reply has submitted that per the provisions of Rule 6(6) of CCR, 2004, in case of goods which are exported, the credit is fully allowed and appropriation as per Rule 6(3) is not required. The Rule 6(6) carves out exception for non-reversal of cenvat credit in certain types of clearances mentioned therein and therefore, by virtue of said Rule 6(6) the provisions of Rule 6(1) (2) (3) and (4) do not apply for the types of clearances mentioned therein. In short by virtue of Rule 6(6), the credit availed on inputs and input services used exclusively or commonly for the manufacture and clearance of goods meant for SEZ, or developer of SEZ for their authorized operation, or cleared to EOU or, cleared to EHTP or STP or, supplied to UN or their agencies, supplied for use of foreign diplomatic missions, or cleared for export etc. the provision of Rule 6(1), (2), (3) do not apply, thereby meaning no attribution and reversal as envisaged in the Rule 6 is required.

12.4 Therefore, as per Rule 6 (6) of CCR, 2004, the provisions of Rule 6(1), (2) (3) and (4) are not applicable in case of excisable goods removed without payment of duty One such type of clearance mentioned at clause (v) of Rule 6(6) is excisable goods cleared for export in terms of the provisions of the Central Excise Rules, 2002. In the present case the exempted goods are cleared for export and it is an admitted fact that said goods are exported out of India. Therefore, by virtue of Rule 6(6) (v), the provisions of Rule (6(1), (2) (3) and (4) are not applicable and therefore, the credit on inputs and input services used to the extent of manufacture and clearance of goods meant for export, the total credit is admissible and there is no requirement of any credit reversal to that extent. However, the credit pertaining to exempted goods cleared domestically for home consumption availing the exemption notification, the credit is required to be reversed in terms of Rule 6(3) of Cenvat Credit Rules, 2004 and in compliance to the said requirement, they have already reversed the credit on input and input service exclusively used for manufacture and clearance of exempted goods amounting to **Rs.29,62,620/-** treating the same as ineligible. Further out of the common credit availed on inputs and input service amounting to **Rs.59,60,955/-** which is commonly used in manufacture and clearance of exempted goods which are exported and also cleared domestically for home consumption availing the exemption Notification and therefore, the said credit is treated as common credit and to the extent used in manufacture and clearance for home consumption availing the exemption notification, the credit is reversed as per the formula. The credit availed on input and input service amounting to **Rs.4,51,646/-** is used in manufacture and clearance of exempted goods for export and so the entire credit is eligible and therefore considered as eligible credit. Therefore, the allegations that the entire credit is used exclusively in the manufacture of exempted goods and therefore, by virtue of Rule 6(1) the credit used in exempted goods is not admissible is not correct legal and proper.

12.5 Regarding the contention of the noticee that they have exported the goods in question and no amount is payable by them, I find that their claim is not supported with any evidence in so far as that they have not provided any proof of export of the exempted goods viz. shipping bills. FOB value, date of export and foreign exchange realized etc. neither it is available on record. Also, no supporting documents have been submitted by the assessee to that they have supplied the goods to SEZ/EOU etc. So it cannot be established that the availed input credit is used in exported goods. Under the circumstances, I am unable to accept the contention of the noticee that they are not required to be reversed the wrongly availed Cenvat Credit. Accordingly, I hold that the noticee have to pay the amount of wrongly availed amount of Cenvat Credit along with interest and penalty in terms of the relevant provisions of Cenvat Credit Rules, 2004 and Rules made there under.

13. **Revenue Para 3) Non-payment of amount equal to 6% on value of traded goods under Rule 6 (2) of CCR 2004 on account of availing of Cenvat credit on common input services.-**

13.1 I find that during the period from April 2017 to June 2017, the assessee had not paid an amount equal to 6% of value of traded goods even though they had taken CENVAT Credit on input services used in manufacture of dutiable goods, exempted goods and trading activity and was exercising option to pay 6% on value of exempted goods/exempted services under Rule 6(3) (i) of CCR, 2004. Therefore, the assessee failed to pay amount of Rs. 97,640/- by the due date specified under Explanation II to Rule 6(3D) of CCR, 2004 and hence in terms of Explanation III to Rule 6 (3D) of CCR, 2004, amount of Rs. 97,640/- not paid by the assessee @ 6% on value of traded goods by due date is required to be recovered from the assessee under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of Central Excise Act, 1944 along with interest at appropriate rate under Section 11AA of Central Excise Act, 1944 comes to amount of Rs.

14,761/- . The assessee subsequently paid the amount of Rs. 97,640/- is required to be appropriated towards their liability for the period April 2017 to June 2017.

13.2 The assessee in their reply dt 18.05.2019 submitted that they are not contesting the demand on merits. They have submitted that w.e.f. from 01.04.17 they have opted to pay an amount equal to 6% of the value of exempted goods in terms of Rule 6(3) (a) (i) in respected of clearance of exempted goods and not opted for formula based reversal in terms of Rule 6(3A) and Accordingly, paid the amount @ 6% on the value of exempted Goods. However, due to this changeover in the option, due to oversight and bona fide mistake they had not reversed 6% of value of trading goods. Further they have stated that amount of **Rs.97,640/-** had been paid vide challan No. 03500682305201800009 dtd. 23.05.18 and the payment particular was intimated to the department under letter dtd. 08.06.18. They have informed that they paid interest liability of **Rs. 14,761/-** vide challan No. CIN-63905042604201900046 dtd. 26.04.19. In their additional submissions dated 15.04.2019 the assessee has requested not to impose penalty as they have paid the interest liability before 30 days after the issuance of SCN and this being bonafide mistake.

13.3 I find that the noticee has accepted their mistake and already paid the amount equal to the 6% of value of traded goods which is to be appropriated and also the assessee stated that that they paid interest on this amount within 30 days of the Show cause notice and not to impose any penalty. However, I find that the assessee has paid the amount only after raising the objection by the Audit officers. Further, the interest amount has also been paid at a later date. Therefore, they are liable to pay penalty as per the prevailing guidelines under Central Excise Act, 1944 and rules made thereunder.

14. Revenue para 9 :Non Payment of Service Tax on amount recovered from employees under head Notice salary recovery / Indemnity bond recovery :

14.1 Now, I take up the next issue that whether the noticee is liable to pay Service Tax on recovery of Notice Pay from the employees who are leaving the company without completing the notice period as specified in the Appointment Letter issued as per the contract entered between them. I find that said Notice Pay is nothing but the amount stipulated in the employment contract for breach in serving (not serving) the stipulated notice period. In other words, notice pay is a sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for "tolerating the act" of the employee to not serve the notice period, which was the employee's agreed contractual obligation.

I find that the term *"service"* has been defined in clause (44) of Section 65B of the Finance Act, 1994, reads as under:

"Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-------."

14.2 Further, Section 66E of the Finance Act, 1944 defines *'declared service'* as any activity carried out by a person for another person for consideration. The "declared services" are listed

out in Section 66E of the Finance Act, 1994. The following shall constitute declared services, namely:-

(a) Renting of Immovable property;

(b) ----------;

(c) ----------;

(d) ----------;

(e) Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act".

A conjoint reading of the above provisions makes it clear that *'agreeing to the obligation to refrain from an act, or to tolerate an act'* for a consideration, qualifies as a *'service'* and therefore, attracts service tax.

14.3 I find that the assessee has offered employment to their employees on the terms and conditions as decided upon by the employer and employee. One of the conditions to offering and accepting of the employment is to continue in employment for the prescribed period and in case of premature resignation or leaving the employment, would have to pay to the assessee the pre-decided amount. In a nut shell, the contractual agreement to offering the employment is that the employee should not leave employment before the prescribed period. It is upon agreeing to this condition that employment is offered. In case of breach of this condition by the employee, he would be required to pay pre-determined amount to the employer, which is called "notice pay recovery". Thus, the employee is under an obligation to complete the prescribed tenure in employment or pay the decided amount towards breach of the condition of contract.

14.4 The above scheme of arrangement clearly indicates that both the parties have entered into a contractual agreement to abide by the terms and conditions. Further, the terms and conditions of the employment also indicate that the assessee has agreed to tolerate the act of breach of contract by the employee i.e. leaving the employment before the agreed upon period subject to payment of a sum decided between both the parties which is in the nature of penal action or damages towards breach of contract. This, the scheme of things clearly indicate that the assessee has agreed to tolerate the breach of contract by the employee, if any, against receiving the consideration in the form of pre-decided sum from employee. The employee has also agreed to pay such amount in case of breach of contract. After making such agreement, the assessee has offered employment and the employee, having agreed to such conditions, has accepted the employment. Thus, the element of agreeing to the obligation to tolerate the act of breach of contract of the employee clearly exists in the scheme of arrangement.

14.5 In the instant case, thus, the employee has breached the condition of the contract not to leave the employment before the agreed upon period and the assessee has tolerated this act of breach of contract of employee. Against the act of tolerating the breach of contract the assessee has received a consideration in the form of notice pay recovery from the employee. Thus, the said activity clearly falls within the ambit of 'declared service' in terms of the provisions of clause (e) of Section 66E of the Finance Act, 1994.

14.6 I further note that the assessee has *agreed to the obligation to refrain from an act or tolerated an act* of the employee leaving their company, without due notice, as initially agreed upon, for which the assessee has deducted notice pay at the time of full and final settlement as per the terms and conditions of the employment agreed upon by both the parties. On the part of the employee, it was obligated that he shall not leave the company without the decided upon period of notice. For the purpose of ensuring the pact, the employer has put in a clause that the employee would be liable to pay the agreed upon consideration to the employer and on payment of such consideration, the employer would permit leaving of the employee without completing the notice period. In other words, the employer has agreed to tolerate the breach of condition regarding the prescribed notice period subject to the employee paying the agreed upon consideration. Thus, the notice pay recovered by the assessee from the employees is consideration for declared services provided by the assessee to the employees who had left or resigned, which cannot form part of employment. The reason behind recovering notice pay is that the company suffers administrative and economical losses due to leaving/resignation of employee without serving proper notice of stipulated time period and for the same, a clause covering the notice period is included in the agreement while granting employment. This declared service, provided by an employer to an employee during the course of his employment, cannot be equated with provision of service by an employee to an employer. Section 65B (44) of the Finance Act, 1994, **excludes** *'provision of service by an employee to the employer in the course of or in relation to his employment'.* However, vice-versa, the provision of service by an employer to the employee is not excluded under the said clause..In case of notice pay recovery, the service provider is the 'employer', *i.e.,* the assessee, who is tolerating the act of an employee and thereby providing a *'declared service'* and thus, it may not get covered under the exclusion clause provided under the definition of *'service'.* Similarly, the term *'in relation to his employment' in the said clause* will only include services by an employee and not services provided by an employer. Therefore, an employer will be liable to pay service tax on the amounts recovered as 'notice pay recovery' from the employees.

14.7 Service Tax is applicable on supply of taxable services. The term *"service"* has been defined in clause (44) of Section 65B of the Finance Act, 1994, that *"Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include--------."* Further, Section 66E of the Finance Act, 1944 defines *'declared service'* as any activity carried out by a person for another person for consideration. The "declared services" are listed out in Section 66E of the Finance Act, 1994. The clause (e) of Section 66E declares that ***'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act'*** shall be treated as declared service. The condition to pay an amount as notice pay in lieu of notice period, for the employer to agree to let go an employee, normally forms part of the terms and conditions of employment. This would mean that the employee while accepting the offer of employment, has not only understood the intent on the part of the employer in prescribing this exit condition, but has also accepted it. In other words, the employee has understood and accepted the condition that in the contingency of his inability to provide the prescribed notice period, he can exercise the option of paying the notice pay as the consideration

for the employer to agree to the obligation of letting him go, which the employer is bound to do as it is part of the terms and conditions already agreed to and settled between them. In my view, therefore, this transaction of the employer agreeing to the obligation of tolerating an act (quitting without any advance notice) on the part of the employee, for payment of a sum (notice pay), will be covered under **Clause (e) of Section 66E of the Finance Act, 1994,** as a declared service.

14.8 In view of the above, I hold that in the subject matter of notice pay recovered from the employees by the assessee, by tolerating the act of leaving employment on part of the employees before the notice period, the assessee have provided a *'declared service'* which falls within the ambit of clause (e) to Section 66(E) of the Act *ibid* and, therefore, they are liable to pay service tax on the total amount of notice pay recovered from the employees along with interest.

14.9 I have also perused the Case Law of the Madras High Court in the case of *GE T&D India Limited v. Deputy Commissioner of Central Excise, Chennai, reported in 2020-VIL-39-Mad-ST* quoted by the assessee and I find that in this case, the authorities demanded service tax on the amount of notice pay recovered by taxpayer from its employee's salary. The employment contract encompassed a situation wherein the employee was required to compensate the tax payer in a case of sudden and unexpected termination of duty. The Hon'ble High Court held that the employer cannot be said to have rendered any taxable service as per Section 66E(e) of the Finance Act, 1994 (i.e. toleration of an act) and has merely facilitated the exit of the employee upon imposition of cost for the sudden exit. Since, the Hon'ble High Court has not appreciate the term 'declared service' under section 66E(e) of the Act in terms of the facts of the case such as the contractual agreement between the two parties, the breach of contract by the employee and the payment made by the employee, as a penalty/ damages towards such breach of contract. Therefore, the ratio of said case law is not applicable to the facts of the present case.

14.10 In short, the notice pay is recovered by the employer from the employee in case of emloyee's exit before the notice period as specified in their contract/bond.The employer tolerates a loss as he is unable to find a relacement of the suddenly leaving employee. Notice period is specified as the employer company has ample time to find the replacement of the leaving employee so that work is not hampered and company does not suffer loss. Therefore, I hold that the assessee has to pay the Service Tax on the amount recovered from the employees.

14.11 Further the noticee has also relied upon Commissioner(A) Vadodara orders dated 21.09.2016 in case of M/s Nirma Ltd. and stated that the Department has accepted the said order. In this regard, I would like to refer Section 35R of the Central Excise Act, 1944. Sub-section (1) to (3) of Section 35R is reproduced below:-

"(1) The Central Board of Excise and Customs may, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purpose of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of this Chapter".

"(2) Where, in pursuance of the orders or instructions or directions, issued under sub-section (1), the Central Excise Officer has not filed an appeal, application, revision or reference against any decision or order passed under the provisions of this Act, it shall not preclude such Central Excise Officer from filing appeal, application, revision or reference in any other case involving the same or similar issues or questions of law"

"(3). Nothwithstanding the fact that no appeal, application, revision or reference has been filed by the Central Excise Officer pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal, application, revision or reference shall contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference"

14.12 In view of the above, it is clear that in certain cases, when the Department accepted the said cases on low monetary grounds, the Department has the not deprived for demanding taxes in a disputed case in future cases. Therefore, I find that the demand raised in the present case is proper, the assessee is liable to pay the amount of wrongly availed Cenvat Credit, Service Tax, interest and also penalty as proposed in the show cause. The assessee placed reliance a large number of case laws in their defence to show that no amount is recoverable from them, no interest is payable by them and also no penalty is imposable by them. I have gone through the said case laws and I am of the view that the said case laws are distinguishable with the present case in hand as the facts, circumstances of the present case is different. Therefore, individual cases are not discussed here.

15. In view of the discussion above and my findings, I pass the following orders:-

Order

(i) I disallow the wrongly availed Cenvat credit amounting to Rs.64,12,601/- **(Rs. Sixty Four Lakhs Twelve Thousand Six Hundred and One Only)** (Revenue Para 02) taken on inputs used exclusively in the manufacture of exempted goods and utilized for payment of duty by M/s Aculife under Rule 3 of Cenvat Credit Rules 2004 read with Rule 6 (1) of Cenvat Credit Rules 2004 and order that the said amount be recovered from the assessee under Rule 14 of Cenvat Credit Rules 2004 read with Section 11A (i) of Central Excise Act, 1944.

(ii) I order that the Interest at appropriate rate be recovered from the assessee on the amount of **Rs.** 64,12,601/- under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944 ;

(iii) I impose a penalty of Rs.6,41,260/- (Rupees six lakhs forty one thousand two hundred and sixty only) on M/s.Acuilife Healthcare P.ltd., Ahmedabad under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of CEA 1944.

(iv) I confirm the amount of **Rs. 97,640/- (Rs. Ninety Seven Thousands Six Hundred and Forty Only)** (Revenue Para 3)) being equal to 6% on value of traded goods and order to recover the said amount from M/s.Acuilife Healthcare P.ltd., Ahmedabad, under Rule 14 of Cenvat Credit Rules 2004 read with Section 11A (i) of CEA, 1944 and the amount of **Rs. 97,640/-** already paid by them is appropriated and adjusted towards the amount payable by them ;

(v) I order that interest at the appropriate rate be charged and recovered on the amount of Rs.97,640/- and the Interest amounting to Rs.14,761/- (Rs. Fourteen Thousand Seven Hundred and Sixty One Only) already paid by them is appropriated and adjusted against the interest

recoverable from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of Central Excise Act, 1944.

(vi) I impose penalty of Rs.9764/- (Nine thousand seven hundred and sixty four only) on M/s.Acuilife Healthcare Pvt. Ltd under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

(vii) I confirm demand of Service tax amounting to Rs. 6,46,281/- (Rs. 5,13,524/- for the FY 2016-17 and Rs. 1,32,757/- for the period April-2017 to June-2017) on consideration received for providing declared service and order that the amount of Service Tax be recovered from the assessee under Section 73 of Finance Act, 1994 and an amount of Rs. 5,13,524/- already paid by the assessee under protest is appropriated towards the Service Tax payable by the assessee. Remaining amount of Rs.1,32,757/- is to be recovered from M/s.Acuilife Healthcare P.ltd.. Protest lodged by the assessee is hereby vacated.

(viii) I order that Interest at appropriate rate on the amount of Service Tax Rs. 6,46,281/- be charged and recovered from the assessee under Section 75 of Finance Act, 1994 ;

(ix) I impose a penalty of Rs 64,628/- (Rupees sixty four thousand six hundred and twenty eight only) on M/s.Acuilife Healthcare P.ltd. under Section 76 of the Finance Act, 1994.

x) I impose a penalty of Rs. 10000/-(Rupees ten thousand only) on M/s. Acuilife Healthcare P.ltd., Ahmedabad under section 77 of Finance Act, 1994.

(M. L. Meena)
Additional Commissioner
Central GST & Central Excise
Ahmedabad North

File No.V.30/15-39/OA/2018
By Regd A.D.

Date:- 01.06.2021.

To,
M/s.Acuilife Healthcare P.ltd.,
Survey No.358 to 369, 383 to 399, 401 and 402,
Village Sachana, Tal. Viramgam,
District Ahmedabad, .

Copy To:

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
1. The Deputy Commissioner, CGST, Division-III, Ahmedabad-North
3. The Superintendent, CGST, AR-II, Division-III, Ahmedabad-North
4. Guard File.