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
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निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN 20210164WT0000222C5E

फा.सं./F.No. STC/15-15/OA/2019

आदेश की तारीख़/Date of Order :- 20.01.2021

जारी करने की तारीख़/Date of Issue :- 20.01.2021

द्वारा पारित/Passed by:- ऍम.एल.मीणा / *M.L.Meena*
अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 36/ADC/ MLM /2020-21

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

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

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

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

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

(1) उक्त अपील की प्रति।

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

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

(1) Copy of accompanied Appeal.

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

विषय: कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice No. V/1(6)CTA/Tech-03/SCN/VM Procon/19-20 dated 20.04.2019 issued to M/s V. M. Procon Pvt. Ltd.,25, 4th Floor, Shukan Mall, Nr. Rajasthan Hospital, Sahibaug, Ahmedabad-380004.

BRIEF FACTS OF THE CASE:

M/s V. M. Procon Pvt., Ltd., 25, 4thFloor, Shukan Mall, Nr. Rajasthan Hospital, Shahibaug, Ahmedabad-380, 004 (hereinafter referred to as the "assesse") is engaged in providing of construction services of Residential Complex and other than Residential Complex was holding Service Tax Registration No. AADCV6093NSD001 and also availing the facility of Cenvat Credit under CENVAT Credit Rules, 2004. The assessee was earlier registered under the Jurisdiction of the Commissioner of Service Tax, Ahmedabad. Consequent to the issue of the Notification No.12/2017-Central Excise (NT) to 14/2017-Central Excise (NT) all dated 09.06.2017, appointing the officers of various ranks as Central Excise officers & reallocating the jurisdiction of the Central Excise Officers and Trade Notice No. 001/2017 dated 16.06.2017 issued by the Chief Commissioner, Central Excise & Service Tax, Ahmedabad Zone, the assessee is now registered under the Jurisdiction of the Commissioner, Central Goods and Service Tax, Ahmedabad North.

2. During the course of audit conducted by the Officers of the Central Tax Audit Commissionerate, Ahmedabad and on verification of the Cenvat credit records, as reflected in Revenue Para 2 of the Final Audit Report No.1590/2018-19 dated 05.04.2019 issued by the Deputy Commissioner, Circle-V, Central Goods and Service Tax, Audit, Ahmedabad, it was observed that the assessee was engaged in the activity of Construction services of Residential Complex and was also availing Cenvat Credit of the Service Tax paid on the services received by them for their construction activity and utilizing the same for payment of Service Tax.

3. It was observed that during the period of audit that the assessee had obtained Building Use Permission/Completion Certificate (hereinafter referred as 'B.U. Permission') for Residential Premises,'Enigma' for Block 'A' and 'B' on 12.09.2014 and for Block 'C' and 'D' on 19.02.2015. It was also observed that out of the said Residential Premises constructed during the period, some of them had been booked and sold after the issuance of B. U Permission by competent authority Ahmedabad Municipal Corporation(AMC).

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

"Section 66E: The following shall constitute declared services, namely;

(e) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation.-For the purposes of this clause,

(I) .... ., ..

(II)

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

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

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

From the above definition, it is clear that sale/transfer of title of immovable property, by way of sale, gift or in any other manner is excluded from the definition of service Therefore, such a sale does not constitute 'Service'.

4.2 A conjoint reading of the above provisions of law makes it explicit that the activity of construction attracts Service Tax, if a part or whole of the consideration towards such construction is received prior to issuance of B.U. Permission. The activity of construction in which the entire consideration is received after B.U. Permission has been kept out of the scope of 'declared services'.

4.3 Accordingly, the assessee is liable to pay Service Tax only for those units, which have been booked/sold before the issue of B.U. Permission dated 12.09.2014 issued for Blocks 'A' & 'B'; and B.U Permission dated 19.02.2015 issued for Blocks 'C' & 'D', under Section 66 of the Finance Act, 1994 read with Service Tax Rules, 1994 and consequentially no Service Tax would be paid for those units which have been sold after the issue of B. U Permission.

5. The builders undertake the construction of the building having different units. All the material, labour and other expenses are incurred in lump sum. However, the agreement for sale (booking) in respect of different units can be at different stage, right from Bhoomi-poojan to various phases of construction or even after completion of construction and obtaining Completion Certificate/B. U. Permission. However, during the course of construction of complex, the builder/ developer utilizes the services of various labour contractors, such as electrical contractors, furniture contractors (for doors/windows), tiles fitting contractors, colour contractors, etc., constituting major part of expenditure incurred by the builder/ developer. In addition, they also utilize certain services such as security service, telephone service, housekeeping service, etc. The builder/developer receives Service Tax paid invoices from such contractors/service providers

and avail the Cenvat Credit of Service Tax paid by the contractors/service providers.

6. The eligibility and admissibility of Cenvat credit flows from the authority of Rule 3 of the Cenvat Credit Rules, 2004 which reads as under:

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

The above definition clearly specifies the class of persons, who are entitled to Cenvat credit, as

(i) Manufacturer or Producer of Final Products and
(ii) Output service provider.

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

6.2 In the typical case of Construction service, service is said to be provided to each individual who books/purchases flats/units/shops, on payment of part/full consideration and not in respect of the entire building constructed. In other words, the builder is agreeing to provide or provide services to multiple service recipients in respect of individual units/shops of the same project. Till the time, an individual units/shops are booked/sold, there is no element of service involved inasmuch as there is no service recipient and the natural corollary that follows is that no service is provided or agreed to be provided. In such a situation, it is service to self and therefore the developer/builder cannot be said to be the provider of output service for the flats/units/shops not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual flat/unit/shop constructed. This is the crux of the matter especially in light of the interpretation of the term 'declared service' at Sec. 65B(22)which read under:

"declared service" means any activity carried out by a person for another person for consideration and declared as such under section 66E".

In other words, the developer/builder is deemed to be the provider of output service only in those cases where the flats/units/shops are booked/ sold prior to obtaining the B. U. Permission from the competent authority. Consequentially, no Cenvat credit can be availed in terms of Rule 3(1) supra, till the time a unit is booked on part/full payment of consideration, as till such time the person indulged in construction cannot be said to be the Service provider and is providing service to self, in so far as the units/shops not booked/sold. Fact remains that the builder is very well aware of the booking status of the individual flats/ units and this leads to his knowledge of the fact whether he is an Output Service Provider for that particular units/shops or otherwise. This position is very clear in light of the provisions of Sec.65B(22) supra to which the builder cannot claim ignorance. Thus, the assessee cannot be held to be an Output Service Provider for the individual units/shops till such time every single units/shops is booked, prior to obtaining Completion Certificate. This is especially so in light of the fact that in the event that the unit is booked after receipt of B. U. Permission, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of B. U Permission, the builder is engaged in providing Construction services to the proposed owner of the unit.

6.3 In a nutshell, till the time units/shops are booked on payment of part/full consideration, no service is provided or agreed to be provided. Thus, the assessee cannot be said to be an Output Service Provider in respect of such units/shops in as much as there is no service recipient for such units/shops and resultantly no service is provided or agreed to be provided.

6.4 In view of the above, it appeared that the assessee is not entitled to take Cenvat credit proportionate to the services utilized for construction of units which have not been booked/sold prior to receiving B.U. Permission, i.e., Units for which the assessee is not an Output Service Provider. Rule 3(1) of Cenvat Credit Rules clearly stipulates that only an output service provider is entitled to take Cenvat Credit.

6.5 It may be generally claimed by the builders that at the time of incurring expenses or availing services, it is not known if it is being used for providing 'output service' or is being used for construction of units/shops sold after receipt of completion certificate, not liable to payment of Service Tax. So far so good, but the builders availing credit of the entire expenses incurred on goods and services, even for those flats sold after receipt of completion certificate and where no service is provided and where no tax is paid, is not in consonance with law. This in itself should have been the cause for the builders not to avail the Cenvat credit, till each individual unit is booked on receipt of consideration, prior to obtaining completion/Building use certificate or in other words, to say that they could have availed the Cenvat Credit only as and when the individual units/shops were booked and that too, prior to obtaining Completion/Building Use Certificate. The assessee has, therefore, wrongly taken the Cenvat Credit, in respect of those units which do not constitute service, in violation of the Rule 3(1) of the Cenvat Credit Rules,

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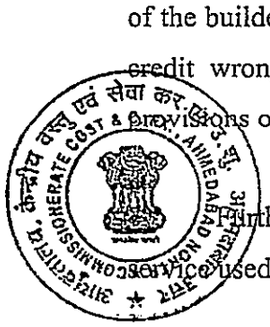
In the case of construction service every project is a differently identifiable business and

the provision of service element would begin on the booking of each individual unit & would cease on completion of the project and obtaining of completion/B.U. certificate, and therefore, as exemplified above no output service is said to be provided till the individual units/shops is booked on payment of part/full consideration, prior to obtaining completion/B.U. certificate. Moreover, as soon as the completion/B.U. certificate is obtained, no service element exists in respect of the units/shops sold/booked thereafter. However, majority of input services are used for the entire project and the Cenvat credit of the tax paid thereon is availed much prior to the completion of the project and obtaining completion/B.U. certificate & is also utilized for payment of Service Tax on the units/shops booked/sold prior to obtaining such certificate Hardly any credit availed, is in balance which would lapse on completion of the project/obtaining of completion certificate. In such a scenario, the exchequer would be defrauded of its legitimate dues in so far as the Cenvat credit of the tax paid on the services used in the construction of units/flats sold after completion/B.U certificate is obtained, is availed, and in which case there is neither any element of service nor any Service Tax is paid.

6.7 To exemplify, a builder starts construction of project having 100 units. All the services of landscaping, works contractor (for construction), electrical fittings, architect service, furniture contractors (for doors/windows), tiles fitting contractors, color contractors, etc., are availed and utilized prior to completion of the project subsequent to which a completion /B. U. certificate is issued. Assuming that Rs.10 lacs of Cenvat credit is involved/availed in the construction of these hundred units, which works out to say Rs.10,000 per unit, assuming all the units are of equal dimensions. Now, if out of 100 units constructed 60 are sold/booked prior to obtaining the completion certificate, output service will be said to be provided on these 60 units only in terms of provisions of Service Tax Act/Rules and Service Tax will be paid on the value of these 60 units only. In fact, no service is provided in respect of the remaining 40 units & no Service Tax is payable/ paid on these units. Consequentially the builder should be entitled to Cenvat credit proportionate to the units in case where output service is provided, i.e. Rs.6 lacs (60 x 10000) and should have availed the same only as and when they provided output service to those persons who booked the flats prior to obtaining completion certificate/B.U. permission. Therefore availing & utilizing entire credit of Rs.10 lacs was neither intended by law nor is in consonance with the provisions of Cenvat Credit Rules. The availment of Cenvat credit in respect of all 100 units while paying Service Tax only in respect of 60 units, goes not only against the will of the statute but also enriches the assessee by permitting him to pay almost all his dues utilizing Cenvat credit, which in fact was never due to him. Permitting the Cenvat credit of all the services used for the entire project would result in double benefit & unjust enrichment of the builders at the cost of exchequer. This cannot be countenanced by law. Therefore, Cenvat credit wrongly availed in excess of the entitlement is required to be recovered under the provisions of Rule 14 of the Cenvat Credit Rules.



Further, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, "input service" means any service used by a provider of output service for providing an output service. Rule 2(1) reads thus:

[(1) "input service" means any service,
(i) used by a provider of output service for providing an output service; or
(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,]

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

8. The Cenvat credit scheme has been introduced with a view to avoid the cascading effect of taxes. The question of cascading effect would not arise in respect of the activity on which no Service Tax is payable. Consequently, the Cenvat credit would not be admissible in respect of such activities which are not chargeable to Service Tax. This analogy is amply specified in the legal statute by virtue of Rule 6(1) of the Cenvat Credit Rules, 2004 which read as under at the material time:

"The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance up to the place of removal or for provision of exempted services except in the circumstances mentioned in sub-rule (2)"

9. The above rule also clarifies the intention of the law-makers to the effect that the assessee is not to be benefitted by Cenvat credit of inputs/input services used in the activity exempted from tax. It is pertinent to note that the provisions of Rule 6 of the Cenvat Credit Rules, 2004 are not applicable to the facts of the instant case since the said Rule deals only with the limited circumstances wherein an assessee is provider of both taxable and exempted output services. However, in the instant case, the assessee is provider of taxable services in respect of only those units booked on full or partial payment which is received prior to obtaining B. U. Permission. The sale of units with full/partial consideration after Completion Certificate' is received does not constitute 'service' at all. Such an activity is entirely out of the scope of 'service' in terms of the definition provided at Section 66B (44). Therefore, the Cenvat Credit in respect of such non-taxable activity not constituting 'service' is not admissible in terms of Rule 3(1) itself.

The text of Rule 6 has been discussed only for the purpose of arriving at the intention of the legislature to the effect that the Cenvat credit would not be admissible in respect of such activities which are not chargeable to Service Tax.

9. Further Section 66B of the Finance Act provides as under:

"SECTION [66B. Charge of service tax on and after Finance Act, 2012.-There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

From the foregoing, it is explicit that Service Tax is levied only on the value of the services provided or agreed to be provided by one person to another and conversely no Service Tax is levied when no service is provided, as in the case where the flats/units/shops are sold after obtaining requisite permission from the competent authority.

10. However, in the instant case, builder/developer has taken Cenvat Credit in respect of services received for the construction of the entire building/complex and the unit-wise segregation of such input services is not possible. Therefore, it is not possible to segregate the Cenvat Credit for each unit since the services of construction, security, etc. are utilized for the entire project. In such circumstances, the best recourse to determine such ineligible Cenvat Credit on a composite project would be to ascertain it on proportionate basis, either based on the number of units, if all the units are of equal dimension or on the basis of constructed area if the units are having different dimensions.

11. In view of the above discussion, it appeared that the builder/developer including the assessee in this case, was eligible to take proportionate credit only for the units booked on payment of consideration, either based on the total area of construction or number of units (if all the units are of equal dimensions).

11.1 In such a scenario, neither undue credit would be availed nor there would be any requirement of recovery of excess credit availed. This will also not entail any financial burden on the builders as they will avail the proportionate credit at the time of booking the flats and the Service Tax will also be paid thereafter on receipt of payment/ advance including Service Tax from the service recipient. On an illustration basis let them assume that a builder proposes to construct 1000 sq. mts. of residential complex and commences construction by utilizing various services. Assuming that 200 sq. mtrs. are booked/sold on part/full payment during the first month of the commencement, the builder can avail 20% of the Service Tax paid on the various services utilized and also can utilize the said credit for payment of Service Tax on the amount so received for booking/sale. This is so because the builder is an Output Service Provider only in respect of 20% of the construction which has been booked/sold. As and when further booking/sale is made the builder can take the subsequent credit proportionately, including the units/shops previously not booked. This is coherently explained hereunder:

Month of commenceme	Total area to be	Service Tax paid on	Are a booked	Total % of area booked	Credit entitled (for the area	Total Credit

nt of services	constructed (Sq. Mtr.)	services utilized during construction (Rs.)	(Sq. Mtr.)	to the total area proposed to be constructed	booked proportionate to total area proposed to be constructed)	availed at the end of the month
(a)	(b)	(c)	(d)	(e)	(f)	(g)
Apr-15	1000	200	100	10	20	20
May-15		400	0	10	40	60
Jun-15		500	200	30	270	330
Jul-15		700	0	30	210	540
Aug-15		800	100	40	500	1040
Sept-15		1500	100	50	1010	2050
TOTAL		4100			2050	

From the above table, it was seen that in the first month of commencement of construction, only 10% of the proposed area to be constructed (1000 sq. mts.) is booked on full/partial payment and, therefore, service is said to be provided in respect of only 10% of the proposed construction. Though Service Tax paid on the services utilized for construction during the month is Rs.200/- the builder would be entitled to take credit only to the extent of 10% of the Service Tax paid on the input services, i.e. Rs.20/-. In the subsequent month though there is no further booking, Service Tax paid on the services utilized in the month is Rs.400/-. As the services used in the second month are also used for the construction of the 10% of the area booked in the previous month, the builder would be entitled to take credit of 10% of the Service Tax of Rs.400/- paid in the second month, i.e. Rs.40/-. Thus, at the end of second month the builder will have availed Cenvat credit to the tune of Rs.60/-, i.e. 10% of the total Service Tax paid (Rs.600/-) till the end of the month, as service is said to be provided only in respect of 10% of the proposed construction. Further, in the third month of construction, assuming another 200 sq. mts. are booked, service is now said to be provided in respect of 30% of the proposed construction area. Assuming the builder has paid Service Tax of Rs.500/- on the input services used in the third month, the builder will be entitled to take Cenvat credit of Rs.270/- i.e. @30% of the Service Tax paid in all the three months (Rs.500/- + Rs.400/- + Rs.200/-), i.e. Rs.330/- less Rs.60/- Cenvat credit already availed till the end of the second month and, therefore, by the end of the third month, he will have availed Cenvat credit equivalent to Rs.330/- i.e. 30% of the Service Tax paid (Rs.1100/-) on the services utilized so far. Accordingly, by the end of the sixth month the builder will be entitled to avail 50% of the Cenvat credit (Rs.2050/-) of the Service Tax paid (Rs.4100/-) on the input services utilized, as by the time 50% of the total proposed construction area is booked on payment of full/partial amount and in which case the service is said to be provided. This should be the scheme of the things, till the time the completion/B.U. certificate is obtained, instead of the builder availing the entire credit of the Service Tax paid on the services utilized, as once the completion/B.U. certificate is received, there is no element of service on the units/shops booked/sold post receipt of the said certificate.

11.2 Even if the assessee takes a stand that they had taken Cenvat Credit in respect of all the services utilized for construction of project/building under the belief that the said project was an 'ongoing concern' and he would be in a position to sell all the units prior to obtaining 'Completion Certificate', the assessee should have paid back the ineligible Cenvat Credit with interest at the time, the 'Completion Certificate' is obtained. At least at the time of obtaining "Completion Certificate", the assessee was aware that they had taken ineligible 'Cenvat Credit in respect of units the sale of which would not constitute a service. Therefore, at least at the time the "Completion Certificate" was obtained the assessee ought to have paid the excess amount of Cenvat Credit availed on the units, the sale of which did not constitute service. Even the said fact of obtaining 'Completion Certificate', by virtue of which the need to pay back ineligible Cenvat credit arose, was never disclosed to the Department. The assesse had suppressed these facts from the Department to illegally avail the Cenvat Credit which was ineligible by the virtue of Rule3 (1) of the Cenvat Credit Rules, 2004.

11.3 In the instant case, the assessee has taken and utilized the CENVAT Credit of the services used for the construction of entire project, i.e., for the units booked/sold prior to obtaining the B.U. permission on which Service Tax was paid, as well as on the units booked/sold after obtaining the B.U. permission and on which no Service Tax was paid and in fact, in which case no service was provided by the assessee. However, no Cenvat credit is admissible for the sales made after obtaining the B.U, permission /completion certificate as no output service is provided in such cases and the services utilized for the construction of the units unsold at the time B.U. permission is obtained, proportionate to the total area constructed cannot be termed as input service and, hence, such portion of Cenvat credit availed and utilized for construction of units sold after obtaining B.U. permission is not admissible under Rule 3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004.

11.4 Therefore, a query memo was issued to the said assesse vide VI/1 (b)-23/IA/C-V/AP-33/2018-19dated 05.03.2019, in which the assessee was asked to reverse the proportionate Cenvat in respect of units of Blocks 'A' & 'B' which remained unsold as on 12.09.2014; and for the units of Block 'C' & 'D' which remained unsold as on 19.02.2015. The assesse, vide reply, received on19.03.2019, furnished details of units sold before BU and after BU, and also provided details of Cenvat Credit availed during the entire project.

12. During the period from April-2013 to March-2015, the assessee has taken total Cenvat Credit to the tune of Rs.94,33,898/- of the Service Tax paid on the services utilized for the construction of the project as per the below mentioned table:

Name of Scheme	Date of BU	Credit taken from Apr-13 to Mar-15	Total Area (Sq. Ft.)	Area in Sq. Feet		Proportion		Proportionate	
				Before BU (taxable)	Remaining after BU (exempted)	Before BU (taxable)	Remaining after BU (exempted)	Before BU (taxable)	Remaining after BU (exempted)

Enigma	12.09.2014 to 19.02.2015	9433898	306196	140675	165521	45.94	54.06	4334196	5099702

As evident from the above table, BU permissions for Blocks 'A' & 'B' was given on 12.09.2014 while the BU permission for Blocks 'C' & 'D' was given on 19.02.2015, by the competent authority. Out of the total built-up area of 306196 Sq. ft., an area of 165521 Sq. ft. was unsold at the time the BU permissions were received. Hence, proportionate Cenvat Credit to the extent of Rs.50,99,702/- as worked out at Annexure 'A' to the show cause notice, availed and utilized for the part of the construction in which no element of service was involved is not admissible as discussed supra.

13. Therefore such Cenvat credit availed by the assessee is found to be availed in contraventions of Rule3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004 with intent to evade the payment of Service Tax, as the said wrong and inadmissible Cenvat credit has been used for payment of Service Tax.

14. Further, Rule 9(6) of the Cenvat Credit Rules, 2004 stipulates that the burden of proof regarding the admissibility of Cenvat credit on input services shall lie upon the manufacturer or provider of output services, taking such credit. In this era of self-assessment, the onus of taking legitimate Cenvat credit has been passed onto the assessee in terms of the said Rule. In other words, it is the responsibility of the assessee to take Cenvat credit only if the same is legally admissible. Therefore, it appeared that there was an intention on part of the assessee to evade payment of Service Tax and they contravened the provisions of Rule 3(1) read with 2(1) of the Cenvat Credit Rules, 2004 and therefore the wrongly availed and utilized input Service credit of Rs.50,99,702/- is liable to be recovered by invoking extended period of five years under provisoto Section 73(1) of the Finance Act, 1994, read with Rule 14 of the Cenvat Credit Rules, 2004. Applicable interest is also to be demanded and recovered from them in terms of Section 75 of the Act ibid.

In the case of Rathi Steel & Power Ltd -2015 (321) ELT200(ALL), the High Court of Judicature at Allahabad held that:

"32. We further find that under Rules, 2004, a burden is cast upon the manufacturer to ensure that Cenvat credit is correctly claimed by them and proper records are maintained in that regard.

33. The assessee, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the Act,

1944 and the rules made there under with an intent to evade the duty.

34. In our opinion, the facts of the present case clearly suggest willful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed there under with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A(1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

Similar view was expressed by the Hon'ble High Court of Judicature for Andhra Pradesh at Hyderabad and held:

'9. The contention of the learned counsel for the assessee that the extended period of limitation of five years for recovery of the duty under the proviso to Section 11 A(1) of the Central Excise Act,1944 would not be available to the Revenue in this case, as the penalty proposed to be levied was dropped, does not hold water. The extended period of five years for recovery of duties either leviedor short-levied arises under various situations such as fraud, collusion, willful mis-statement, suppression of facts or contravention of the provisions of the Act or the Rules made there underwith intention to evade payment of duty. It is no doubt true that the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty [Union of India v. Rajasthan Spinning and Weaving Mills - (2009) 13 SEC 448 = 2009 (238) E. L. T.3 (S. C.)]. But merely because the ingredients for both are the same, it would not mean that in case penalty is not imposed, the duty also cannot be recovered, Once the assessee availed credit under Rule 2(k) of the Rules of 2004, without entitlement it amounts to contravention of the rule with the intention of evading payment and the extended period of limitation would be available to the Revenue, notwithstanding the decision not to purpose penalty upon the assessee."

15. The Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place.

Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the assesse, therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. From the evidences, it appeared that the assessee has knowingly availed ineligible Cenvat Credit with intent to evade payment of Service Tax. The deliberate non payment of duty/ tax and/or availing of ineligible Cenvat Credit and suppression of value of taxable services provided/received is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

16. Further, it appeared that, the assessee has wrongly taken Cenvat credit of tax paid on various services, proportionate to those used in the constructions of units, booked/sold after obtaining BU permission, in as much as they are neither the provider of output service nor are these services (proportionate to the unsold units) used for providing an output service as contemplated in Rule 2 (1) of the Cenvat Credit Rules, 2004. The provisions of the Cenvat Credit Rules, 2004 are explicit in as much as they clearly laid down the provisions for eligibility/ineligibility for availing credit of duty paid on goods & capital goods as well as Service Tax paid on services. What construes "Capital Goods" "Inputs & "Input Services" is well defined under the Rules. Therefore, there cannot be any ambiguity regarding the eligibility for availing Cenvat Credit and the assessee could not have bred any doubt as regards the same. However, the assessee in sheer disregard to the provisions of law availed and utilized ineligible Cenvat credit and, thereby, they contravened the provisions of Rule 3 (1) of the Cenvat Credit Rules, 2004, read with Rule 2(1) of the Cenvat credit Rules, 2004. Further, it appeared that, the event of obtaining of B.U. was never disclosed to the Department and consequent reflecting of the non-taxable value in the ST-3 returns was never brought to the notice of the Department by the assessee. Thus, it appeared that the assessee has suppressed the said facts with intent to evade payment of tax by utilizing such inadmissible Cenvat credit. Moreover, in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the assessee to the department and, therefore, the department would come to know about such wrong availing of Cenvat credit only during audit or preventive/other checks. Therefore, the Government in its wisdom has incorporated the provisions of Sub Rule 5 & 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of Cenvat credit on the manufacturer or output service provider taking such credit. As the wrong and inadmissible credit taken is in contravention of the provisions of the Cenvat Credit Rules, 2004 by resorting to suppression & misrepresentation, the same is required to be recovered under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004, by invoking extended period. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in the case of Lalit Enterprises Vs. CST Chennai, it is held that extended period is evocable when department came to know of Service charges received by appellant on verification of his accounts. Interest at the appropriate rate is also required to be recovered from them under Section 75 of the Finance Act, 1994 read with Rule 14 of the Rules. All the above acts of contravention of the provisions of the Finance Act and Rules framed there under on the part of the assessee have been committed with intent to evade payment of duty and, thereby, they have rendered themselves liable for penalty under Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules,

17. Pre-Show Cause Notice, consultation for Litigation Management and Dispute Resolution, terms of instructions issued from File No 1080/09/DLA/MISC/15 dated 21.12.2015, was granted to the assessee on 10.04.2019 before the Additional Commissioner, Central Tax Audit, Ahmedabad. However, no one appeared on behalf of the said assessee. Subsequently, the

assessee submitted a reply vide letter dated 11.4.2019, wherein it is contended that availment of Cenvat Credit is absolutely legal in accordance with Rule 4(7) of the Cenvat Credit Rules, 2004; that at the time of taking credit there is no existence of any exempted service and, hence, Rule 6 cannot be applied; that in line with Rule 11(4) even if the output service becomes exempted subsequently, credit only in respect of inputs contained in the taxable service is required to be paid whereas there is no provision for payment of Cenvat Credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances.

18. The contentions made by the assessee, vide their reply dated 11.4.2019 does not appear to be acceptable in view of the discussions in the above paras. The provisions of Rule 6 of the Cenvat Credit Rules, 2004 are not applicable to the present case, as the assessee is a provider of taxable services only for those units booked, on full or partial payment, received prior to obtaining B. U. Permission. The sale of units with full/partial consideration, after 'Completion Certificate' is received, does not constitute 'service'at all and is outside the scope of 'service' as defined in Section 66B(44). Thus, the assessee is not eligible to take Cenvat credit of such portion of input services, utilized in an activity which does not constitute "Service" and which is not admissible under Rule 3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004.

19. In view of the above, a Show Cause Notice bearing **F. No.VI/1(b)/CTA/Tech-03/SCN.VM Procon/19-20 dated 20.04.2019** was issued to the assessee called upon to Show Cause as to why:

(i) Wrongly taken and utilized Cenvat credit of Rs.50,99,702/- (Rupees Fifty Lakhs, Ninety-Nine Thousand, Seven Hundred and Two only) (inclusive of Education Cess and Higher Education Cess), as detailed in Annexure-A to the Show Cause Notice should not be disallowed and recovered from the assessee under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004;

(ii) Interest on wrongly availed Cenvat credit of Rs.50,99,702/- should not be charged and recovered under Section 75 of the Finance Act, 1944 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004;

(iii) Penalty should not be imposed upon them under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

DEFENSE SUBMISSION:

20. The assessee, vide their letter received in this office on 29.04.2019 and letter dated 25.11.2020 produced at the time of personal hearing submitted their defense submission as under:

20.1 The noticee denied all the allegations/observations raised in the show cause notice and

state that the show cause notice is not sustainable on the basis of the submissions made below which are independent and without prejudice to each other.

20.2 They stated that the salient issues to be addressed herein as under:

(i) Whether they have not entitled to take Cenvat Credit proportionate to the services utilized for construction of flats/units which has not been booked/sold prior to the completion certificate/BU or not.

(ii) Whether Credit can be allowed to the Noticee under Rule 3 of the CCR, 2004 in such circumstances or not.

(iii) Whether they can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 2004 or not.

(iv) Whether recovery of Cenvat Credit amounting to Rs.50,99,702/- on the basis of reconciliation of income with the books of account without taking fact in to the account is sustainable or not.

(v) Whether extended period can be invokable or not.

(vi) Whether interpretation difference, classification dispute, penalty under section 78 of the Finance Act, can be leviable or not.

20.3 Regarding the allegation that noticee has not entitled to take Cenvat credit proportionate to the services utilized for construction of flats/units which has not been booked/sold prior to the completion certificate/BU or not, they stated that they wanted to draw attention towards the fact that, for the purpose of invoking provisions of Rule 6 of the Cenvat Credit Rules, 2004, in the present set of facts and circumstances, the output service must first be exempt service. That upon receipt of Completion Certificate forthe projects, the output activity of sale of residential units becomes "non service" as per provisions of Section 65B of the Finance Act, 1994 read with definition of the term "exempt service" under Rule 2(e) of the CCR, 2004.

They stated that from the supra provision, it has been clear that if during the impugned period, noticee has been engaged in providing of the taxable & non-taxable service, then as per provision of the rule 6(3), noticee was required to reverse proportionately Cenvat Credit taken during the impugned period which has not been in this case.

They stated that during the impugned period, they have been engaged in the providing of the taxable service & discharge service tax liabilities on that, so there was no question of the reversal of Cenvat credit has been availed during the impugned period.

20.4 On the issue as to whether the Credit can be allowed to them under Rule 3 of the CCR, 2004 in such circumstances or not, they submitted that in the present case, the dispute is limited to credits availed on input services during a time when output service was wholly taxable however, portion thereof became non-taxable on account of receipt of Completion Certificate later on. They explained Rule 3 of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, 2004.

They stated that, a harmonious reading of Rule 3 of the CCR, 2004 read with Rule 6 and Rule 11 of the said Rules will suggest that, eligibility/ entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot bedenied and/or recovered unless specific machinery provisions are made in this regard. So demand of Cenvat Credit reversal was not requisite.

20.5 On the issue of "maintenance of proper separate accounts" as required under Rule 6 of the CCR, 2004, they submitted that from the analysis of all the legal provisions for the purpose of Cenvat Credit in respect of input service, that before obtaining the completion certificate, the service of the noticee was very much taxable during which period the appellant received input service. They explained relevant sub Rule (7) of Rule 4 of Cenvat Credit Rules, 2004.

They stated that from the above rule, it is clear that they are not required to wait till output service is sold to the service recipient. They can take the credit immediately after the day on bill/ challan of input service is received. In the present case, there is no dispute that the noticee have availed the credit after receipt of bill, challan in respect of input service, therefore, the noticee was legally entitled to take the credit on the date after the receipt of service Bills/ Challans. Therefore, the availment of Cenvat Credit by the noticee is absolutely legal and correct in accordance with Rule 4(7) of Cenvat Credit Rules, 2004. At the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. The part of the service was exempted only after obtaining completion certificate.

They stated that they were not required to avail the Cenvat Credit on the input service, if any, received after obtaining the completion certificate. In the present case, they have either not availed the Cenvat Credit in respect of the services received after obtaining the completion certificate in respect of exempted service or availed proportionate credit attributed to the taxable output service.

In case of service becomes exempted at a later stage, unlike the provision for manufactured goods provided under Rule 11(1)(2) and (3), there is no such provision inrespect of the service. The only provision for the service is provided under Sub-Rule (4) of Rule 11. They discussed the Rule 11(4) of the Cenvat Credit Rules, 2004.

They submitted that from the sub rule (4), it can be seen that even if an output service provider

avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no provision for payment of Cenvat Credit equivalent to the input services used in respect of exempted service. Therefore, the Cenvat Credit availed in respect of input service is not required to be paid back under any circumstances.

20.6 Regarding recovery of Cenvat Credit amounting to Rs.50,99,702/- on the basis of reconciliation of income with the books of account without taking fact in to account is sustainable or not, they submitted that they want to draw attention towards the fact that the department has computed recovery of wrongly availed Cenvat Credit for the period Apr-2013 to Jun-2017. Against which they contended that reconciliation is not correct in view of the submission made in above paras. They also relied on the following case laws:

(i) 2013 (31) S.T.R. 673 (Tri. - Bang.) In the CESTAT, South Zonal Bench, Bangalore- S/Shri M.V. Ravindran, Member (J) and P. Karthikeyan, Member (T) Regional Manager, Tobacco Board Versus Commr. Of C. Ex., Mysore Final Order No. 874/2010 and Stay Order No. 429/2010, dated 17-5-2010 in Application No. ST/Stay/215/2009 in Appeal No.ST/369/2009

Demand - Quantification of - Auctioning service - Actual amount received from growers and buyers of tobacco - Issue involved based on factual matrix of calculation of liability of Service Tax needs to be appreciated on reconciliation of figures produced by assessee– Matter remanded for fresh adjudication - Impugned order set aside Section 73 of Finance Act, 1994.[para 6]Appeal allowed.

(ii) 2010 (20) S.T.R. 789 (Tri. - Mumbai) In the CESTAT, West Zonal Bench, Mumbai Shri Ashok Jindal, Member (J) Anvil Capital Management (P) Ltd. Versus Commr. Of S.T., MUMBAI Final Order No. A/39/2010-WZB/C-IV/SMB and Stay Order No. S/6/2010-WZB/C-IV/SMB, dated 1-1-2010 in Application No. ST/S/1655/2009 in Appeal No.ST/237/2009:

Demand - Quantum of - Service tax demand on differential amount between brokerage shown in ST-3 returns and ledger account - Impugned orders containing finding that relevant recordsor documentary evidence not produced by appellant - Reconciliation statement produced and the same requiring examination - Matter remanded for fresh adjudication - Section 73 of Finance Act, 1994. [paras 2, 5, 6]- Case remanded.

(iii) 2010 (19) S.T.R. 242 (Tri. - Ahmd.) in the CESTAT, West Zonal Bench, Ahmedabad[COURT NO. II] Shri Ashok Jindal, Member (J) Commissioner of Service Tax, Ahmedabad Versus PURNI ADS. PVT. LTD. Final Order Nos. A/372-373/2010-WZB/AHD, dated 23-4-2010 in Appeal Nos. ST/154-155/2009:

Demand - Assumptions and presumptions - Short payment of Service tax- Audit detected difference between amounts shown in ST-3 return and balance sheet Finding ofCommissioner

(Appeals) that method adopted for reconciliation of income incomplete andfaulty, sustainable - Receipts held as taxable, without adducing evidence - Tax cannot beassessed merely on assumptions and presumptions – Onusto prove with sufficient evidence not discharged by original authority - Entire demand based on assumption, without evidence - Explanation given by assessee to reconcile differences pointed out by Department, not considered by adjudicating authority -Impugned order upheld - Section 73 of Finance Act, 1994. [paras 7, 8]-Appeals rejected.

(iv) 2009 (16) S.T.R. 63 (Tri. - Chennai) in the CESTAT, South Zonal Bench, Chennai Ms. Jyoti Balasundaram, Vice-President and Shri P. Karthikeyan, Member (T) Sify Technologies Ltd. Versus Commissioner of Service Tax, Chennai- Final Order No. 657/2009, Stay Order No. 504/2009 and Misc. Order No. 309/2009, dated 4-6-2009 in Application Nos. ST/S/56/2009 and ST/EH/42/2009 in Appeal No. ST/82/2009

Demand - Short payment - Demand of Service tax of over Rs.1.86 crores - Details of tax paid on disputed services and liability furnished in reply to show cause notice discrepancies found by adjudicating authority between figures furnished by appellants but no attempt made to verify and ascertain correct figures - Reconciliation possible only after removal of details like realization from exempted services, export of services, sales, etc. -

Variation between figures in reply to SCN and ST-3 returns noticed in impugned order but demand confirmed ignoring one class of variations - Issue stated as arising due to errors in reporting and appellant undertaking to reconcile figures - Matter remanded for fresh adjudication - Section 73 of Finance Act, 1994. [paras 1, 4, 5, 7]: Case remanded.

(v) 2013 (30) S.T.R. 62 (Tri. - Ahmd.) in the CESTAT, West Zonal Bench, Ahmedabad [COURT NO. II] Shri B.S.V. Murthy, Member (T) Bhogilal Chhagulal & Sons Versus Commissioner of S.T., Ahmedabad Final Order No. A/669/2012-WZB/AHD and Stay Order No. S/811/2012-WZB/AHD, dated 10-52012 in Application No.ST/Stay/251/2012 in Appeal No. ST/107/2012:

Demand - Short payment of Service Tax - Difference in value shown in Balance Sheet and declared in ST-3 Returns as per CERA party audit report - Records of relevant period verified and reconciliation of Balance Sheet and ST-3 returns conducted by Service Tax wing also - Tax liability discharged along with interest - HELD : Once records verified, reconciliation conducted and period of short levy covered by verification, confirmation of demand amounts to duplication of demand - No reasons cited for non-acceptance of impugned report and worksheet by lower authorities. Also, amount actually paid lesser and short levy present for subsequent period. Therefore, matter to be considered in light of audit report - Specific observation to be given for reasons of confirmation of amount demanded in CERA party's report if same already verified by Department - Impugned order set aside - Matter remanded for fresh consideration – Section 73 of the Finance Act, 1994. [paras 4, 5]: Appeal allowed.

They submitted that from the cases cited above, it is clear that department has not taken factual fact in to account & raised the recovery of Cenvat Credit availed, which has not been demandable & justifiable, so notice for the recovery of Cenvat Credit has to be quashed/dropped.

21. They further submitted that entire demand is time barred. The show cause notice covers the period of 01.04.2013 to 31.03.2015. The show cause notice has been issued on 12.04.2019. Thus, the show cause notice has invoked the extended period of limitation. They submitted that the extended period of limitation cannot be invoked in the present case, since there is no suppression, willful misstatement on their part. There is no question of suppression or willful misstatement by them. The show cause notice has entirely failed to make out any case of suppression, willful misstatement on the part of the Noticee. The show cause notice is liable to be dropped on this ground also.

22. They further submitted that penalty cannot be imposed under Section 78 of the Finance Act, 1994 in the present case. The Noticee has demonstrated above that they have not suppressed any information from the department and there was no willful misstatement on their part. It is, therefore, clear from the statutory provisions that for imposing penalty under section 78 of the Act, it has to be established that there is a short payment of service tax by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Act or rules made there under with intent to evade payment of service tax. They submitted that the Show Cause Notice has not given any reason whatsoever for imposing the penalty under Section 78 of the Act. The show cause notice merely alleging baldly that there is suppression on the part of the Noticee. The present show cause notice has not brought any evidence/ fact which can establish that the Noticee has suppressed anything from the department. Hence no case has been made out on the ground of suppression of facts or willful misstatement of facts with the intention to evade the payment of service tax. The present case is not the case of fraud, suppression, willful misstatement of facts, etc. and, hence, penalty under section 78 of the Act cannot be imposed. The show cause notice is liable to be dropped on this ground also.

23. They stated that they are entitled to entertain the belief that their activities were not taxable. That cannot be treated as suppression from the department. They relied upon Hon'ble Gujarat High Court's decision in case of Steel Cast Ltd.-2011 (21) STR500 (Guj).

24. They submitted that no case has been made out by the Department that the present demand of service tax is on account of fraud, collusion, and willful mis-statement, suppression of facts or contravention of any of the provisions of Act or rules made there under with intention to evade the payment of service tax. Hence, no interest or penalty under section 76 and 78 of the Act can be imposed on this ground itself. The Show Cause Notice is liable to be dropped on this ground also. The issue involved in the present case is of interpretation of statutory Provisions. For that reason also, penalties cannot be imposed.

25. They submitted that it is a settled principle of law that if a dispute is arising out of

interpretation of the provisions of statute or exemption notification, no penalty can be levied. If at all it is held that the service tax is payable as demanded by the Show Cause Notice, then also it can be said that it is a dispute arising out of interpretation of the provisions of the law and not because of any intentional avoidance of tax. They placed reliance on the following case laws in this regard:

(i) Bharat Wagon &Engg. Co. Ltd. v. Commissioner of C.Ex.,Patna,--- (146) ELT 118 (Tri. - Kolkata);

(ii) GoenkaWoollen Mills Ltd. v. Commissioner of C.Ex., Shillong,2001 (135) EL T 873 (Tri. - Kolkata);

(iii) Bhilwara Spinners Ltd. v. Commissioner of Central Excise,Jaipur, 2001 (129) EL T 458 (Tri. - Del.).

26. They requested for a lenient and to drop the proceeding in the interest of justice.

PERSONAL HEARINGS:

27. Personal hearing was granted to the assessee on 23.07.2019, 28.08.2019, 21.07.2020, 21.09.2020 and 25.01.2020. Shri Vipul Khandar, CA appeared for the personal hearing on 25.11.2020. He stated that in view of his written submission submitted earlier and also submission made today, he requested to take into consideration of all submissions and case laws. He also requested to drop the SCN proceedings.

DISCUSSION AND FINDINGS:

28. I have carefully gone through the records of case, written submissions as elaborated herein above and other related records. I have also considered the arguments made by the assessee during personal hearing.

29. In the instant case, the main issue to be decided by me is as to whether the assessee has wrongly availed and utilized Cenvat credit to the tune of Rs.50,99,702/- proportionately worked out in respect of such portion of input services utilized for construction of residential flats/units which has not been booked/sold prior to the issuance of the completion certificate/BU permission by the competent authority.

30. I find that the assessee is a developer/builder and is engaged in the activity of Construction of Residential Complex services. They were also availing Cenvat Credit of the Service Tax paid on the services received by them for their construction activity and utilizing the same for payment of Service Tax.

31. I further observe that the assessee had undertaken a scheme in the name of "ENIGMA" construction of a residential complex. The assessee has obtained Building Use Permission/Completion Certificate for Block 'A' and 'B' of said complex on 12.09.2014 and for Block 'C' and 'D' of said complex on 19.02.2015. I further note that out of the said Residential Premises constructed, some of the units had been booked and sold after the issuance of B.U.

Permission by the Competent Authority i.e. Ahmedabad Municipal Corporation(AMC).

32. I further find that the assessee has taken and utilized the CENVAT Credit of the services used for the construction of entire project, i.e., for the units booked/sold prior to obtaining the B.U. permission on which Service Tax was paid, as well as on the units booked/sold after obtaining the B.U. permission and on which no Service Tax was paid and in fact, in which case no service was provided by the assessee.

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

"Section 66E: The following shall constitute declared services, namely;

(e) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation.-For the purposes of this clause,

(I) ....

(II)

33.1 When the construction is completed and the B.U. Permission is obtained, what turns out is an immovable property. When such property is sold/transferred after B.U. Permission is received, it is deemed to be sale of immovable property which is specifically excluded from the definition of service, in terms of Section 65(B)(44) of the Finance Act 1994, of which the relevant text reads as under:

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

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

From the above definition, it is clear that sale/transfer of title of immovable property, by way of sale, gift or in any other manner is excluded from the definition of service. Therefore, such a sale does not constitute 'Service'.

33.2 A conjoint reading of the above provisions of law makes it explicit that the activity of construction attracts Service Tax, if a part or whole of the consideration towards such construction is received prior to issuance of B.U. Permission. The activity of construction in which the entire consideration is received after B.U. Permission has been kept out of the scope of 'declared services'.

33.3 Accordingly, the assessee is liable to pay Service Tax only for those units, which have

been booked/sold before the issue of B.U. Permission dated 12.09.2014 issued for Blocks 'A' & 'B' and B.U Permission dated 19.02.2015 issued for Blocks 'C' & 'D', under Section 66 of the Finance Act, 1994 read with Service Tax Rules, 1994 and consequentially no Service Tax would be paid for those units which have been sold after the issue of B. U Permission.

34. I further note that the builders undertake the construction of the building having different units. All the material, labour and other expenses are incurred in lump sum. However, the agreement for sale (booking) in respect of different units can be at different stage, right from Bhoomi-poojan to various phases of construction or even after completion of construction and obtaining Completion Certificate/B. U. Permission. However, during the course of construction of complex, the builder/ developer utilizes the services of various labour contractors, such as electrical contractors, furniture contractors (for doors/windows), tiles fitting contractors, colour contractors, etc., constituting major part of expenditure incurred by the builder/ developer. In addition, they also utilize certain services such as security service, telephone service, house keeping service, etc. The builder/developer receives Service Tax paid invoices from such contractors/service providers and avail the Cenvat Credit of Service Tax paid by the contractors/service providers.

35. The eligibility and admissibility of Cenvat Credit flows from the authority of Rule 3 of the Cenvat Credit Rules, 2004 which reads as under:

RULE 3. CENVAT credit.-(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of the duties, taxes, cess specified in the said rule paid on:

(i) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004.

The above definition clearly specifies the class of persons, who are entitled to Cenvat credit, as

(i) Manufacturer or Producer of Final Products and

(ii) Output service provider.

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

Permission does not constitute service.

35.2 In the typical case of Construction service, service is said to be provided to each individual who books/purchases flats/units/shops, on payment of part/full consideration and not in respect of the entire building constructed. In other words, the builder is agreeing to provide or provide services to multiple service recipients in respect of individual units/shops of the same project. Till the time, an individual units/shops are booked/sold, there is no element of service involved in as much as there is no service recipient and the natural corollary that follows is that no service is provided or agreed to be provided. In such a situation, it is service to self and therefore the developer/builder cannot be said to be the provider of output service for the flats/units/shops not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual flat/unit/shop constructed. This is the crux of the matter especially in light of the interpretation of the term 'declared service' at Sec. 65B(22)which read as under:

"Declared service" means any activity carried out by a person for another person for consideration and declared as such under section 66E".

In other words, the developer/builder is deemed to be the provider of output service only in those cases where the flats/units/shops are booked/ sold prior to obtaining the B. U. Permission from the competent authority. Consequentially, no Cenvat credit can be availed in terms of Rule 3(1) supra, till the time a unit is booked on part/full payment of consideration, as till such time the person indulged in construction cannot be said to be the Service provider and is providing service to self, in so far as the units/shops not booked/sold. Fact remains that the builder is very well aware of the booking status of the individual flats/ units and this leads to his knowledge of the fact whether he is an Output Service Provider for that particular units/shops or otherwise. This position is very clear in light of the provisions of Sec. 65B(22) supra to which the builder cannot claim ignorance. Thus, the assessee cannot be held to be an Output Service Provider for the individual units/shops till such time every single unit/shop is booked, prior to obtaining Completion Certificate. This is especially so in light of the fact that in the event that the unit is booked after receipt of B. U. Permission, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of B. U Permission, the builder is engaged in providing Construction services to the proposed owner of the unit.

35.3 In a nutshell, till the time a units/shops are booked on payment of part/full consideration, no service is provided or agreed to be provided. Thus, the assessee cannot be said to be an Output Service Provider in respect of such units/shops in as much as there is no service recipient for such units/shops and resultantly no service is provided or agreed to be provided.

35.4 In view of the above, I hold that the assessee is not entitled to take Cenvat credit proportionate to the services utilized for construction of units which have not been booked/sold prior to receiving B.U. Permission, i.e., units for which the assessee is not an Output Service

Provider. Rule 3(1) of Cenvat Credit Rules clearly stipulates that only an output service provider is entitled to take Cenvat Credit.

36. Now, I come to the quantification of ineligible CENVAT credit. I find that during the period from April-2013 to March-2015, the assessee has taken and utilized CENVAT Credit to the tune of totally Rs.94,33,898/- of the Service Tax paid on the services received and utilized for the construction of the entire residential project. Therefore, it is not possible to segregate the Cenvat Credit for each unit since the services of construction, security, etc. are utilized for the entire project. In such circumstances, the best recourse to determine such ineligible Cenvat Credit on a composite project would be to ascertain it on proportionate basis, either based on the number of units, if all the units are of equal dimension or on the basis of constructed area if the units are having different dimensions. I further note that BU permissions for Blocks 'A' & 'B' was given on 12.09.2014 while the BU permission for Blocks 'C' & 'D' was given on 19.02.2015, by the competent authority. Out of the total built-up area of 306196 Sq. ft., an area of 165521 Sq. ft. was remained unsold at the time of the BU permissions received. The amount of ineligible Cenvat Credit availed and utilized in respect of the units booked/sold after obtaining the B.U. permission from the AMC, is worked out on proportionate basis, as below:

Name of Scheme	Date of BU	Credit taken from Apr-13 to Mar-15	Total Area (Sq. Ft.)	Area in Sq. Feet		Proportion		Proportionate	
				Before BU (taxable)	Remaining after BU (exempted)	Before BU (taxable)	Remaining after BU (exempted)	Before BU (taxable)	Remaining after BU (exempted)
Enigma	12.09.2014 to 19.02.2015	9433898	306196	140675	165521	45.94	54.06	4334196	5099702

36.1 In view of the above, I hold that the Cenvat Credit to the tune of Rs.50,99,702/- (proportionate basis) availed and utilized for the part of the construction of units, which have not been booked/sold prior to receiving B.U. Permission, is not admissible to them in terms of Rule 3(1) read with Rule 2(1) of the CENVAT Credit Rules, 2004, as discussed supra.

37. As regard the invocation of extended period, I find that the Government has from the very beginning placed full trust on the manufacturers/ service providers and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder, as considerable amount of trust is placed on them and private records maintained by them, for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the

assessee, therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. As discussed in detailed in foregoing paras, the assessee has deliberately availed ineligible Cenvat Credit with intent to evade payment of Service Tax. The deliberate availment of ineligible Cenvat Credit is in utter disregard to the requirements of law and breach of trust deposed on them, and is certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

37.1 I further find that the assessee has wrongly taken Cenvat credit of tax paid on various services, proportionate to those used in the constructions of units, booked/sold after obtaining BU permission, in as much as they are neither the provider of output service nor are these services (proportionate to the unsold units) used for providing an output service as contemplated in Rule 2 (1) of the Cenvat Credit Rules, 2004. The provisions of the Cenvat Credit Rules, 2004 are explicit in as much as they clearly laid down the provisions for eligibility/ineligibility for availing credit of duty paid on goods & capital goods as well as Service Tax paid on services. What construes "Capital Goods" "Inputs & "Input Services" is well defined under the Rules. Therefore, there cannot be any ambiguity regarding the eligibility for availing Cenvat Credit and the assessee could not have bred any doubt as regards the same. However, the assessee in sheer disregard to the provisions of law availed and utilized ineligible Cenvat credit and, thereby, they contravened the provisions of Rule 3 (1) of the Cenvat Credit Rules, 2004, read with Rule 2(1) of the Cenvat credit Rules,2004. Further, the event of obtaining of B.U. was never disclosed to the Department and consequent reflecting of the non-taxable value in the ST-3 returns was never brought to the notice of the Department by the assessee. The assessee has, thus, suppressed the said facts with intent to evade payment of tax by utilizing such inadmissible Cenvat credit. Moreover, in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the assessee to the department and, therefore, the department would come to know about such wrong availing of Cenvat credit only during audit checks. Therefore, the Government in its wisdom has incorporated the provisions of Sub Rule 5 & 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of Cenvat credit on the manufacturer or output service provider taking such credit. Further, these facts only came to the knowledge of the Department only when the Audit was undertaken by the Department. This act of the said assessee is tantamount as willful misstatement and suppressing the facts with an intention to evade service tax payment. As the wrong and inadmissible credit taken is in contravention of the provisions of the Cenvat Credit Rules, 2004 by resorting to suppression & misrepresentation, the same is required to be recovered under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004, by invoking extended period.

In this regard, I place reliance upon the case law of Rathi Steel & Power Ltd.-2015 (321) ELT 200(ALL), the High Court of Judicature at Allahabad held that:

"We further find that under Rules, 2004, a burden is cast upon the manufacturer to ensure that Cenvat credit is correctly claimed by them and proper records are maintained in that

regard.

33. The assessee, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the Act,1944 and the rules made there under with an intent to evade the duty.

34. In our opinion, the facts of the present case clearly suggest willful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed there under with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A (1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

37.3 I further place reliance upon the case law of Mahavir Plastics versus CCE Mumbai, reported in 2010 (255) ELT 241, wherein it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. I also place reliance upon the case law of Lalit Enterprises Vs. CST Chennai, reported in 2009 (23) STT 275 wherein it is held that extended period is evocable when department came to know of Service charges received by appellant on verification of his accounts.

38. In view of the above, I hold that an amount of Rs.50,99,702/- is required to be recovered from the assessee by invoking extended period of five years under proviso to Section 73(1) of the Finance Act, 1994, read with Rule 14 of the Cenvat Credit Rules, 2004, along with applicable interest in terms of Section 75 of the Act ibid read with Rule 14 of Cenvat Credit Rules, 2004.

39. I further find that all the above acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the assessee have been committed with intent to evade payment of service tax and, thereby, they have rendered themselves liable for penalty under Section 78 of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

40. The assessee has submitted a lengthy written submission and relied a large number of case laws in their defence highlighting their stand on the wrong availment of Cenvat Credit, payment of interest, penalty and invocation of extended period. I find that their contentions are baseless in view of the facts in the present case as well as case the facts of the case laws cited by them are also distinguishable and hence, same deserve rejection.

41. The assessee has relied the case of Commissioner Vs Alembic Ltd reported in 2019(29) GSTL 625(Guj) wherein the Hon'ble High Court ruled in favour of the party and stated that they have correctly taken the Cenvat Credit. I find that the case has not been reached finality and an appeal filed by the department has been admitted by the Hon'ble Supreme Court(Principal

Commissioner Vs Shreno Ltd (Real Estate Division) reported in 2020(34) GSTL J 82 (SC).

42. In view of the above findings, I pass the following order:-

ORDER

(I) I confirm the demand of the wrongly availed and utilized Cenvat credit to the tune of **Rs.50,99,702/- (Rupees Fifty Lakhs, Ninety-Nine Thousand, Seven Hundred and Two only)** (inclusive of Education Cess and Higher Education Cess) and order to recover the same from M/s V. M. Procon Pvt. Ltd., Ahmedabad under Section 73(2) of the Finance Act, 1994 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004.

(II) I order M/s V. M. Procon Pvt. Ltd., Ahmedabad, to pay interest as applicable on the aforesaid confirmed demand of wrongly availed and utilized CENVAT credit under Rule 14(1)(ii) of CENVAT Credit Rules, 2004 read with Section 75of the Finance Act, 1994.

(III) I impose a penalty of **Rs.50,99,702/- (Rupees Fifty Lakhs, Ninety-Nine Thousand, Seven Hundred and Two only)** upon M/s V. M. Procon Pvt. Ltd., Ahmedabad,under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78(1) of the Finance Act, 1994.

43. I further Order that in the event the entire amount demanded 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. (III) 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.

44. The Show Cause Notice bearing **F. No.VI/1(b)/CTA/Tech-03/SCN/VM Procon/19-20 dated 20.04.2019** is disposed-of in the aforesaid manner.

(M. L. Meena)
Additional Commissioner,
CGST & CEx., Ahmedabad-North.

F. No.STC/15-15/OA/2019 - Date : 20.01.2021.

By Regd.A.D.

To,
M/s V. M. Procon Pvt. Ltd.,
25, 4th Floor, Shukan Mall,
Nr. Rajasthan Hospital,
Shahibaug, Ahmedabad-380 004

Copy to:
1. The Commissioner, CGST & Central Excise, Ahmedabad North.
2. The Deputy Commissioner, CGST, Division-II, Ahmedabad North.
3. The Superintendent, CGST & Central Excise, Range-I, Division-II, Ahmedabad North.
4. Guard File.