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,
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निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN 20210264WT000051035C

फा.सं./F.No. STC/15-17/OA/2019

आदेश की तारीख़/Date of Order :- 01.02.2021
जारी करने की तारीख़/Date of Issue :- 01.02.2021

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*
संयुक्त आयुक्त / Joint *Commissioner*

## मूल आदेश संख्या / Order-In-Original No. 40/JC/ MT /2020-21

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, 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. VI/1(b)CTA/Tech-08/SCN/Bakeri/19-20 dated 22.04.2019 issued to M/s Bakeri Urban Development Private Limited, 1st Floor Sanskrut, Nr. Old High Court Road, Off Ashram Road, Ahmedabad-380009.

Brief Facts of the Case:

M/s Bakeri Urban Development Private Ltd, 1st Floor Sanskrut, Nr Old High Court Road, Off. Ashram Road, Ahmedabad, Gujarat-380009*(hereinafter referred to as the 'assessee')* was allotted Service Tax Registration No AAACH4674CSD001 under the categories of Construction of Residential Complex Service and Construction of Other Than Residential Complex service, Other Taxable Services – other than the 119 listed, etc., under Sections 65 and 68(2) of the Finance Act, 1994. The assessee was engaged in Construction service and is paying service tax after claiming abatement under Construction of Residential Complex Service and Construction of Other than Residential Complex Service. They were also availing the facility of Cenvat Credit under CENVAT Credit Rules, 2004.

2 Audit of the Service Tax records of the assessee was conducted by the officers of the Central Tax Audit, Ahmedabad, for the period from October 2013 to June 2017 and the following objections remained unsettled :-

**Revenue Para 3 : Wrong Availment of Cenvat Credit by merging Education Cess and Secondary & Higher Education Cess into Basic S.Tax Credit**

3.1 On scrutiny of ST-3 returns for the period April, 2015 to –Sep 2016, it was noticed that the assessee had utilized the closing balance of Rs. 54,434/- of Education Cess and Rs. 27,222/- Secondary & Higher Education Cess by merging the same in the Basic Service Tax Credit. It appeared that the assessee has wrongly availed Cenvat Credit to the tune of Rs. 81,656/- in Financial Year 2015-16

3.2 The said assessee was asked to reverse the Cenvat Credit, as such transfer and utilization of credits of Education Cess and Secondary & Higher Education Cess were not allowed under the Cenvat Credit Rules, 2004. They vide letter dated 15.04.2019 submitted that Cess is an integral part of Service Tax and in terms of Rule 3 of the Cenvat Rules, credit of Education Cess is available to the assessee, and has been rightly availed and utilized.

3.3 Rule 3(7)(b) of the Cenvat Rules reads as under:

(b) CENVAT credit in respect of -

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(ii) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(iii) the education cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

(iiia) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);]

(iv) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under items (i), (ii) and (iii) above;

(v) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(vi) the education cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and]

(vii) the additional duty of excise leviable under [section 85 of the Finance Act, 2005 (18 of 2005)],

shall be utilised towards payment of duty of excise or as the case may be, of service tax leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 or the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), or the education cess on excisable goods leviable under section 91 read with section 93 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007) or the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003), or the education cess on taxable services leviable under section 91 read with section 95 of the said Finance (No. 2) Act, 2004 (23 of 2004), or the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007), or the additional duty of excise leviable under section 85 of the Finance Act, 2005 (18 of 2005) respectively, on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves, if such inputs are removed as such or after being partially processed or on any output service :]

[**Provided** that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

**Provided** further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services :]

3.4 1st proviso to Rule 3(7)(b) of the Cenvat Rules provides that the Cenvat Credit of education cess availed on excisable goods and taxable services can only be utilized either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services. Similarly, 2nd proviso states that the credit of Secondary & Higher Education Cess on excisable goods and the Secondary and Higher Education Cess availed on taxable

services can only be utilized for payment of Secondary & Higher Education Cess on excisable goods or for the payment of Secondary & Higher Education Cess on taxable services. In view of the above provisos it is felt that a restriction has been placed on utilization of the education cess (EC) and the secondary & higher education cess (S & HEC) availed on taxable services and such credit of EC and S & HEC can be utilized only against payments for EC and S & HEC on taxable services and cannot be utilized towards payments of basic Service Tax. Further, the assessee had not provided any documents evidencing the reversal of Cenvat Credit wrongly utilized by them. The wrongly utilized Cenvat Credit of Education Cess and Secondary & Higher Education Cess amounting to Rs 81,656/- required to be demanded and recovered from them.

3.5 It, appeared that assessee by merging and utilizing the credit of Rs. 54,434/- of Education Cess and Rs. 27,222/- of Secondary & Higher Education Cess in the basic service tax credit, has contravened the provisions of:

- 1st and the 2nd proviso to Rule 3(7)(b) of the Cenvat Rules as they have failed to reverse the education cess and secondary & higher education cess, wrongly utilized towards the payment of basic duty

3.6 The assessee had not disclosed to the department in any of the records/returns that they had utilized Cenvat Credit of Education Cess and Secondary & Higher Education Cess towards the payment of basic Service Tax. This fact came to the knowledge of the department only during audit. The assessee refused to reverse the Education Cess and Secondary & Higher Education Cess wrongly merged in service tax credit and also utilized towards the payment of basic service tax, in violation of the 1st and 2nd provisoto Rule 3(7)(b) of the Cenvat Rules.

3.7 In view of the above, it appeared that the assessee has suppressed the material facts from the department with an intent to evade payment of duty by not reversing the wrongly utilized Cenvat Credit and accordingly, the proviso to Section 73(1) of the Act read with Rule 14(1)(ii) of the Cenvat Rules is applicable for invoking the extended period limitation, for demand and recovery of the wrongly utilized Cenvat Credit of Education Cess and Secondary & Higher Education Cess, of Rs 81,656/-. As they had not reversed the wrongly utilized Cenvat Credit of Rs 81,656/-, it appeared that interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Act read with Rule 14(1)(ii) of the Cenvat Rules. It appeared that by the act of non-reversal of the Cenvat Credit wrongly utilized by them, in contravention to the 1st and 2nd proviso of Rule 3(7)(b) of the Cenvat Rules, and by not disclosing these facts in their returns, they suppressed the material facts with an intention to utlize such wrongly availed Cenvat Credit for payment of Service Tax. Therefore, it appeared that the assessee in addition to the reversal of Cenvat Credit along with interest would also be liable for penal action under the provisions of Sections 78(1) of the Act read with Rule 15(3) of the Cenvat Rules, 2004.

**Revenue Para No 2 – Wrong availment of Cenvat Credit on ineligible input services**

On verification of the records, it was observed that the assessee was engaged in the activity of Construction services of residential complexes 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.

4.2 It was also observed that out of various Residential Units constructed during the period, some of them had been booked and sold after the issuance of the Completion Certificate by competent authority.

5.1 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 such declared service is Construction Services and the relevant text of the statute reads as under:

*Section66E: The following shall constitute declared services, namely :—*

*a)* ------

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

***Explanation.**—For the purposes of this clause,—*

*(I)* .....

*(II)* .....

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

5.3 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 Completion Certificate/Building Use permission. The activity of construction, in which the entire consideration is received after Building Use Permission, has been kept out of the scope of "Declared Services".

5.4 Accordingly, the assessee is liable to pay Service Tax only for those Residential Units/Flats, which have been booked /sold before the issue of Building Use (BU) Permission dated 19.10.2013, 05.04.2014, 06.02.2015, 29.03.2016 in respect of various blocks of Swara Scheme, Building Use (BU) Permission dated 09.01.2014, 15.03.2014, 27.05.2014, 26.12.2014, 01.07.2015 in respect of various blocks of Swareet Scheme, Building Use (BU) Permission dated 25.12.2015 in respect of Serenity Proximus Scheme and Building Use (BU) Permission dated 30.06.2017 in respect of Serenity Pastures Scheme, under Section 66 of the Finance Act, 1994 and consequentially, no Service Tax would be paid for those Residential Units/Flats which have been sold after the issue of B. U. Permission.

6. The builders undertake the construction of the building having different Residential Units/Flats. All the material, labour and other expenses are incurred in lump sum. However, the agreement for sale (booking) in respect of different units/flats can be at different stages, 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 contractor such as electrical contractors, furniture contractors (for doors/ windows), tiles fitting contractors, colour contractors, *etc.*, constituting major part of expenditure incurred by the builder/developer. In addition, they also utilize certain services such as security service, telephone service, housekeeping service, *etc.* The builder/developer receives Service Tax paid invoices from such contractors/service providers and avails the Cenvat Credit of Service Tax paid by the contractors/service providers.

7. The eligibility and admissibility of Cenvat Credit flows from the authority of Rule 3 of the Cenvat Credit Rules, 2004, applicable for the period prior to 1.4.2016, 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.

7.1 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 flat/unit/shop, 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 "Completion Certificate" does not constitute service.

7.2 In the typical case of Construction service, service is said to be provided to each individual who books/purchases flats/units, 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 flat/unit of the same project. Till the time, an individual flat/unit is 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 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 constructed. This is the crux of the matter especially in light of the interpretation of the term "Declared Service" at Section 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".*

7.3 In other words, the developer/builder is deemed to be the provider of output service only in those cases, where the flats/unitsare booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) *supra*, till the time a flat/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 flats/units 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 flat/unit or otherwise. This position is very clear in light of the provisions of Section-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 flat/unit till such time every single flat/unit 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 Completion Certification, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of Completion Certification, the builder is engaged in providing Construction services to the proposed owner of the unit.

7.4 In nutshell, till the time a flat/unit is 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 flats/units in as much as there is no service recipient for such flats/units and resultantly no service is provided or agreed to be provided.

7.5 Therefore, it appeared that the assessee is not entitled to take Cenvat Credit proportionate to the services utilized for construction of flats/units which have not been booked/sold prior to receiving Completion/B.U. Certificate, 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.

8. Generally, the builders are claimed 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 flats/units sold after receipt of completion certificate, not liable to payment of Service Tax. But the builders availing credit of the entire expenses incurred on goods and services, even for those flats/units 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 to not 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 flat/unit was booked and that too prior to obtaining Completion/BuildingUse Certificate. The assessee has therefore, wrongly taken the Cenvat Credit, in respect of those units/flats which do not constitute service, in violation of the Rule 3(1) of the Cenvat Credit Rules, 2004.

8.1 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 and would cease on completion of the project and therefore, as exemplified above no output service is said to be provided till the individual flat/unit 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 flats/units sold/booked thereafter. However, majority of input services are used for the entire project and the Cenvat Credit of the tax paid there on is availed much prior to the completion of the project and obtaining Completion/B.U. Certificate and is also utilized for payment of Service Tax on the flats/units 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.

8.2 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 lakhs 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 units 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 lakhs (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 and utilizing entire credit of Rs.10 lakhs 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 and 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,2004.

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

*[(l) "Input Service" means any service, -*

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

*(ii) usedby 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,*

9.1 The assessee is not an Output Service Provider in respect of the flats/units, which have not been booked/sold, on the date the Completion Certificate/B.U. Permission is received. Resultantly, the portion of services utilized for construction of such flats/units would not qualify as "Input Service" in as much as such portions of services have not been utilized for providing 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".

10. 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. 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 definition provided at Section 65B(44) of the Finance Act, 1994. Therefore, the Cenvat credit in respect of such non-taxable activity not constituting 'service' is not admissible in terms of Rule 3(1) of the Cenvat Credit Rules, 2004 for the period prior to 1.4.2016.

11. With effect from 1.4.2016, Rule 2 (e) of the Cenvat Credit Rules, 2004 reads as under:

[(e) "exempted service" means a -

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under section 66B of the Finance Act; or

(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

11.1 The relevant text of Rule 6 of the Cenvat Credit Rules, 2004 after 1.4.2016, reads as under:

RULE 6. [Obligation of a manufacturer or producer of final products and a [provider of output service]]. — [(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be :

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

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

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

*Explanation 3.* - For the purposes of this rule, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994 [provided that such activity has used inputs or input services].

*Explanation 4.* - Value of such an activity as specified above in Explanation 3, shall be the invoice/agreement/contract value and where such value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Finance Act, 1994 and the rules made thereunder.]

[(2) A manufacturer who exclusively manufactures exempted goods for their clearance upto the place of removal 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 input services.]

[(3) (a) A manufacturer who manufactures two classes of goods, namely :-

(i) non-exempted goods removed;

(ii) exempted goods removed;

Or

(b) a provider of output service who provides two classes of services, namely :-

(i) non-exempted services;

(ii) exempted services,

shall follow any one of the following options applicable to him, namely :-

[(i) pay an amount equal to six *per cent* of value of the exempted goods and seven *per cent.* of value of the exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period; or]

(ii) pay an amount as determined under sub-rule (3A) :

11.2 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 are sold after obtaining requisite permission from the competent authority.

11.3 Therefore, after 1.4.2016, service, on which no service tax is leviable under section 66B of the Finance Act has been considered as exempted services under the provisions of Rule 2(e)(2) of the Cenvat Credit Rules, 2004. The Explanation 3 inserted to Rule 6(1) of the Cenvat Credit Rules says that exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994 [provided that such activity has used inputs or input services].

11.4 From the foregoing, it appeared that after 1.4.2016, the assessee is liable to follow the provisions of Rule 6 of the Cenvat Credit Rules, 2004 for reversal of Cenvat credit availed by them on which no service tax was leviable.

12. 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.

13. In view of the above, 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). 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. To illustrate, if a builder proposes to construct 1000 sq. mts. of residential complex and commences construction by utilizing various services. Assuming that 200 sq.mts. 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 flats/units previously booked. This is coherently explained hereunder:

| Month of Commencement of Construction | Total area to be constructed (sq. mts.) | Service Tax paid on services utilized during construction (Rs.) | Area booked (sq. mts.) | Total % of area booked to the total area proposed to be constructed | Credit entitled (for the area booked proportionate to total area proposed to be constructed) | Total Credit 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 |
| Sep-15 | | 1500 | 100 | 50 | 1010 | 2050 |
| | | 4100 | | | 2050 | |

14. From the above table, it is 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 service element of service on the flats/units booked/sold post receipt of the said certificate.

15. Even if the assessee had taken Cenvat Credit in respect of all the services utilized for construction of project/building, 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 assessee 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 prior to 1.4.2016 and under Rule 6 of the Cenvat Credit Rules, 2004 after 1.4.2016.

16. It appeared from the details 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. 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 flats/unitssold after obtaining B.U. Permission is not admissible under Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 for the period prior to 1.4.2016 and under Rule 6 of the Cenvat Credit Rules, 2004 for the period after 1.4.2016.

17. The assessee has availed total Cenvat Credit of Rs.8,50,43,807/- of Service Tax paid on services utilized for the construction of the projects in respect of Swara, Swareet, Serenity Proximus and Serenity Pastures Schemes and the proportionate Cenvat Credit liable to be reversed by them for different periods is as shown below :

| Name of the Project- | Serenity Pastures | Serenity Proximus | Swara | Swareet | Total |
|---|---|---|---|---|---|
| Total Area of the units of Whole Project (Sq. feet) | 2620341 | 1420056 | 398570 | 352425 | 5461903 |
| Area of units Sold Before BU on which Cenvat is eligible | 1757988 | 890505 | 231975 | 262900 | 3813879 |
| Area of Unsold Units as on BU date on which Cenvat not eligible | 862353 | 529551 | 166595 | 89525 | 1648024 |
| Total Cenvat Credit availed for the entire project | 3972481 | 5111952 | 9110182 | 12303015 | 85043807 |
| Eligible Cenvat Credit units sold before BU | 2665139 | 3205661 | 5302292 | 9177733 | 74897003 |

| | | | | | |
|---|---|---|---|---|---|
| Ineligible Cenvat Credit on units unsold as on BU date | 1307342 | 1906291 | 3807890 | 3125282 | 10146804 |

18. As evident from the above table, proportionate Cenvat Credit to the extent of Rs. 1,01,46,804/-, availed and utilized for the part of the construction in which no element of service was involved is not admissible as discussed supra. Therefore, such Cenvat Credit is found to have been availed by the assessee in contravention of Rule 3(1) read with Rule 2(l) of the Cenvat Credit Rules, 2004 prior to 1.4.2016 and in contravention of Rule 6 of the Cenvat Credit Rules, 2004 post 1.4.2016, 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.

19. Vide letter dated 12.4.2019 the Department had asked the assessee to reverse the proportionate ineligible Cenvat Credit. The assessee vide their letter dated 15.04.2019 has submitted that the CENVAT Credit has been availed as per the prevailing provisions of CENVAT Credit Rules, 2004 at the appropriate time and in respect of taxable output services. At the time of availing of such credit, the assessee did not receive completion certificate and it is not practically possible / feasible to anticipate level of Post BU sales. Further, there is no rule in the CENVAT Credit Rules, 2004 which requires the assessee to reverse the credit once availed as per the legitimate process.

20. Further, Rule 9(6) of Cenvat Credit Rules, 2004 stipulates that the burden of proof regarding the admissibility of Cenvat Credit on input services shall lie upon the manufacturer or provider of output services, taking such credit. In this era of self-assessment, the onus of taking legitimate Cenvat Credit has been passed on the said 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 is intention to evade payment of Service Tax and they have contravened the provisions of Rule 3(1) read with 2(l) of the Cenvat Credit Rules, 2004 & Rule 6 of the Cenvat Credit Rules, 2004 and therefore, the wrongly availed and utilized input Service Tax Credit of Rs.1,01,46,804/-is liable to be recovered by invoking extended period of five years under proviso to Section 73(1) of the Finance Act, 1994, read with Rule 14(1)(ii) 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* read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004.

21. 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. 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 are in utter disregard to the requirements of law and breach of trust deposed on them, and are certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime.

22. The assessee appeared to have taken ineligible Cenvat Credit of tax paid on various services, proportionate to those used in the constructions of flats/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 flats)used for providing an output service as contemplated in Rule 2 (l) of Cenvat Credit Rules, 2004. The provisions of the Cenvat Credit Rules, 2004 are explicit in as much as they clearly lay down the provisions for eligibility/ineligibility for availing credit of duty paid on goods and capital goods as well as Service Tax paid on services. What construes "Capital Goods", "Inputs" and "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(l) of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, as discussed above. 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. 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 Rules 5 and 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of Cenvat Credit on the 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 and misrepresentation, the same is required to be recovered under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) 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 case of *M/s. Lalit Enterprises Vs. CST Chennai*, it is held that extended period is invocable when department came to know of Service charges received by appellant on verification of his accounts. Interest at the appropriate rate is also required to be recovered from them under Section 75 of the Finance Act, 1994 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004. All the above-mentioned acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the assessee have been committed

with intent to evade payment of duty and thereby they have rendered themselves liable for penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

23. Therefore, M/s Bakeri Urban Development Private Limited, 1st Floor Sanskrut, Nr Old High Court Road, Off. Ashram Road, Ahmedabd, Gujarat-380009, were called upon to show cause to the Additional/Joint Commissioner of Central GST, Ahmedabad North, as to why:-

(i) Wrongly taken and utilized Cenvat credit amounting to **Rs.1,01,46,804/- (Rupees One Crore One Lakh Forty Six Thousand Eight Hundred and Four Only)** should not be disallowed and recovered from them, under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules,2004 by invoking extended period of limitation;

(ii) Wrongly taken and utilized Cenvat credit amounting to**Rs.81,656/- (Rupees Eighty One Thousand Six Hundred and Fifty Six Only)** should not be disallowed and recovered from them, under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules,2004 by invoking extended period of limitation;

(iii) Interest should not be charged and recovered under Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 ; *and*

(iv) 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.

Defence Reply:

24. Vide their letter dated 06.01.2021, M/s.Bakeri Urban Development Pvt. Ltd stated that - They denied all the allegation leveled in the show cause notice and stated that no Service Tax, interest and penalty are payable by them. They stated that the Core issue raised by the Department in the Notice is that they have availed Credit of Rs. 8,50,43,807 during the period and utilised the same for providing taxable services of construction of complex. It is the contention of Department that the credit eligibility to them shall be restricted to the proportion of constructed area sold prior to receipt of Completion Certificate i.e. 38,13,879 sq ft out of aggregate constructed area of 54,61,903 sq ft and credit in proportion to the area sold after receipt of Completion Certificate shall be required to be reversed.

25. They stated that the Audit Officer is patently wrong and contrary to the mechanism of Declared Services in so far as it concerns clause (b) of Section 66E of the Act. As it is well known that prior to 1st July, 2012 the Service Tax was levied based on a selective approach of taxation whereby only such services were taxed which were not specifically included in the list of taxable services. However, in order to widen the scope of taxation, Government had shifted the whole of the approach of taxation from selective to comprehensive and thereby all the services were made taxable w.e.f. 1st July, 2012 except those were declared to be non-taxable or exempt. Keeping the dichotomy of both the approaches of taxation in mind, it is required to analyse the definition of taxable service as given in clause (44) of Section 65B read with

definition of Declared Services as given in clause (b) of Section 66E of the Act. They explained the relevant parts of the said provisions.

26. They stated that the definition of 'Service' is comprehensive in nature and exhaustively and predominantly crafted by legislature to align it with the comprehensive approach of taxation adopted in the country from 1st July, 2012. Any activity carried out by one person for another for consideration including declared service is what the service is except the cases where activity involves mere transfer of titles. This implies that all the activities for consideration shall be primarily regarded as service unless it falls into any of the excluded categories. Moreover, clause (b) of Section 66E which defines Declared Services as all constructions of complex, building or civil structures except where the entire consideration is received after receipt of the completion certificate. Comprehensiveness is the common thread running in both the definitions. It is therefore required to deduce that if the activity does not fall into exceptions specifically carved out in the definition, it shall be deemed as service. Thus, as per conjoint reading of both the definitions in light of given understanding, leads to an unequivocal conclusion that unless and until the Builder receives completion certificate from appropriate authority and consideration is wholly received thereafter, the activity carried out by him shall be regarded as Service. It will be out of proportion to hold a view that the Developer / Builder will be building a property for other than sale and if not so, it is corollary to deduce that the activity of the Developer / Builder, until the completion certificate is actually received, is intended to construct and sale the unit prior to receipt of completion certificate.

27. They stated that forgoing submission and position of law as it stood, it may be appreciated that the contention of revenue is completely contrary thereto and hence liable for rejection. They emphasized that they have been paying Service Tax in respect of the units booked prior to receipt of the completion certificate for an aggregate area of 5,64,608 out of total area of 6,29,523 sq ft. They stated that as much as 93% of the total area was booked prior to the receipt of completion certificate and deemed as taxable services. Having the given fact, the contention of the Audit fails to hold ground in factual matrix.

28. They stated that the contention of the Audit that the Builder / Developer is not the provider of output service until such time every single unit is booked prior to receipt of completion certificate. Reason ascribed by the Audit in support of their contention is that until unit is booked builder is providing service to self and therefore cannot be considered as Service Provider.

29. They submitted that the contention as well as ratio given by Department in the SCN are completely arbitrary and imaginary. Whether or not the builder / developer is a service provider and consequently provider of output service depends upon the very fact as to whether the said builder / developer is engaged into any activity resulting into taxable service or not. Position of builder / developer as provider output service is dependent upon overall activity undertaken by it and not required to be seen *qua* each unit being sold by it. Phrase "provider of output service" has not been defined anywhere in the Act or the Rules and therefore it shall be understood with its natural meaning ascribed in ordinary course. Thus provider of output service is a person who

is engaged into any activity carried out by one person for another for consideration resulting into taxable service. "Output Service" has been defined in Rule 2(g) of the Rules as *"any service provided by a provider of service located in the taxable territory..."*. Definition as given in clause (g) supports to the interpretation advanced by them that the provider of output service is a person who provides service. Important point which emerges here is that the reference to words "provider of output service" as used in Rule 3, due to which it assumes significance over the present case, is a reference to the person rather than the service. Evaluation of the phrase shall be carried out *qua* the person who is venturing into such activity and not *qua* individual activity he has undertaken. If the person is said to be a provider of output service he remains so irrespective and notwithstanding he undertakes other activities not resulting to taxable service. The argument of the Department that the builder / developer cannot be said to be provider of output service completely devoid of merit. They invited reference to the definition of "assessee" as given in Section 2(7) of the Act. It has defined "assessee" as a person liable to pay the service tax and includes his agent. This undoubtedly supports the argument placed on record by them that the provider of output service is a reference *in personam* and not *in rem.* Hence, once the person is engaged into provision of output service i.e. construction of unit prior to receipt of completion certificate or intending to construct and sale at least one unit prior to receipt of completion certificate, it is required to be deemed as provider of output service and no cognizance is to be taken for other transactions whether or not resulting into taxable service.

30. They stated that fallacy transpiring from the contention of the Department which deserves discussion at this juncture, is that builder / developer is not deemed as provider of output service until the unit is booked prior to receipt of the completion certificate. If the contention of Department is literally accepted it implies that builder / developer shall not avail CENVAT Credit unless and until the first unit is booked. Presuming that the builder / developer has commenced the activity of construction by procuring inputs and input services i.e. cement, steel. Labours, machineries etc, however could not attract any buyer. In such circumstances, the builder / developer shall not take credit as no sale has been effected by the builder / developer. In the present case they had availed credit in respect of the input services from time to time which *inter alia* included credit availed in the nascent stage of its operations where there was no booking would have been received. However, nowhere in the Notice, had challenged admissibility of such credit availed prior to receipt of the first booking. Moreover, it can be submitted that with the given contention of Department, no credit can be availed by the manufacturer while setting up of factory nor he shall be able to take credit in respect of productions of goods until the said goods are actually sold. It is needless to emphasize that law of CENVAT Credit under Central Excise as well as Service Tax has not been implemented. Availing of CENVAT Credit only upon actual sale of the goods / provision of service for which the inputs / input services in respect of which the credit has been taken, are actually used, is not *sine qua non* as per CENVAT Credit Rules, 2004. Hence, the condition envisaged by Department is not legally acceptable.

31. They submitted that the contention of Department that service is self service until booking of the unit prior to completion certificate is suffering from severe infirmity. Concept of self-service in case of Real Estate Developers had been done away by the Parliament in the year 2010 since creation of a deeming fiction in order to bring transactions of real estate developers within its fold. Pursuant to such an amendment, it cannot be inferred that the services were self-services until receipt of booking money. Contention of Department is arbitrary and weird in nature. It can be exemplified with the help of an illustration. A builder has begun construction of a building comprising of 5 floors. Builder could not receive booking of first floor until completion of the construction first four floors. In such a scenario, it is required to be held that the builder had self-consumed the services of construction of first floor according to the theory of Department. At a later stage but before receipt of completion certificate, the builder could receive the booking of first floor and hence the same will change the contention that the services were self-consumed. If the services were self-consumed at once it shall remained as self-service forever and no change can take place subsequently. Very contention of Department is completely capricious in nature and contrary to the position of law as it stood since its inception. Therefore, they stated that the SCN is arbitrary and illegal and therefore, may not be considered.

32. They invited reference to Para 6.3 of the SCN wherein it was stated that the Builder / Developer cannot be said to be a provider of output service but with a different reasoning. It was contended that there is no service recipient as regards the units sold after receipt of completion certificate and therefore the Builder / Developer is not provider of output service. They submitted that the contention Department is wrong and deserves no further refutation. They submitted that being no recipient of service as regards units sold post receipt of completion certificate shall not have any impact over the status of the builder / developer and will not be any deterrence.

33. They stated that the contention of the Department is completely arbitrary and contrary to the legal position and utterly overlooked a conducive aspect that as per the provisions of Rules, the credit is to be availed at the time of receipt of invoice of input services or within a specified period from the date of invoice. There is no provision in the Rules which requires or allows the provider of output service to avail credit at a later stage. No specific provision is made in the Rules in respect of the Real Estate Developers to avail credit at the time of receipt of booking prior to completion certificate. They invited reference to provisions of rule 3(1) and sub-rule (7) of rule 4 of Cenvat Credit Rules, 2004.

34. They invited attention to the decision of Hon'ble Supreme Court in case of **CUS v. Dilip Kumar & Company – 2018 (361) ELT 577** wherein it is clearly laid down that *"Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption"*. Also relied on the decisions of Hon'ble Supreme Court in case of Bansal Wire Industries Ltd v. State of UP – 2011 (269) ELT 145 (SC) and Baidyanath Ayruved Bhawan (P) Ltd v. Excise Commissioner – 1999 (110) ELT 863 (SC). They stated that Hon'ble Supreme Court has laid down in case of Gwalior Rayon Silk Manufacturing Co. Ltd v. Custodian of Vested Forest that the language of legislature gives

the intention of making the statute. As a consequence a construction that requires for its support some addition or substitution of words, of which results in rejection of words as meaningless has to be avoided. Therefore they submitted that in absence of the specific condition as to restrict the availing of credit by the builders / developers, other than such specified in rule 4(7) shall not be read and must not be allowed to be read.

35. They submitted that the condition being contemplated in the Notice is contrary to the legislative intent too. It is proven jurisprudence that legislature cannot be presumed ignorant. Hon'ble Supreme Court has held in case of **Shree Bhagwati Steel Rolling Mills v. CCE – 2015 (326) ELT 209** that the parliament is presumed to know law when it enacts particular piece of legislation. Appropriate machinery for reversal / restriction of CENVAT Credit has been incorporated in the rules while its enactment as well as later stage. They invited attention to Rule 6(3) wherein appropriate machinery has been incorporated for reversal of credit part of which culminates into non-taxable activities and also to Rule 6(4) whereby credit of capital goods was completely denied if used exclusively for providing exempted services. However, full amount of credit was allowed if the capital goods is partly used for providing taxable services irrespective of its quantum as against exempted services. They drawn attention to rule 11(4) whereby credit was required to be reversed in respect of inputs lying in stock once the service provider opts to take exemption. These were the different situations in which the legislature intentionally opted to enact appropriate machinery for reversal / restriction of CENVAT Credit, however no machinery has been articulated in respect of the builders / developers for reversal of CENVAT Credit. They stated that the Real Estate Development is one of the primary component of Indian Economy and the legislature is much aware of it. It would not just be illegal to presume ignorance on part of legislature but also irrational and illogical to deduce that the legislature was not aware of typical situation of Real Estate Sector and accordingly did not incorporate specific machinery. Therefore, evolution of a new condition to cater the situation on hand by Department when it is not expressly or impliedly covered by any of the rules in force, is impermissible and encroachment upon legislative function. The Notice to compel the builders / developer to avail credit only at the time of booking of the unit, is a legislative function in absence of specific rule and which your good self must not allow to be executed.

36. They stated that the contention of the Department that the builder / developer is getting double benefit if the credit is not been disallowed in respect of the units sold after receipt of completion certificate. However, it is to vehemently submit that benefit or double benefit shall not be the criteria to restrict or disallow credit eligibility. As elaborately discussed hereinbefore that the plain and unambiguous language of the law does not leave any room for intendment. Consequences, whether liked by either party or not, must not be sufficient to construct the rule written plain and clear by legislature. Hence, argument advanced in the Notice that the builder / developer is being double benefited has no strength. However, if for sake of argument, theory of consequence is accepted, they are afraid number of instances will be significantly more where the exchequer is unduly benefited. For example, services involving site formation, excavation and mining had been taxed at the full rate and without any abatement since its inception, whereas

the fact is more than 50% of the value of such services is towards cost of diesel which was no subject matter of service tax and the Government had already earned huge income over diesel. Taxation at the full rate not only resulted into tax on the value of diesel but also the duties levied on diesel. Another example is that of software where both the VAT and Service Tax were being levied parallel on the full amount which was completely unethical economical practice of taxation.

37. They submitted that in light of their extensive submission, it reveals that the contention of the Department is completely unlawful and erroneous. As per the definition of "input service" given in Rule 2(l) any service which is used by a provider of output service for providing an output service is an input service. Contention of Department is that the part of the service which is utilised for construction units sold post completion certificate shall not be regarded as input service, however the part of service which is utilised for construction of units sold pre completion certificate must be regarded as input services and accordingly benefit of credit was made available. Nowhere in the Notice, has identified that which part of input service or input services were actually utilised for construction of unit post completion certificate. It is admitted by the Department that all the input services were being collectively used by the builder / developer for construction of units sold before as well as after receipt of completion certificate and that is why the alleged reversal was computed on the basis of proportion of area of constructed units sold post completion certificate borne to the total area of construction. Therefore it is undisputable that all the input services in respect of which CEVNAT Credit was being claimed by the builder / developer is deemed to have been utilised for construction of units sold before receipt of completion certificate. They referred to the definition of Rule 2(l) of the Cenvat Credit Rules, 2004 defining "input service" and it requires the nexus of input service to the output service. Nowhere in the rule condition of exclusivity has been incorporated by the legislature. Therefore, it is required to be accepted as a proper legal position that part use of the service for providing output service shall also be treated as input service as per the given definition. In order to fortify the view expressed, they invited attention to rule 6(3) whereby the reversal of credit on proportionate basis has been devised in the CENVAT Credit Rules. Very need of rule 6(3) implies that the definition of input services shall comprises of both the services – those used exclusively for providing taxable services and those used commonly for taxable and exempted services. Had the definition of input services would have been framed on the basis of exclusivity, rule 6(3) would have become redundant and infructuous. They stated that it is a settled position of law that none of the provisions of statute shall be read redundant. In view of foregoing, they submitted that contention of Department that service is not input services is bad in law and arbitrary.

38. They stated that in the Notice it was contented that that they are liable to follow provisions of Rule 6 w.e.f. 01.04.2016. However, the Department has not quantified the amount of credit liable to be reversed but not been reversed by them. They submitted that the contention of the Department is contradictory to own contentions as well as proposal to reverse the Credit. Alleged applicability of Rule 6 is in sheer contradiction to the alleged theory of credit

ineligibility in terms of Rule 3 contemplated in the Notice. They stated that applicability of rule 6 w.e.f. 01.04.2016 itself suggest that they are entitled for full amount of credit as per Rule 3 and liable for reversal of credit equivalent to the amount computed in strict accordance of rule 6.

39. Therefore they submitted that whole of the demand of credit proposed in the Notice fails to survive on the very contention as to applicability rule 6 w.e.f. 01.04.2016. As regards, applicability of rule 6, they submitted that the Department has not quantified the amount of reversal required to be made as per rule 6 w.e.f. 01.04.2016. They submitted that for abundant clarity that rule 6 cannot be applied retrospectively or retroactively to the present case.

40. They reiterated that the method adopted by the Department in Para 12 of the Notice is illegal and contrary to the Rules. The Department has worked out the alleged amount of reversal by taking entire amount of CENVAT Credit availed by them during the period October, 2013 to June, 2017. The methodology contemplated by the Department is impractical and unfeasible to implement at the relevant point in time as the number of total area sold post completion certificate cannot be predicted at the time of availing of credit. The credit shall be availed as per the time and manner provided in rule 4(7) and availing of part credit at different points in time was not allowed in the Rules. If the methodology contemplated by Department is adopted, credit shall be required to be availed at each booking of the unit prior to receipt of completion certificate in respect of single invoice, which was in sheer contradiction and contrary to the procedures and conditions laid down by the Rules.

41. Therefore, they submitted that the very formula and methodology contemplated by Department is illegal and contrary to the Rules and hence shall not be allowed to raise alleged demand of CENVAT Credit against the Noticee. In light of foregoing submission, they submitted that the credit was rightly availed and utilised by them and same was in complete accordance and compliance of the Rules.

42. The Department has contended in Para 14 of the Notice that the Noticee has not discharged its burden to prove eligibility of credit as required in rule 9(6). Rule 9(6) imposes the burden to prove admissibility of the credit on the assessee who avails the credit. They explained the provision of rule 9(6) of the Cenvat Credit Rules, 2004.

43. They stated that Sub-rule (6) requires the manufacturer and provider of output service to maintain proper records and also to discharge burden of proof regarding admissibility of CENVAT Credit. Having holistic reading of rule 9 it can be unequivocally deduced that the onus which has been imposed upon the service provider as regards admissibility of the CENVAT Credit shall be construed *qua* the documentary and procedural requirement and not in terms of substantive provisions. Burden which has been casted upon the assessee is regarding the documents and credibility of the document which may be produced in order to avail credit, however with no stretch it can be extended to admissibility of credit in terms of rule 3. They had furnished all the documents in support its eligibility as to credit and sufficient discharged the

onus casted upon it under rule 9(6). They stated that they had discharged its onus to prove admissibility of credit as per rule 9(6). They relied the following case laws-

1. Decision of Hon'ble Gujarat High Court in case of CCE v. Alembic Ltd are squarely covered by the decision of Hon'ble Gujarat High Court in case of **Commissioner v. Alembic Ltd – 2019 (29) GSTL 625 (Guj)**. Issue involved in case of Alembic Ltd *ibid* was identical to the issue involved in the present case.

2. Decision of the Apex Court in case of **UOI v. Kamlakshi Finance Corporation Ltd – 1991 (55) ELT 433 (SC).**

3. Decision of the Apex Court in case of **IDL Industries Ltd v. CCE – 2016 (337) ELT 496 (SC).**

44. Regarding the allegation in the Notice that they had utilized credit of Rs. 54,434 relating to Education Cess and Rs. 27,222 of SHE Cess for payment of basic Service Tax, they submitted the allegation raised in the Notice is regarding utilization of credit of Education Cess and SHE Cess which remained in balance due to withdrawal of such levy. However, there is no dispute as regards availing of such credit.

45. They submitted that the credit of Education Cess and Credit of SHE Cess can be very well utilized for payment of Service Tax as it clearly transpires from the plain language employed in Rule 3. Though the Department has referred to first and second proviso to Rule 3, it is required to be appreciated that nowhere in the said proviso the Government has denied utilization of the said credits for the purpose of payment of Service Tax. Language of the said proviso, if carefully evaluated, it emanates there from that the such credit of cess **"can be utilized"** for payment of cess, however nowhere in the said rule utilization of credit for payment of service tax has been prohibited.

46. They submitted that the credit of Cess availed by them which is no matter of dispute in the Notice, is a mandate of the Government and a vested benefit, which cannot be denied subsequently to them. If the credit of such Cess remained unutilized and the Noticee is left remediless, it shall tantamount to the breach of promise made by the Government with respect to the vested benefit and same is not permitted except by way of explicit and express provision of law.

47. They further submitted that the Notice has proposed to invoke extended period of five years in terms of proviso to section 73(1) of the Act. They stated that Noticee has completely failed to understand and comprehend as to the true and plausible reasoning for alleging suppression / misrepresentation on part of the Noticee and whether the act of invoking larger period is thoughtful and well deliberated or a sheer outcome of anxious effort to bring the demand within the fold of a valid notice. It is very well settled principle of law that invocation of larger period should not be a matter of ordinary course and shall be supported by contemporaneous facts and evidences. Mere mentioning of facts and circumstances or blur allegations are not sufficient to expect the assessee to show causes as regards allegations grave in nature. All the contraventions stated in proviso to section 73(1) of the Act are grave and serious and be resorted only when the facts and evidences suggest positive defiance of law by the

assessee rather than mere inaction or non-payment of tax. In the case before your good self, if the findings of the Notice are carefully perused, it reveals that the revenue had not applied its mind before levelling allegations and the Noticee cannot be said to have put on notice as to the exact reasoning of suppression if any committed by them. It clearly emanates from the Notice that the act of invoking larger period is an anxious effort made by revenue to save the notice from being hit by normal limitation and without attributing cohesive as well as plausible reasons as regards suppression if any committed by them.

48. They stated that it is a settled position of law that onus of proof to invoke larger period lies on revenue and it is the revenue who shall bring all corroborative evidences / facts in the show cause notice. Rather than being submissive in nature, revenue should analyse facts, intentions, reasoning and possibility of deliberate efforts behind non-payment / short payment of tax / duty. Mere mentioning of facts and observing to a fact of non-payment does not automatically enable revenue to invoke larger period. For better understanding of position of law and applicability thereof to present facts. They drawn attention to provisions of section 73(1) proviso which reads as under.

49. They stated that proviso to section 73(1) which enables revenue to issue show cause notice within a period of five years instead of normal limitation, presupposes existence of one of the five specified states of affairs indulged into by the Noticee. It is the revenue who should gather sufficient evidences as to indicate which one of the five reasons, the Noticee has been indulged into, before invoking larger period. If careful perusal is made, the Department would find that list of specified reasons starts with word 'fraud', 'collusion' and 'willful mis-statement'. Using of words 'fraud' etc in the list shows degree of intensity legislature intended to exist before substituting period of one year with a larger period of five years. It is not the mechanical provision enabling revenue to depend upon under every circumstance where demand involves for a period more than one year. Words 'fraud' etc are of highest amplitude and involves deliberate and *mala fide* intentions on part of the Noticee with an object to deceive the tax authorities by acting in sheer defiance of law to make unlawful and illegal monetary advantage. Therefore before taking recourse to proviso, it is expected from revenue that proper and adequate findings are brought on records having direct and proximate relation to stated practices of tax evasion by them. Merely because demand involved stands barred by normal period of one year, revenue tend to invoke larger period in anxiety of initiating actions will defeat the very purpose of drawing a legislative line of demarcation between situation where demands should be made within one year and those to be made within larger period. The way revenue has proposed to invoke larger period in present case before your good selves, if accepted, we are afraid every demand beyond one year would be attempted to be protected by revenue under proviso without differentiating between the Noticee having a strong case in its favour and the one involving wilful default. Therefore, they submitted that the revenue has not sufficiently and adequately established charges of suppression / misrepresentation on part of the Noticee and it is ought to have failed in shifting the onus unto the Noticee. In such circumstances, they are not to be attributed of grave charges involving suppression. They relied the following case laws.

i) Hon'ble Supreme Court in case of **Pushpam Pharmaceuticals Company v. CCE, 1995 (78) ELT 401 (SC).**

ii) **CCE v. Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC)**

iii) **Padmini Products v. CCE – 1989 (43) ELT 195 (SC)**

IV) **Continental Foundation Jt. Venture v. CCE 2007 (216) ELT 177 ( SC)**

50. In view of foregoing they stated that it is required to be held that invocation of larger period of limitation in the case is not warranted and legally required. Hence the demand raised in the impugned Notice is not tenable for want of proper jurisdiction and legal authority. As the impugned Notice is travelling beyond normal limitation, entire demand stands bad in law and liable for deletion.

51. They stated that the revenue has attempted to disallow and recover the CENVAT Credit of Rs. 1,01,46,804 under Rule 14(1)(ii) read with Section 73(1) of the Act. It is needless to state that Section 73(1) of the Act deals with issuance of the notice in respect of short payment of tax whereas the question involved in the case before your good self is relating to the demand of CENVAT Credit alleged to have wrongly claimed in terms of CENVAT Credit Rules, 2004 and accordingly the credit is disallowed and recovered under rule 14(1)(ii) of the CENVAT Credit Rules, 2004. It is therefore essential to examine as to whether the credit can be primarily demanded under Rule 14(1)(ii) of the CENVAT Credit Rules, 2004 or not. If the demand of CENVAT Credit fails to sustain under Rule 14(1)(ii) question of the demand by way of issuing a notice under section 73(1) of the Act shall not arise.

52. Therefore, they submitted that the demand of CENVAT Credit fails to survive under Rule 14(1)(ii) of the CENVAT Credit Rules, 2004. They drawn attention to Notification No. 20/2017-CE (NT) dated 30.06.2017 prescribing CENVAT Credit Rules, 2017 in suppression of CENVAT Credit Rules, 2004. They stated that it is very much clear that the CENVAT Credit Rules, 2004 has been suppressed w.e.f. 1st July, 2017, pursuant to which no recovery of whatsoever nature shall survive under erstwhile CENVAT Credit Rules, 2004. In this case, the Notice has been issued on 22.04.2019, a day on which the CENVAT Credit Rules, 2004 did not exist. Hence, the demand and recovery of CENVAT Credit in terms of Rule 14(1)(ii) of CENVAT Credit Rules, 2004 fails to survive.

53. They stated that that provisions of Chapter-V of Finance Act, 1994 have been saved in specified circumstances as against omission of Chapter-V under section 173 but the same shall not have any impact of saving over the CENVAT Credit Rules, 2004 or rules made thereunder. CENVAT Credit Rules, 2004 were the rules issued under the provisions of Central Excise Act, 1944 and the same have been specifically suppressed by the Notification No. 20/2017 *ibid.* Hence, resort to provisions of Section 174(2) in Para 18 of the Notice shall not save the act of demand and recovery of the CENVAT Credit under Rule 14(1)(ii) of the CENVAT Credit Rules, 2004.

54. They placed reliance on the decision of Hon'ble Supreme Court in case of **Kolhapur Canesugar Works Ltd v. UOI – 2000 (119) ELT 257 (SC)**, wherein it is laid down that a proceeding pending under a rule lapses on repeal of the rule without a saving clause. Moreover it is decided that provisions of Section 6 of the General Clauses Act are not applicable to repeal of rule. In the case before your good self, neither sub-section (2) of Section 174 nor the Notification No. 20/2017-CE provided for saving clause and *in absentia* demand and recovery of the CENVAT Credit under Rule 14 of CENVAT Credit Rules, 2004 fails to hold the water. Therefore, they submitted that Notice issued after suppression of CENVAT Credit Rules, 2004 under Rule 14 thereof to demand and recover the amount of CENVAT Credit is illegal and bad-in-law and hence the demand of Rs. 1,01,46,804 is to be assailed.

55. Regarding demand of interest under rule 14(1)(ii) read with section 75 of the Act, they requested to drop the case as the demand of CENVAT Credit *per se* failed to survive in view of foregoing submissions. It is a settled position of law that demand of interest does not sustain when the liability of tax fails. They further submitted that the demand of interest raised by the Department under rule 14(1)(ii) does not survive in view of suppression of the CENVAT Credit Rules, 2014 w.e.f. 01.07.2017 in terms of discussed advanced in details in foregoing paragraph. Therefore, they requested to drop the demand of interest.

56. Regarding penalty under rule 15(3) read with section 78, they requested to drop as the demand of CENVAT Credit *per se* failed to survive in view of foregoing submissions. They stated that it is a settled position of law that no penalty under shall is imposable when the liability of tax fails. They further submitted that penalty under rule 15(3) read with section 78 is not imposable in the present case as they cannot be charged with the grave allegations of suppression, misrepresentation etc. They submitted that the Notice is barred by limitation in terms of sub-section (1) of section 73 as the charges of suppression etc are not invokable against them in the given circumstances. They placed reliance upon following decisions in support of their contention as regards limitation of extended period as well as penalty under rule 15(3) u/s 78 of the Act :

- **BSNL v. CCE - 2009 (14) STR 356 (Tri-Ahd)**
- **CCE v. Commandant, CISF Unit - 2019 (24) GSTL 232 (Tri-Del)**
- **Kandla Port Trust v. CCE - 2019 (24) GSTL 422 (Tri-Ahd)**
- **CCE v. NEPA Ltd - 2013 (298) ELT 225 (Tri-Del)**

57. In view of their submission above, they requested to drop the case and also requested for a personal hearing in the matter.

**Personal Hearing**

58. Personal hearing in this case was fixed on 27.08.2020, 29.09.2020, 14.10.2020, 30.11.2020 and 06.01.2021. Shri Rahul Patel Consultant, appeared before me through virtual mode of hearing on 06.01.2021. He stated that he has already replied to the show cause notice vide letter dated 06.01.2021. He further stated that they have rightly taken Cenvat Credit which are eligible to them. He cited various case laws in their defense and stressed reliance in the case of

CCE Vs Alembic Ltd reported in 2019(29)GSTL 625 (Guj). He also stated they have not to reverse/pay any amount towards wrong availment of Cenvat Credit. When the amount of Service Tax/Credit is not payable, no question of payment of interest and penalty. He requested for taking into consideration of all the points submitted in their written submission. He also requested to drop the proceedings initiated in the show cause notice.

**Discussion and findings:**

59. I have carefully gone through the records of the case, submission made by the assessee in their written submission as well as submission made at the time of personal hearing.

I find that the main issues to be discussed in the present case are –

i) **Wrong Availment of Cenvat Credit by merging Education Cess and Secondary & Higher Education Cess into Basic Service Tax Credit to the tune of Rs.81,656/- ; and**

ii) **Revenue Para No 2 – Wrong availment of Cenvat Credit on ineligible input services**

60. In the case of wrong availment of Cenvat Credit by merging Education Cess and Secondary & Higher Education Cess into Basic Service Tax Credit, involving Cenvat Credit of Rs.81,656/-, the Show Cause Notice has alleged that during scrutiny of ST-3 returns for the period April, 2015 to –Sep 2016, it was noticed that the assessee had utilized the closing balance of Rs. 54,434/- of Education Cess and Rs. 27,222/- Secondary & Higher Education Cess by merging the same in the Basic Service Tax Credit and therefore the assessee has wrongly availed Cenvat Credit to the tune of Rs. 81,656/- in FY 2015-16.

61. The assessee, in their defence, has stated that they had utilized credit of Rs. 54,434 relating to Education Cess and Rs. 27,222 of SHE Cess for payment of basic Service Tax, which remained in balance due to withdrawal of such levy.

62. They submitted that the credit of Education Cess and Credit of SHE Cess can be very well utilized for payment of Service Tax in terms of Rule 3. They stated that nowhere in the said proviso the Government has denied utilization of the said credits for the purpose of payment of Service Tax. Language of the said proviso, if carefully evaluated, it emanates there from that the such credit of cess **"can be utilized"** for payment of cess, however nowhere in the said rule utilization of credit for payment of service tax has been prohibited.

63. They submitted that the credit of Cess availed by them which is no matter of dispute in the Notice, is a mandate of the Government and a vested benefit, which cannot be denied subsequently to them. If the credit of such Cess remained unutilized and they left remediless, it shall tantamount to the breach of promise made by the Government with respect to the vested benefit.

64. I find that Notification No.22/2015-CE (NT) dated 29.10.2015 has been issued by the Government allowing credit of Education Cess and Secondary and Higher Education Cess paid on input service in respect of which the invoice, bill, challan or Service Tax Certificate for

Transportation of Goods by Rail (referred to in Rule 9) as the case may be is received by the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of Service Tax on any output service. For convenience, I reproduce the said Notification hereunder:-

"Cenvat Credit Rules, 2004 — Fifth amendment of 2015

In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the CENVAT Credit Rules, 2004, namely :-

1.(1) These rules may be called the CENVAT Credit (Fifth Amendment) Rules, 2015.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, in sub-rule (7), in clause (b), after the fifth proviso, the following proviso shall be inserted, namely :-

"Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the premises of the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service.

Provided also that the credit of balance fifty per cent. Education Cess and Secondary and Higher Education Cess paid on capital goods received in the premises of the provider of output service in the financial year 2014-15 can be utilized for payment of service tax on any output service :

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input service in respect of which the invoice, bill, challan or Service Tax Certificate for Transportation of Goods by Rail (referred to in rule 9), as the case may be, is received by the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service.".

65. From the reply to the show cause notice by the assessee, it is seen that the Cenvat Credit of Education Cess and Secondary and Higher Education Cess has been utilized for payment of Service Tax, which remained in balance due to withdrawal of such levy. I find that as per the Notification No.22/2015-CE(NT) dated 29.10.2015, condition to utilize the credit of 'Education Cess and Secondary and Higher Education Cess' has been prescribed to the effect that *"credit of Education Cess and Secondary and Higher Education Cess paid on input service in respect of which the invoice, bill, challan or Service Tax Certificate for Transportation of Goods by Rail (referred to in rule 9), as the case may be, is received by the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service"*

66. From the reply submitted by the assessee, I observe that the credit of Education Cess and Secondary and Higher Education Cess was lying unutilized in their Cenvat Account invoices of which were received by them prior to 01.06.2015. Therefore, I hold that they are not eligible for the utilization of Cenvat Credit of Education Cess and Secondary and Higher Education Cess for payment of Service Tax and the Cenvat Credit so wrongly availed by them to the tune of Rs.81,656/- required to be recovered in terms of Section 73(1) of the Finance Act, 1994 read with Rule 14(1) (ii) of Cenvat Credit Rules, 2004. They are also liable to pay for penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

67. With regard to the issue of wrong availment of Cenvat Credit on ineligible input service services to the tune of Rs.1,01,46,804/-, the SCN has alleged that out of various Residential Units constructed during the period, some of them had been booked and sold after the issuance of the Completion Certificate by competent authority and the assessee took Cenvat Credit after receipt of Completion Certificate. Further, 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 such declared service is Construction Services.

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

69. The 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 Completion Certificate/Building Use permission. The activity of construction, in which the entire consideration is received after Building Use Permission, has been kept out of the scope of "Declared Services".

70. Therefore, the assessee is liable to pay Service Tax only for those Residential Units/Flats, which have been booked /sold before the issue of Building Use (BU) Permission dated 19.10.2013, 05.04.2014, 06.02.2015, 29.03.2016 in respect of various blocks of Swara Scheme, Building Use (BU) Permission dated 09.01.2014, 15.03.2014, 27.05.2014, 26.12.2014, 01.07.2015 in respect of various blocks of Swareet Scheme, Building Use (BU) Permission dated 25.12.2015 in respect of Serenity Proximus Scheme and Building Use (BU) Permission dated 30.06.2017 in respect of Serenity Pastures Scheme, under Section 66 of the Finance Act, 1994 and consequentially, no Service Tax would be paid for those Residential Units/Flats which have been sold after the issue of B. U. Permission.

71. As per the definition of Rule 3 of Cenvat Credit Rules, 2004 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.

72. 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 flat/unit/shop, 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 "Completion Certificate" does not constitute service.

73 In the typical case of Construction service, service is said to be provided to each individual who books/purchases flats/units, 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 flat/unit of the same project. Till the time, an individual flat/unit is 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/unitsnot booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual flat/unit constructed. Therefore, present case would fall under "Declared Service" at Section65B(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".*

74. In other words, the developer/builder is deemed to be the provider of output service only in those cases, where the flats/unitsare booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) *supra*, till the time a flat/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 flats/units 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 flat/unit or otherwise. This position is very clear in light of the provisions of Section-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 flat/unit till such time every single flat/unit 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 Completion Certification, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of Completion Certification, the builder is engaged in providing Construction services to the proposed owner of the unit.

75. Till the time a flat/unit is 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 flats/units in as much as there is no service recipient for such flats/units and resultantly no service is provided or agreed to be provided.

76. In view of the above, the assessee is not entitled to take Cenvat Credit proportionate to the services utilized for construction of flats/units which have not been booked/sold prior to receiving Completion/B.U. Certificate, 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.

77. 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 flats/units 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/units 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 to not 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 flat/unit was booked and that too prior to obtaining Completion/BuildingUse Certificate. The assessee has therefore, wrongly taken the Cenvat Credit, in respect of those units/flats which do not constitute service, in violation of the Rule 3(1) of the Cenvat Credit Rules, 2004.

78. 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 and would cease on completion of the project and therefore, as exemplified above no output service is said to be provided till the individual flat/unit 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 flats/units sold/booked thereafter. However, majority of input services are used for the entire project and the Cenvat Credit of the tax paid there on is availed much prior to the completion of the project and obtaining Completion/B.U. Certificate and is also utilized for payment of Service Tax on the flats/units 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.

79. The assessee has stated that the definition of 'Service' is comprehensive in nature and exhaustively and predominantly crafted by legislature to align it with the comprehensive

approach of taxation adopted in the country from 1st July, 2012. Any activity carried out by one person for another for consideration including declared service is what the service is except the cases where activity involves mere transfer of titles. This implies that all the activities for consideration shall be primarily regarded as service unless it falls into any of the excluded categories. Moreover, clause (b) of Section 66E which defines Declared Services as all constructions of complex, building or civil structures except where the entire consideration is received after receipt of the completion certificate. Comprehensiveness is the common thread running in both the definitions. It is therefore required to deduce that if the activity does not fall into exceptions specifically carved out in the definition, it shall be deemed as service. It will be out of proportion to hold a view that the Developer / Builder will be building a property for other than sale and if not so, it is corollary to deduce that the activity of the Developer / Builder, until the completion certificate is actually received, is intended to construct and sale the unit prior to receipt of completion certificate.

80. They invited attention to the decision of Hon'ble Supreme Court in case of **CUS v. Dilip Kumar & Company – 2018 (361) ELT 577,** in case of Bansal Wire Industries Ltd v. State of UP – 2011 (269) ELT 145 (SC) and Baidyanath Ayruved Bhawan (P) Ltd v. Excise Commissioner – 1999 (110) ELT 363 (SC). They stated that Hon'ble Supreme Court has laid down in case of Gwalior Rayon Silk Manufacturing Co. Ltd v. Custodian of Vested Forest, in case of **Shree Bhagwati Steel Rolling Mills v. CCE – 2015 (326) ELT 209.** They stated that they had discharged its onus to prove admissibility of credit as per rule 9(6). They relied the following case laws-

1. Decision of Hon'ble Gujarat High Court in case of CCE v. Alembic Ltd. Hon'ble Gujarat High Court in case of **Commissioner v. Alembic Ltd – 2019 (29) GSTL 625 (Guj).**
2. Decision of the Apex Court in case of **UOI v. Kamlakshi Finance Corporation Ltd – 1991 (55) ELT 433 (SC).**
3. Decision of the Apex Court in case of **IDL Industries Ltd v. CCE – 2016 (337) ELT 496 (SC).**

81. I find that Cenvat Credit taken on the units which are unsold at the time of BU permission, the show cause notice has alleged that various residential units constructed during the period, some of them had been booked and sold after the issuance of the completion certificate by the competent authority.

82. Under the negative list regime of service tax, with effect from 1.7.2012, certain activities had been made chargeable to service tax, as 'declared services' by virtue of Section 66E of the Act. One such declared services is Construction Services. Section 66E of the Finance Act, 1994. When the construction is completed and the "Completion Certificate" is obtained, it turns out to be an immovable property. When the property is sold/transferred after 'Completion Certificate' is received, it is deemed to be sale of immovable property which is specifically excluded from the definition of service, in terms of Section 65 (B)(44) of the Act, 1994. In view of the same, 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'.

83. 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 Completion Certificate/Building Use permission. The activity of construction in which the entire consideration is received after Building Use permission, has been kept out of the scope of 'declared services'.

84. Therefore, in my view, the assessee is liable to pay service tax only for those units/residences, which have been booked/sold before the issue of building use (BU) permission dated 23.10.2013 for their various schemes. Consequentially, no service tax would be paid for those units/residences, which have been sold after the issue of BU permission. The eligibility and admissibility of credit has been stipulated under Rule 3 of the Cenvat Rules. The 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.

85. In the case of Construction service, service is said to be provided to each individual who books/purchases units, on payment of part/full consideration and not in respect of the entire building constructed. The builder is agreeing to provide or provide services to multiple service recipients in respect of individual flat/ unit of the same project. Till the time, an individual flat/unit is 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 not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual unit constructed. This is the crux of the matter especially in light of the interpretation of the term 'declared service' at Section 65B(22) of the Finance Act, 1994 which states that - "declared service" means any activity carried out by a person for another person for consideration and declared as such under section 66E".

86. The developer/builder is deemed to be the provider of output service only in those cases where the flats/units are booked/sold prior to obtaining the 'Completion Certificate' from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) of the Cenvat Rules, till the time a flat/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 flats/units not booked/sold. The 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 flat / unit or otherwise. This position is very clear in light of the provisions of Section 65B(22) of the Act to which the builder cannot claim ignorance. Thus, the assessee cannot be held to be an output service provider for the individual flat / unit till such time every single flat/ unit 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 Completion Certification, the builder is engaged in the activity of sale of immovable property and if the unit is booked before receipt of Completion Certification, the builder is engaged in providing construction services to the proposed owner of

the unit.

87. Therefore, the assessee is not entitled to take Cenvat Credit proportionate to the services utilized for construction of residential units which have not been booked / sold prior to receiving Completion/BU certificate i.e Units for which the assessee is not an output service provider. Rule 3(1) of the Cenvat Rules clearly stipulates that only an output service provider is entitled to take Cenvat Credit.

88. 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 flats/units sold after receipt of completion certificate and therefore, not liable to payment of service tax. 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 to not 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 flat/unit was booked and that to prior to obtaining completion/Building use Certificate. The said assessee has therefore wrongly taken the Cenvat Credit, in respect of those units which do not constitute a service, in violation of Rule 3(1) of the Cenvat Rules, 2004. The said wrongly taken Cenvat Credit is to be recovered in terms of Rule 14(1)(ii) of Cenvat Credit Rules, 2004 along with interest and penalty in terms of the Finance Act, 1994.

89. Further, in terms of Rule 2(1) of Cenvat Credit Rules, 2004, *"input service"* has been defined. Going by the circumstances, I find that the said assessee is not an output service provider in respect of the bungalows/units which have not been booked/sold, on the date the completion certificate/BU permission is received. Resultantly, the portion of services utilized for construction of such flats/ units would not qualify as 'input service' in as much as such portions of services have not been utilized for providing an output service. Therefore, they are not eligible to take Cenvat Credit of such portion of input services, utilized in an activity, which does not constitute 'service'.

90. 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 statuette by virtue of Rule 6(1) of the Cenvat Rules which read as under at the material time:

*"The CENVA T 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)"*

91. 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. In the instant case, the said assessee is provider of taxable services in respect of only those units booked on full or partial payment which is received prior to obtaining Completion Certificate. 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) of the Act. Therefore, the Cenvat Credit in respect of such non taxable activity not constituting 'service' is not admissible in terms of Rule 3(1) of the Cenvat Rules itself. The text of Rule 6 of the Cenvat Rules 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.

92. From the above, 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 bungalows/units are sold after obtaining requisite permission from the competent authority.

93. In the present case, builder/developer has taken Cenvat Credit in respect of services received for the construction of the entire building/complex. It is not possible to segregate the Cenvat Credit for each unit since the services 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.

94. In view of the above discussion, I find 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). 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.

95. The said 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/flats/shops prior to obtaining 'Completion Certificate', the said assessee should have paid back the ineligible Cenvat Credit with interest at the time, the 'Completion Certificate' is obtained. 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 assessee had suppressed these facts from the department to illegally avail the Cenvat Credit which was ineligible by the virtue of Rule 3(1) of the Cenvat Rules

96. The said 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 BU permission on which service tax was paid, as well as on the units booked/sold after obtaining the BU 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 BU 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 residential units sold after obtaining BU permission is not admissible under Rules 3(1) read with Rule 2(1) of the Cenvat Rules. The assessee has taken Cenvat Credit to the tune of Rs 1,01,46,804/- of the service tax paid on the services utilized for the construction of the entire project.

97. The assessee has contended that Cenvat Credit taken on the units which are unsold at the time of BU Permission, 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.

98. They also submitted that the work of construction of residential complex was going on and various goods, and services were received till the completion of the construction work, and thereafter the completion certificate was obtained. The Cenvat Credit of such goods and services were used was taken even before the completion certificate was issued/obtained. Therefore, as on the date of availing of Cenvat Credit, the completion certificate was not issued, and such material was used for the purpose of construction only.

99. They placed reliance on judgment of Hon'ble High Court of Gujarat, in the case of CCE Vs Alembic Ltd reported in 2019(29) GSTL 625 (Guj) wherein the Hon'ble High Court ruled in favour of the assessee and stated that the said case is squarely applicable to the present case.

100. I find that the explanation submitted by the assessee in this regard is not convincing and not tenable. Going by the facts, I find that, the assessee is liable to pay Service Tax only for those Residential Units/Flats, which have been booked /sold before the issue of Building Use (BU) Permission dated 19.10.2013, 05.04.2014, 06.02.2015, 29.03.2016 in respect of various blocks of Swara Scheme, Building Use (BU) Permission dated 09.01.2014, 15.03.2014, 27.05.2014, 26.12.2014, 01.07.2015 in respect of various blocks of Swareet Scheme, Building Use (BU) Permission dated 25.12.2015 in respect of Serenity Proximus Scheme and Building Use (BU) Permission dated 30.06.2017 in respect of Serenity Pastures Scheme, under Section 66 of the Finance Act, 1994 and consequentially, no Service Tax would be paid for those Residential Units/Flats which have been sold after the issue of B. U. Permission. Cenvat credit

availed by the assessee is in contraventions of Rules 3(1) read with 2(1) of the Cenvat Rules with an intent to evade the payment of service tax, as the said wrong and inadmissible Cenvat Credit has been used for payment of Service Tax.

101. Rule 9(6) of Cenvat Credit Rules, 2004 which 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. They failed to comply with the self assessment, the onus of taking legitimate Cenvat Credit has been passed on the assessee in terms of the said rule. It is the responsibility of the assessee to take Cenvat Credit only if the same is legally admissible. Therefore, there is a definite intention on their part to evade payment of service tax and the assessee have contravened the provisions of Rules 3(1) read with 2(1) of the Cenvat Rules. Therefore, the wrongly availed and utilized input service tax credit of Rs 1,01,46,804/- is liable to be recovered by invoking the extended period of five years, under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1 )(ii) of the Cenvat Rules, 2004. Applicable interest is also to be recovered from them, in terms of Section 75 of the Finance Act, 1994. They are also liable to penalty for their failure to pay/reverse the wrongly taken/availed Cenvat Credit under the provisions of Finance Act, 1994.

102. 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).

103. I find that in the present case, there is a clear attempt has been made on the part of the part of the assessee to evade the Service Tax by taking illegitimate Cenvat Credit contravening various provisions of Cenvat Credit Rules, 2004. The deliberate non-payment of duty/ tax and suppression of value of taxable services provided/received or wrong availment of 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. Therefore, extended period of limitation is invokable in this case. I find that the assessee has large number of case laws justifying that they rightly taken the Cenvat Credit, no interest and penalty is liable to be paid by them and also no extended period is invokable in the present case. They have also cited the case of order passed by the Hon'ble Supreme Court in the case of UOI Vs Kamlakshi Finance Corporation Ltd 1991 (55) ELT 433 (SC). I find that the nature and circumstances of the present case is different than those case quoted by the assessee. Besides, in the case of Commissioner Vs Alembic Ltd reported in 2019(29) GSTL 625 (Guj), the Department has filed an appeal before Hon'ble Supreme Court of India. Under the circumstances, I find that those case laws cited by the assessee are not comparable with the present case. Further, the case laws cited in the show cause notice by the Department regarding extended period of limitation is more appropriate to the present case.

104. The reply submitted by the assessee is not convincing and the Cenvat Credit of Rs

1,01,46,804/- is required to be reversed under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Rules, 2004 by invoking the extended period of time along with applicable interest under the provisions of Section 75 of the Finance Act, 1994 and penalty under the provisions of Section 78(1) of the Finance Act, 1944 read with Rule 15(3) of the Cenvat Rules, 2004.

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

## ORDER

(i) I disallow the wrongly taken and utilized Cenvat Credit amounting to **Rs.1,01,46,804/- (Rupees One Crore One Lakh Forty Six Thousand Eight Hundred and Four Only)** and order that the said amount be recovered from M/s.Bakeri Urban Development Pvt. Ltd, under Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules,2004.

(ii) I disallow the wrongly taken and utilized Cenvat Credit amounting to **Rs.81,656/- (Rupees Eighty One Thousand Six Hundred and Fifty Six Only)** and order that the said amount be recovered from M/s.Bakeri Urban Development Pvt.Ltd, under Section 73(1) of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules,2004.

(iii) I order M/s. Bakeri Urban Development Pvt. Ltd to pay appropriate interest under Section 75 of the Finance Act, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004 on the amount of disallowed Cenvat Credit shown at (Sr. No. (i) and (ii) above.

(iv) I impose a penalty of Rs. 1,02,28,460/- (Rs. 1,01,46,804/- + Rs.81,656/-) (Rupees one crore two lakhs twenty eight thousand four hundred and sixty only) **on** M/s. Bakeri Urban Development Private Limited, 1st Floor Sanskrut, Nr Old High Court Road, Off. Ashram Road, Ahmedabad-380009 under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules, 2004.

(v) I further Order that in the event the entire amount demanded/confirmed as above is paid within thirty days from the receipt of this Order along with applicable interest, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the penalty imposed at Sr. No.(iv) 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.

106. The Show Cause Notice No.VI/1(b)CTA/Tech-08/SCN/Bakeri/19-20 dated 22.04.2019 issued to M/s. Bakeri Urban Development Private Limited, 1st Floor Sanskrut, Nr Old High Court Road, Off. Ashram Road, Ahmedabad-380009, is disposed-of in the above manner.

(Mayur Tripathi)
Joint Commissioner,
CGST & CEx., Ahmedabad-North.

F.No.STC/15-17/OA/2019

Date: 01.02.2021

By Regd. Post AD

To,

M/s. Bakeri Urban Development Private Limited,
1st Floor Sanskrut, Nr Old High Court Road,
Off. Ashram Road, Ahmedabad-380009

Copy to:

1. The Commissioner, CGST & Central Excise, Ahmedabad North
2. The Deputy/Assistant Commissioner, S.G. Highway East Division, CGST, Ahmedabad North Commissionerate.
3. The Superintendent, Range-I, S.G. Highway East Division, CGST Ahmedabad North Commissionerate.
4. Guard file.