मूल आदेश संख्या / Order-in-Original No. 49/ आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009		GST ONE NATION ONE TAX ONE MARKET OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009

निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. STC/15-45/OA/2019 आदेश की तारीख/Date of Order : - 17.02.2021

जारी करने की तारीख/Date of Issue :- 24.02.2021

DIN No:20210264WT00008182E3

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*

संयुक्त आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 49/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 दो महिनों के अन्दर आयुक्त (अपील), केन्द्रीयजी.एस.टी.; केन्द्रीयजी.एस.टी.भवन, अंबावाड़ी, अहमदाबाद - 380015 को प्रारूप संख्या एसटी-4 (ST-4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रूपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form ST-4 to the Commissioner(Appeals), GST Bhawan, Ambawadi, Ahmedabad-380015 within two months from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

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

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

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एसटी-4 (ST-4) में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील), नियमावली 2001 केनियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्तअपीलकीप्रति।3

(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 जिस प ररू. 5.00 (पांच रूपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form ST-4 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषय: कारण बताओ सूचना/ The Show Cause Notice No. F.No.VI/1(b)/Tech-24/SCN/AVS/2019-20 dated 25.07.2019 issued to M/s AVS Corporation, 2/D. River View Flat, Behind Swastik Super Market, Ashram Road, Ahmedabad-380009.

Facts and grounds.

M/s AVS Corporation, 2/D. River View Flat, Behind Swastik Super Market, Ashram Road, Ahmedabad-380009 (hereinafter referred to as the 'said assessee', for the sake of brevity) was engaged in providing Construction of Residential Complex Service. The said assessee was holding Service Tax Registration No. ABAFA5312QSD001.The said assessee was also availing the facility of Cenvat Credit under M/s. AVS Corporation, 2/D, River View Flat, Behind Swastik Super Market, Ashram Road, CENVAT Credit Rules,2004.

2. During the course of audit conducted by the Officers of the Central Tax Audit Commissionerate, Ahmedabad for the period from 2016-17 to 2017-18 (Upto June'2017), and on verification of the records, and as reflected in S. Tax Revenue Para-1 of the Final Audit Report No. 1974/2018-19-Service Tax dated 28.6.2019, issued by the Deputy Commissioner, Circle-III, CGST Audit, Ahmedabad, it was observed that the said 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.

3. 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. i.e., the Ahmedabad Municipal Corporation (AMC).

4. Under the negative-list regime of Service Tax, with effect from 01.07.2012, certain activities had 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)

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, (f) .....

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

4.2 A conjoint reading of the above provisions of law makes it explicit that the activity of construction attracts Service Tax, if a part or whole of the consideration towards such construction is received prior to 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".

4.3 Accordingly, the said 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 29.10.2016 (For Bungalows No. 1 to 50), 28.06.2017 (For Bungalows No. 51 to 88), 30.05.2018 (For Bungalows No. 89 to 119), 14.03.2019 (For Bungalows No. 201 to 209), and 22.10.2018 (For Bungalows No. 210to 287) under various phases for various residential bungalows for their scheme Satva Homes', under Section 66 of the Finance Act, 1994 read with Service Tax Rules, 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.

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

6. The eligibility and admissibility of Cenvat Credit flows from the authority of Rule 3 of the Cenvat Credit Rules, 2004. applicable for the period prior to 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 or provider of output services on or after the 10th day of September 2004

The above definition clearly specifies the class of persons, who are entitled to Cenvat Credit, as (i) Manufacturer or Producer of Final Products and (ii) Output Service Provider.

6.1 Though *construction of a complex, building, civil structure or a part thereof, including a*

complex or building intended for sale to a buyer, wholly or partly, is considered to be a declared service under Section 66E (b) of the Finance Act, 1994, the developer/builder cannot be said to have provided or agreed to provide such service in respect of each individual 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.

6.2 In the typical case of Construction service, service is said to be provided to each individual who books/purchases bungalows/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 bungalow/unit of the same project. Till the time, an individual bungalow/unit is booked/sold. there is no element of service involved inasmuch as there is no service recipient and the natural corollary that follows is that no service is provided or agreed to be provided. In such a situation, it is service to self and therefore, the developer/builder cannot be said to be the **provider of output service** (emphasis supplied) for the bungalows/units not booked/sold, at the time the requisite permission from the competent authority was issued. This will be the case for each individual bungalow/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".*

In other words, the developer/builder is deemed to be the provider of output service only in those cases, where the bungalows/units are booked/sold prior to obtaining the Completion Certificate from the competent authority. Consequentially, no Cenvat Credit can be availed in terms of Rule 3(1) *supra,* till the time a bungalow/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, insofar as the bungalows/units not booked/sold. Fact remains that the builder is very well aware of the booking status of the individual bungalows/units and this leads to his knowledge of the fact whether he is an Output Service Provider for that particular bungalow/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 said assessee cannot be held to be an Output Service Provider for the individual bungalow/unit till such time every single bungalow/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 .

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

provided.

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

6.5 It may be generally claimed by the builders that at the time of incurring expenses or availing services, it is not known if it is being used for providing "Output Service" or is being used for construction of bungalows/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 bungalows/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 bungalow/unit was booked and that too prior to obtaining Completion/Building Use Certificate. The said assessee has therefore, wrongly taken the Cenvat Credit, in respect of those units/bungalows which do not constitute service. in violation of the Rule 3(1) of the Cenvat Credit Rules, 2004.

6.6 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 bungalow/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 bungalows/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 bungalows/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/bungalows sold after Completion/B.U. Certificate is obtained, is availed, and in which case there is neither any element of service nor any Service Tax is paid.

6.7 To exemplify. a builder starts construction of project having 100 units. All the services of landscaping, works contractor (for construction), electrical fittings, architect service, furniture contractors (for doors/windows), tiles fitting contractors, color contractors, etc., are availed and utilized prior to completion of the project subsequent to which a Completion /B.U. Certificate is issued. Assuming that Rs. 1 0lacs of Cenvat Credit is involved/availed in the construction of these hundred units, which works out to say Rs. 1 0,000/- 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 lacs (60 x 10000) and should have availed the same only as and when they provided output service to those persons who booked the flats prior to obtaining Completion Certificate/B.U. Permission. Therefore, availing and utilizing entire credit of Rs. 10lacs 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 said 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.

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

Rule 2(1) reads thus:

[(l) "Input Service" means any service.

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

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

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

8. 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.

9 . 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;

9 .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]. [(I) 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 l 2AA 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) :

9.2 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(emphasis supplied), as in the case where the flats/units are sold after obtaining requisite permission from the competent authority.

9.3 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].

9.4 From the foregoing, it appeared that after 1.4.2016, the assessee was 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.

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

11. In view of the above discussion, it appeared that the builder/developer including the said 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. On an illustration basis, let us assume that 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 bungalows/units previously booked. This is coherently explained hereunder:

Month of Commencement of Construction	Total area to be constructed (sq. rnts.)	Service Tax paid on services utilized 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-I		400	0	10	40	60
Jun-15		500	200	30	270	330
Jul-15		700	0	30	210	540
Aug-I		800	100	40	500	1040
Sep-15		1500	100	50	1010	2050
		4100			2050	

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 I 0% 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 R.s.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 iriput 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.

11.1 Without prejudice to the above, even if the said assessee had taken Cenvat Credit in respect of all the services utilized for construction of project/building, the said 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 said 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 said 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 said 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.

11.2 Whereas, it appeared that in the instant case 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 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 face 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 bungalows/units sold after obtaining B.U. Permission is not admissible under Rule 3(l) read with Rule 2(1) of the Cenvat Credit Rules. 2004 for the period prior to 1.4.2016 and under ~ @le 6 ofthe Cenvat Credit Rules, 2004 for the period after 1.4.2016.

12. During the course of audit it was observed that the assessee has constructed total 206 Bungalows under their scheme 'Satva Homes' from period 29.10.2016 to 14.03.2019, covered under Two Phases. Under the Phase-I of the project the assessee has constructed Bungalows No. 1 to 119. Further under Phase-II of the project the assessee has constructed Bungalows No. 201 to 287. Further, it was observed that the assessee has undertaken the construction of the said

Bungalows under 5 clusters and has obtained 5 different BU permissions, as detailed in below table

(for ease of understanding each cluster is given a code):

Cluster Code	Bung Nos.	Commencement Date	Date of BU	Total No. of Units covered in BU	Total Area Constructed (Sq. Mtr.)
A	1 to 50	31-12-14	29-10-16	50	8964.36
B	51 to 88	31-12-14	28-06-17	38	6623.12
C	89 to 119	10-05-16	30-05-18	31	5340.06
D	201 to 209	20-05-15	14-03-19	9	1800.31
E	210 to 287	20-05-15	22-10-18	78	14419.46
	Total			**206**	**37147.31**

12.2 Whereas it appeared from the above table the construction of Bungalows had been commenced and also the completion certificate had been obtained in different point of time. From the above table it can be inferred that for the period Apr-2014 to Mar-2015 (i.e. FY 2014-15), the assessee was having only cluster 'A' and 'B' under construction, similarly for the FY 2015-16 clusters A.'B.'D and 'E' were under construction, which means that the Credit availed by the assessee for the FY 2014-15 can only be attributable to clusters 'A' and 'B' i.e. from Bungalows No. Ito 50 and 51 to 88 and for the FY 2015-16 can only be attributable to clusters 'A', 'B', 'D' and ·E'. Thus, accordingly the credit availed by the assessee during the said periods can be attributable to different clusters based on the proportionate area constructed during the said periods. Accordingly, the percentage of credit attributable to the various clusters for the period upto Jun-17 has been worked out and is as under:

					Ratio attributable to the Cenvat Credit availed during the period				
FY	Period	Credit availed	Codes covered	Total Area of Codes covered	1 to 50	51to 88	89 to 119	201 to 209	210to 287
2014-15	Apr-Mar	64890	A+B	15587.48	57.51%	42.49%	0%	0%	0%
2015-16	Apr-Mar	5544781	A+B+D+E	31807.25	28.18%	20.82%	0%	5.66%	45.33%
2016-17	Apr-Sep	1819664	A+B+C+D+E	37147.31	24.13%	17.83%	14.38%	4.85%	38.82%
2016-17	Oct-Mar	2265156	B+C+D+E	28182.95	0%	23.50%	18.95%	6.39%	51.16%
2017-18	Apr-Jun	405352	B+C+DE	28182.95	0%	23.50%	18.95%	6.39%	51.16%
		10099843							

12.3 Further, from the ration of Cenvat Credit attributable to various cluster for different periods has stated above, the total credit availed by the assessee for the different clusters can be derived, as mentioned in the below table:

FY	Period	Credit availed	Codes covered	Total Area of Codes covered	Credit attributable to various Clusters				
					1 to 50	51to 88	89 to 119	201 to 209	210 to 287
2014-15	Apr-Mar	64890	A+B	15587.48	37318	27572	0	0	0
2015-16	Apr-Mar	5544781	A+B+D+E	31807.25	1662519	1154423	0	313835	2514004
2016-17	Apr-Sep	1819664	A+B+C+D+E	37147.31	439085	324446	261668	88254	706211
2016-17	Oct-Mar	2265156	B+C+D+E	28182.95	0	532312	429247	144743	1158854
2017-18	Apr-Jun	405352	B+C+DE	28182.95	0	95258	76814	25902	207378
		10099843			**2038922**	**2134011**	**767729**	**572734**	**4586447**

12.4 Further. during the course of audit it was observed that as on date of BU, for various clusters, there were certain bungalows which remained unsold, on which the assessee has no liability to pay S. Tax, and is required to reverse the Cenvat credit attributable to such un-sold bungalows as on date of BU. The summary of units sold/un-sold and the area covered under the said units as on date of BU is as under:

Code	Bung Nos.	Date of BU	Total No. Units covered in BU	Total Area Covered	Units Sold before BU	Unsold Units as on date of BU	Area Sold Before BU	Area Unsold as on BU	Ratio of Unsold Flats as on BU
A	1- 50	29-10-16	50	8964.36	39	11	6486.93	2477.43	**27.64%**
B	51 -88	28-06-17	38	6623.12	31	7	5626.87	996.25	**15.04%**
C	89-119	30-05- I 8	3 1	5340.06	8	23	1230.68	4109.38	**76.95%**
D	201 –209	14-03-19	9	1800.31	1	8	320.02	1480.29	**82.22%**
E	210 -287	22-10-18	78	14419.4	24	54	3650.38	10769.08	**74.68%**
	Total		206	**37147.31**	**103**	**103**	**17314.88**	**19832.43**	

12.5 Further, from the above since we have the credit attributable to the various clusters and the percentage of un-sold area as on date of BU (i.e. the proportionate exempted area constructed) for each clusters, we may derive the Cenvat credit attributable to the un-sold Bungalows as on date of BU. the same is calculated in the below mentioned table:

Cluste Code	Bung Nos	Total of Units covered in BU	Total Area Constructed	Area Sold Before BU	Area as on BU	Ratio of Unsold Units as on BU	Total Cenvat Credit attributabl to Cluster	Cenvat credit pertaining to exempted area constructe
A	1 10 50	50	8964.36	6486.93	2477.43	**27.64%**	2038922	563558
B	51 tO 88	38	6623.12	5626.87	996.25	**15.04%**	2134011	320955
C	89to 119	31	5340.06	1230.68	4109.38	**76.95%**	767729	590767
D	201 to	9	1800.31	320.02	1480.29	**82.22%**	572734	470902
E	210t0	78	14419.46	3650.38	10769.08	**74.68%**	4586447	3425159
	Total	206	**37147.31**	**17314.88**	**19832.43**		**10099843**	**5371341**

12.6 As evident from the above tables, BU permission was given on above cited dates for their scheme 'Satva Homes' by the competent authority at different interval of time. Out of total built-up area of 37147.31 Sq. mtr., there were certain area which remained unsold at the time of BU permission for different period. Hence, proportionate Cenvat Credit to the extent of Rs. 53.,71.341/**0s** worked out in the above mentioned tables, availed and utilized for the part of the construction in which no element of service was involved is not admissible as discussed supra.

12.7 A query memo was issued to the said assessee on 14.05.2019 conveying the objection. The assessee under their reply dated 10.06.2019 have stated that they are not in agreement with the audit objection.

13. Therefore, such Cenvat Credit was found to have been availed by the assessee in contravention of Rule 3(1) read with Rule 2(1) of the Cenvat Credit Rules, 2004 prior to 14.2016 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.

14. 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 said assessee to take Cenvat Credit only if the same is legally admissible. Therefore, it appears that there is intention to evade payment of Service Tax and they have contravened the provisions of Rule 3(1) read with 2(1) 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. 53,71.341/-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 I4(I)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.

In the case of Mis. Rathi Steel & Power Ltd. -2015(321)EL T200(All), the High Court of Judicature at Allahabad held that:

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

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

34. In our opinion, the facts of the present case clearly suggest wilful suppression of materialfacts by the assessee as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of dtyas would be covered by Clauses IV

and V of section 11A(1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

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

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

15. The Government has from the very beginning placed full trust on the manufacturers/service providers and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, a manufacturer/service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder. as considerable amount of trust is placed on them and private records maintained by them. for normal business purposes are accepted, practically for all the purposes. All these operate on the basis of honesty of the said 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 appears that the said assessee has knowingly availed ineligible Cenvat Credit with intent to evade payment of Service Tax. The deliberate nonpayment 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.

16. Further, it appeared that, the said assessee has wrongly taken Cenvat Credit of tax paid on various services, proportionate to those used in the constructions of bungalows/units, booked/sold after obtaining BU permission, inasmuch 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(1) of Cenvat Credit Rules, 2004. The provisions of the Cenvat Credit Rules. 2004 are explicit inasmuch 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 said assessee could not have bred any doubt as regards the same. However, the said 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(D) of the Cenvat Credit Rules, 2004 and Rule 6 of the Cenvat Credit Rules, as discussed above. Further, it appears 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 said assessee. Thus, it appears that the said 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 said 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(l) of the Finance Aet, 1994 read with Rule 14(1)(ii) of the Cenvat Credit Rules, 2004, by invoking extended period. In the case of Mahair Plastics versus CCE Mumbai. 2010 (255) EL T 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 rules *ibid.* All the above-mentioned acts of contravention of the provisions of the Finance Act and Rules framed thereunder on the part of the said assessee have been committed with intent to evade payment of duty and thereby they have rendered themselves liable for penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules. 2004.

17. Therefore, M/s AVS Corporation, 2/D. River View Flat, Behind Swastik Super Market, Ashram Road, Ahmedabad-380009 was issued a SCN F.No.VI/1(b)/Tech-24/SCN/AVS/2019-20 dated 25.07.2019 for recovery of wrongly taken Cenvat Credit of Rs. 53,71,341/- alongwith interest and penalty by the Additional Commissioner Central Tax Audit ,Ahmedabad on above grounds which is taken up here for adjudication.

Personal Hearing and Defence Reply:

Personal Hearing in the matter was fixed on 29.01.2021 which was attended by Shri Vipul Khandhar,CA on behalf of the noticee. He requested to decide the matter considering his reply to be filed. He filed his reply to the SCN on 02.02.2021.Shri khandhar has given a detailed reply of the notice wherein firstly he has discussed brief facts of the case from point no. 1 to 3 of

the reply and then given his defence from point No.3.1 to 3.7.5 in a very detailed manner .In point No. 4 he has requested to drop the proceedings. His defence reply is reproduced here from point 3.1 despite there is repitition of the facts/provisions of Act and Rules which have already been discussed above but this gives the complete viewpoint of the assessee and it is essential to deal with it in interest of justice-

"[**Now the salient issues to be addressed here in as under:**

(i) Whether the noticee has not entitled to take cenvat credit proportionate to the services utilised for construction of flats/units which has not been booked/sold prior to the completion certificate/BU or not.

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

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

(iv) *Whether recovery of cenvat credit amt to Rs.5371341/- on the basis of reconciliation of income with the books of account without taking fact in to the account is sustainable or not.*

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

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

3.1 Regarding the noticee has not entitled to take cenvat credit proportionate to the services utilised for construction of flats/units which has not been booked/sold prior to the completion certificate/BU or not.

Noticee want to draw attention towards the fact that, for the purpose of invoking provisions of Rule 6 of the Cenvat Credit Rules, 2004, in the present set of facts and circumstances, the output service must first be exempt service. That upon receipt of Completion Certificate for the projects, the output activity of sale of residential units becomes "non-service" as per provisions of Section 65B of the Finance Act, 1994 read with definition of the term "exempt service" under Rule 2(e) of the CCR, 04 as under:

SECTION [65B. Interpretations. — In this Chapter, unless the context otherwise requires,—

"declared service" means any activity carried out by a person for another 22) person for consideration and declared as such under section 66E;

SECTION [66D. Negative list of services. —The negative list shall comprise of the following services, namely:—

(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) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

[(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;

[but shall not include a service -

(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994; or

(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India;]".

So from the supra provision it has been clear that if during the impugned period, noticee has been engaged in the providing of the taxable &non taxable service then as per provision of the rule 6(3) noticee require to reverse proportionately cenvat credit taken during the impugned period which has not been in this case.

During the impugned period noticee has been engaged in the providing of the taxable service & discharge service tax liabilities on that, so there were no question of the reversal of cenvat credit has been availed during the impugned period.

4.3.2 Regarding the Credit can be allowed to the noticee under Rule 3 of the CCR, 2004 in such circumstances or not.

In the present case, the dispute is limited to credits availed on input services during a time when output service was wholly taxable however, portion thereof became non-taxable on account of receipt of Completion Certificate later on.

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 -

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 -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act :

[Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods -

(a) in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed; or

(b) specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed;]

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

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

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

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

(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(via) 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);]

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) [, (vi) and (via)]:

** *]*

*[(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act [* * *] :*

Provided that a provider of [output] service shall not be eligible to take credit of such additional duty;]

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

(ix) the service tax leviable under section 66 of the Finance Act; [* *]*

[(ixa) the service tax leviable under section 66A of the Finance Act;]

[(ixb) the service tax leviable under section 66B of the Finance Act;]

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(xa) 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]

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

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,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004 :

[Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of debonding of the unit in terms of the para 8 of Notification No. 22/2003-Central Excise, published in the Gazette of India, part II, Section 3, sub-section (i), vide number G.S.R. 265(E), dated, the 31st March, 2003.]

Explanation. - For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the Customs Tariff Act.

[(1a) A provider of output service shall be allowed to take CENVAT credit of the Krishi Kalyan Cess on taxable services leviable under section 161 of the Finance Act, 2016 (28 of 2016)].

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) :

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be seven per cent of the value so exempted :

Provided also that in case of transportation of goods or passengers by rail, the amount required to be paid under clause (i) shall be an amount equal to two per cent. of value of the exempted services.

Explanation 1. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation 2. - No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

Explanation 3. - For the purposes of this sub-rule and sub-rule (3A),-

(a) "non-exempted goods removed" means the final products excluding exempted goods manufactured and cleared upto the place of removal;

(b) "exempted goods removed" means the exempted goods manufactured and cleared upto the place of removal;

(c) "non-exempted services" means the output services excluding exempted services.]

RULE 11. Transitional provision. — (1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.

[(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported.]".

This being the case, a harmonious reading of Rule 3 of the CCR, 04 read with Rule 6 and Rule 11 of the said Rules will suggest that eligibility / entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output

service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. So demand of cenvat credit reversal was not requisite.

3.3 Regarding the noticee can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 04 or not.

From the analysis of all the legal provisions for the purpose of Cenvat Credit in respect of input service, that before obtaining The completion certificate, the service of the noticee was very much taxable during which period the appellant received input service. The relevant sub Rule (7) of Rule 4 of Cenvat Credit Rules, 2004 reads as under:-

4(7) The Cenvat Credit in respect of Input service shall be allowed, on or after the day on which the invoice, bill or as the case may be, challan referred to in Rule 9 is received:

"Provided that in case of an input service where the service tax is paid on reverse charge by the recipient of the service, the CENVAT credit in respect of such input service shall be allowed on or after the day on which the payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or, as the case may be, challan referred to in Rule 9:

Provided further that in case the payment of the value of input service and the service tax paid or payable as indicated in invoice, bill, or as the case may be, challan referred to in Rule 9, is not made within three months of the date of the invoice, bill, or as the case may be challan, the manufacturer of the service provider who has taken credit on such input service, shall pay an amount equal to the cenvat credit availed on such input service and in case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these Rules:

Provided also that if any payment of part thereof, made towards an input service is refunded or a credit note is received by the manufacturer or the service provider who has taken credit on such input service, he shall pay an amount equal to the CENVAT credit availed in respect of the amount so refunded or credited:

CENVAT credit in respect of invoice, bill or as the case may be, challan referred to in rule 9 issued before the first day of April 2011 shall be allowed, on or after the day on which payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or, as the case may be, challan referred to in Rule 9.

Explanation –I

The amount mentioned in this sub rule, unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the fifth day of the following month except for the month of March, when such payment shall be made on or before 31st March.

Explanation –II

If the manufacturer of goods or the provider of output service , fails to pay the amount payable under this sub rule , it shall be recovered , in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.

Explanation –III

In case of manufacturer who avails the exemption under a notification based on the value of clearance in the financial year and service provider who is an individual or proprietor ship firm or partnership firm , the expression, "following month" and the "month of March" occurring in sub rule- 7 shall be read respectively as "following quarter" or "quarter ending with the month of March"

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

In case of service becomes exempted at a later stage, unlike the provision for manufactured goods provided under Rule 11(1)(2) and (3), there is no such provision in respect of the service. The only provision for the service is provided under Sub-Rule (4) of Rule 11 which reads as under:

"11(4). A person provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after directing the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

From the above sub rule (4), it can be seen that even if an output service provider avail the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no provision for payment of cenvat credit equivalent to the input services used in respect of exempted service.

Therefore, the cenvat credit availed in respect of input service is not required to be paid back under any circumstances.

3.4 Regarding recovery of cenvat credit amt to Rs.5371341/- on the basis of reconciliation of income with the books of account without taking fact in to account is sustainable or not.

Appellant wants to draw attention towards the fact that the department has computed recovery of wrongly availed cenvat credit for the period Apr-2016 to Jun-2017.

Against which appellant contended that reconciliation is not correct in view of the submission made in supra para 3.1 to 3.3.

Noticee also relies on the following case laws:

(i) 2013 (31) S.T.R. 673 (Tri. - Bang.) IN THE CESTAT, SOUTH ZONAL BENCH, BANGALORE S/Shri M.V. Ravindran, Member (J) and P. Karthikeyan, Member (T) REGIONAL MANAGER, TOBACCO BOARD Versus COMMR. OF C. EX., MYSORE Final Order No. 874/2010 and Stay Order No. 429/2010, dated 17-5-2010 in Application No. ST/Stay/215/2009 in Appeal No. ST/369/2009

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

Appeal allowed

(ii) 2010 (20) S.T.R. 789 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH, MUMBAI Shri Ashok Jindal, Member (J) ANVIL CAPITAL MANAGEMENT (P) LTD. Versus COMMR. OF S.T., MUMBAI Final Order No. A/39/2010-WZB/C-IV/SMB and Stay Order No. S/6/2010-WZB/C-IV/SMB, dated 1-1-2010 in Application No. ST/S/1655/2009 in Appeal No. ST/237/2009

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

Case remanded

(iii)2010 (19) S.T.R. 242 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri Ashok Jindal, Member (J) COMMISSIONER OF SERVICE TAX, AHMEDABAD Versus PURNI ADS. PVT. LTD. Final Order Nos. A/372-373/2010-WZB/AHD, dated 23-4-2010 in Appeal Nos. ST/154-155/2009

Demand - Assumptions and presumptions - Short payment of Service tax - Audit detected difference between amounts shown in ST-3 return and balance sheet - Finding of Commissioner (Appeals) that method adopted for reconciliation of income incomplete and faulty, sustainable - Receipts held as taxable, without adducing evidence - Tax cannot be assessed merely on assumptions and presumptions - Onus to prove with sufficient evidence not discharged by original authority - Entire demand based on assumption, without evidence - Explanation given by assessee to reconcile differences pointed out by Department, not considered by adjudicating authority - Impugned order upheld - Section 73 of Finance Act, 1994. [paras 7, 8]

Appeals rejected

(i) 2009 (16) S.T.R. 63 (Tri. - Chennai) IN THE CESTAT, SOUTH ZONAL BENCH, CHENNAI Ms. Jyoti Balasundaram, Vice-President and Shri P. Karthikeyan, Member (T) SIFY TECHNOLOGIES LTD. Versus COMMISSIONER OF SERVICE TAX, CHENNAI Final Order No. 657/2009, Stay Order No. 504/2009 and Misc. Order No. 309/2009, dated 4-6-2009 in Application Nos. ST/S/56/2009 and ST/EH/42/2009 in Appeal No. ST/82/2009

Demand - Short payment - Demand of Service tax of over Rs. 1.86 crores - Details of ax paid on disputed services and liability furnished in reply to show cause notice - Discrepancies found by adjudicating authority between figures furnished by appellants but no attempt made to verify and ascertain correct figures - Reconciliation possible only after removal of details like realization from exempted services, export of services, sales, etc. - Variation between figures in reply to SCN and ST-3 returns noticed in impugned order but demand confirmed ignoring one class of variations - Issue stated as arising due to errors in reporting and appellant undertaking to reconcile figures - Matter remanded for fresh adjudication - Section 73 of Finance Act, 1994. [paras 1, 4, 5, 7]

Case remanded

(v) 2013 (30) S.T.R. 62 (Tri. - Ahmd.) IN THE CESTAT, WEST ZONAL BENCH, AHMEDABAD [COURT NO. II] Shri B.S.V. Murthy, Member (T) BHOGILAL CHHAGULAL & SONS Versus COMMISSIONER OF S.T., AHMEDABAD Final Order No. A/669/2012-WZB/AHD and Stay Order No. S/811/2012-WZB/AHD, dated 10-5-2012 in Application No. ST/Stay/251/2012 in Appeal No. ST/107/2012

Demand - Short payment of Service Tax - Difference in value shown in Balance Sheet and declared in ST-3 Returns as per CERA party audit report - Records of relevant period verified and reconciliation of Balance Sheet and ST-3 returns conducted by Service Tax wing also - Tax liability discharged along with interest - HELD : Once records verified, reconciliation conducted and period of short levy covered by verification, confirmation of demand amounts to duplication of demand - No reasons cited for non acceptance of impugned report and worksheet by lower authorities - Also, amount actually paid lesser and short levy present for subsequent period - Therefore, matter to be considered in light of audit report - Specific observation to be given for reasons of confirmation of

amount demanded in CERA party's report if same already verified by Department - Impugned order set aside - Matter remanded for fresh consideration - Section 73 of Finance Act, 1994. [paras 4, 5]

Appeal allowed

So, from the above it is clear that department has not taken factual fact in to account & raised the recovery of cenvat credit availed, which has not been demandable & justifiable, so notice for the recovery of cenvat credit has to be quashed/dropped.

3.5 **Entire demand is time barred-Extended Period**

3.5.1 The show cause notice covers the period of 01.04.2016 to 30.06.2017. The show cause notice has been issued on 25.07.2019. Thus, the show cause notice has invoked the extended period of limitation.

3.5.2 The Noticee submits that the extended period of limitation cannot be invoked in the present case since there is no suppression, willful misstatement on the part of the Noticee.

3.5.3 There is no question of suppression or willful misstatement by the Noticee. The show cause notice has entirely failed to make out any case of suppression, willful misstatement on the part of the Noticee.

3.5.4 The show cause notice is liable to be dropped on this ground also.

3.7 **Penalty cannot be imposed under Section 78 of the Finance Act, 1994 in the present case**

3.7.1 The show cause notice has proposed to impose penalty under Section 78 of the Finance Act, 1994. The Noticee has demonstrated above that they have not suppressed any information from the department and there was no willful misstatement on the part of the Noticee.

3.7.2 It is therefore clear from the statutory provisions that for imposing penalty under section 78 of the Act it has to be established that there is a short payment of service tax by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any provisions of the Act or rules made there under with intent to evade payment of service tax.

3.7.3 It is submitted that the Show Cause Notice has not given any reason whatsoever for imposing the penalty under Section 78 of the Act. The show cause notice merely alleging baldly that there is suppression on the part of the Noticee. The present show cause notice has not brought any evidence/ fact which can establish that the Noticee has suppressed anything from the department. Hence no case has been made out on the ground of suppression of facts or willful misstatement of facts with the intention to evade the payment of service tax. Hence the present case is not the case of fraud, suppression, willful misstatement of facts, etc. Hence penalty under section 78 of the Act cannot be imposed. The show cause notice is liable to be dropped on this ground also. Further, the Noticee is entitled to entertain the belief that there activities were not taxable. That cannot be treated as suppression from the department. The Noticee rely on Hon'ble Gujarat High Court decision in case of **Steel Cast Ltd. 2011 (21) STR 500 (Guj).**

3.7.4 Without prejudice to the above submissions, it is submitted that no case has been made out by the Department that the present demand of service tax is on account of fraud, collusion,

and willful mis-statement, suppression of facts or contravention of any of the provisions of Act or rules made there under with intention to evade the payment of service tax. Hence no interest or penalty under section 76 and 78 of the Act can be imposed on this ground itself. The Show Cause Notice is liable to be dropped on this ground also.

The issue involved in the present case is of interpretation of statutory Provisions. For that reason also, penalties cannot be imposed.

3.7.5 Without prejudice to the above submissions, it is submitted that it is a settled principle of law that if a dispute is arising out of interpretation of the provisions of statute or exemption notification, no penalty can be levied. If at all it is held that the service tax is payable as demanded by the Show Cause Notice, then also it can be said that it is a dispute arising out of interpretation of the provisions of the law and not because of any intentional avoidance of tax. Noticee place reliance on the following case laws in this regard:

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

b) **Goenka Woollen Mills Ltd. v. Commissioner of C.Ex., Shillong, 2001 (135) ELT 873 (Tri. - Kolkata)**

c) **Bhilwara Spinners Ltd. v. Commissioner of Central Excise, Jaipur, 2001 (129) ELT 458 (Tri. – Del.)**

A lenient view may please be taken and the proceeding may be dropped in the interest of justice.

]"

Discussion and Findings:

19. The project "Satva Homes" is differently identifiable business for the assessee and the Department . Noticee is a output service provider only for those units which were booked and part/full payment received before the issuance of completion certificate. The completion certificate was received on five different dates from 26.10.2016 to 26.10.2019 for the blocks A,B,C,D and E of the project which are discussed above. Every Customer who books the particular unit before the completion certificate is liable to pay Service Tax and the developer collects and credits this amount to government exchequer. For these units only the noticee M/s AVS Corporation can be said to be output Service provider. For the units sold for full consideration after the completion certificate they have not discharged any service tax liability neither they are required . So they should have not taken Cenvat credit for unsold units till the issuance of completion certificate. The calculation in the SCN for ineligible credit has been done on the basis of built area as the all units are not equal .

20. The SCN explains that before and after 01.04.2016 in both periods the assessee was not eligible for excessive credit on unsold units till BU permission. With effect from 01.04.2016 explanation 3 & 4 to Rule 6(1) of Cenvat Credit Rules were inserted .Exempted services have been defined for the purpose of Rule 6 by also including what is not a service u/s 65B(44). The

ambit and domain of 'exempted service' has been increased and it covers the instant case which is termed as 'non service' as alleged by the noticee in their reply. In my opinion the eligibility of excessive credit as per Rule 3(1) of CCR-2004 to the noticee is not available before as well as after 01.04.2016. The noticee should have checked their eligibility of credit in respect of unsold units in light of Rule 3 read with Rule 2(1) which is detailed in notice .It appeared that the noticee had the full knowledge about their ineligibility for excess credit on unsold units till BU but they have even taken this inadmissible credit.

21. Further noticee has mentioned the provisions of Rule 11 and contended that a harmonious reading of Rule 3 of the CCR, 04 read with Rule 6 and Rule 11 of the said Rules will suggest that eligibility / entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. So demand of cenvat credit reversal was not requisite. In my opinion for deciding eligibility and entitlement for credit Rule 3 is sufficient and in the instant case at the time of availing credit the assessee was output service provider only for the booked units and not for whole project /all the units before BU permission. The contention of the assessee that the Cenvat credit cannot be denied and/or recovered unless specific machinery provisions are made in this regard is not tenable as once it is proved that the assessee has wrongly taken credit then Rule 14 comes into play. Rule 14(1)(ii) reads as under-

" Where the CENVAT credit has been taken or utilized wrongly , or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of the output services and the provisions of Sec.11A and 11AB of the Central Excise Act and Sections 73 & 75 of the Finance Act, 1994 shall apply mutatis mutandis for effecting such recoveries."

22. So it is clear that there is specific machinery provisions with the Revenue to recover the wrongly availed credit applying section 73 of the FA, 1994. Apart from this ,Rule 15 of Cenvat credit gives provisions of penalty for wrongly availed credit wilfully or fraudulently.

23. Further the assessee has mentioned Rule 4(7) and contended that the noticee is not required to wait till output service is sold to the service recipient. The Noticee can take the credit immediately after the day on bill/ challan of input service is received. In the present case, there is no dispute that the noticee have availed the credit after receipt of bill, challan in respect of input service, therefore, the noticee was legally entitled to take the credit on the date after the receipt of service Bills/ Challans. Therefore, the availment of cenvat credit by the noticee is absolutely legal and correct in accordance with Rule 4(7) of Cenvat Credit Rules, 2004. At the time of taking credit, there is no existence of any exempted service, therefore, there is no application of Rule 6. The part of the service was exempted only after obtaining completion certificate. Thereafter, the noticee was not required to avail the cenvat credit on the input service, if any, received after obtaining the completion certificate. In the present case, the appellant have either not availed the cenvat credit in respect of the services received after obtaining the completion certificate in respect of exempted service or availed proportionate credit attributed to the taxable output service. The contention of the noticee is not relevant to the facts of the instant case as

output service. The contention of the noticee is not relevant to the facts of the instant case as there was no dispute that they had availed the credit after receipt of the bill/challan in respect of input service. They were legally entitled to take the credit on the date after receipt of the bills /challans and accordingly they have taken credit as per Rule 4(7). The core issue is here that they were not eligible to take credit for the units where they were not output service provider i.e. unsold flats after BU permission. The SCN nowhere alleges that the noticee have contravened Rule 4(7).

24. From the above discussion and considering the grounds of SCN and reply of the noticee it is clear that noticee was not eligible for taking CENVAT Credit on unsold units after BU permission as per Rule 3(1) read with Rule 2(1) .They should not have taken such credit and respected the provisions of Rule 9(6) by virtue of which they are given facility as well as responsibility to examine their eligibility and admissibility of Cenvat Credit before availing in this era of self assessment. The intention of government is evident from the fact that in similar cases ,in GST regime also ,ITC is not available to Builders as per provisions of section 17(5)(c) and (d) of CGST Act,2017 . In present case, date of BU permission was never disclosed to the Department. It was departmental Audit team who detected this wrong availment of credit by them. I find the grounds and facts of the notice strong, logical and as per provisions of law and noticee's reply does not hold water and only becomes misinterpretation of law to defend their wrong act in the present circumstances and facts of the case.

25. The assessee has relied a large number of case laws and stated that the said case laws are squarely applicable in the present case. On going through the said case laws, I find that facts and circumstances of those cases are different and therefore, the said case laws are not maintainable.

In view of the above I pass the following order-

Order

26. (i) I confirm the demand of the wrongly availed and utilized Cenvat credit to the tune of Rs.53,71,341 - (Rupees Fifty three Lakhs, seventy one Thousand three hundred and forty one only) (inclusive of Education Cess and Higher Education Cess) and order to recover the same henceforth from M/s AVS Corporation Ltd., Ahmedabad under Section 73(1) of the Finance Act, 1994 read with Rule 14(1) (ii) of the Cenvat Credit Rules, 2004.

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

(iii) I impose a penalty of Rs.53,71,341 - (Rupees Fifty three Lakhs, seventy one Thousand three hundred and forty one only) upon AVS Corporation Ltd., Ahmedabad ,under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78(1) of the Finance Act, 1994.

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

28. The Show Cause Notice bearing F.No.Vl/1(b)/Tech-24/SCN/AVS/2019-20 dated 25.07.2019 is disposed of in aforesaid manner.

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

F No. STC/15-45/OA/2019.
By Speed Post AD

Date:24.02.2021.

To,

M/s AVS Corporation,
2/D. River View Flat,
Behind Swastik Super Market,
Ashram Road, Ahmedabad-380009

Copy to :

1) The Commissioner, Central GST & Central Excise, Ahmedabad North, Ahmedabad.
2) The Deputy/Assistant Commissioner, Div-VII CGST & Central Excise, Ahmedabad North.
3) The Superintendent, Range-I Division VII, CGST & Central Excise, Ahmedabad North
4) Guard File.