आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER
केंद्रीय वस्तु एवं सेवा कर तथा केंद्रीय उत्पाद शुल्क, अहमदाबाद उत्तर
CENTRAL GOODS & SERVICES TAX & CENTRAL EXCISE, AHMEDABAD NORTH
पहली मंजिल, कस्टम हाउस, नवरंगपुरा, अहमदाबाद – 380009
FIRST FLOOR, CUSTOM HOUSE, NAVRANGPURA, AHMEDABAD – 380009
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. **V.48/15-252/OA/2021** आदेश की तारीख़/Date of Order:- 19.05.2022

जारी करने की तारीख़/Date of Issue :- 19.05.2022

DIN NO: 20220564WT0000999CB8

द्वारा पारित/Passed by:- आर गुलजार बेगम ***/R. GULZAR BEGUM***

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 11/ADC/GB/2022-23

जिस व्यक्ति)यों (को यह प्रति भेजी जाती है ,उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

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

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

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

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

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

(1) उक्त अपील की प्रति।

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

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

(1) Copy of accompanied Appeal.

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

विषयः- कारण बताओ सूचना/ Show Cause Notice **F. No. GADT/TECH/SCN/CE/2/2021-TECH and LEGAL-O/o COMMR-CGST-ADT-AHMEDABAD dated 13.04.2021** issued to **M/s. Big Box Containers Pvt Ltd,** Survey No. 881/1, Opposite Gallops SEZ, Near Hotel Kankavati, Village-Rajoda, Sarkhej-Bavla Road, Ahmedabad-382220.

BRIEF FACTS OF THE CASE

M/s Big Box Containers Pvt Ltd, Survey No 881/1, Opposite Gallops SEZ, Near Hotel Kankavati, Village: Rajoda, Sarkhej-Bavla Road, Ahmedabad 382 220 (hereinafter referred to as the 'assessee' for the sake of brevity)is engaged in the manufacture of corrugated boxes and sheets. The assessee has a Central Excise Registration No AADCB7995BEM001. The audit of the assessee was carried out for the period from April 2016 to June 2017 and the details of the unsettled objections are as follows:

Revenue Para No 1 - Wrong availment/utilization of cenvat credit

2. On verification of records related to availment of cenvat credit, it was seen that the assessee had not submitted any invoices on which cenvat credit was availed by them. It was found that cenvat credit would not be admissible to the assessee without the cover of duty paying documents. The details of cenvat credit not admissible to them is tabulated as under:

(Rs in actuals)

Month	Cenvat credit not admissible				
	Central Excise	Service Tax	Capital Goods	Additional Duty of Excise	Total
2016-17					
APRIL	1084275	1866	0	58379	1144520
MAY	703488	2916	0	38329	744733
JUNE	701202	111162	0	32123	844487
JULY	1220397	31569	0	436555	1688521
AUG	797939	54934	0	16356	869229
SEPT	476912	126825	0	6381	610118
OCT	723751	103993	10895	18878	857517
NOV	447654	148141	0	30069	625864
DEC	643375	18968	0	18101	680444
JAN	669888	81211	16007	15375	782481
FEB	564135	71812	570	31488	668005
MARCH	1201433	0	21334	104780	1327547
TOTAL	9234449	753397	48806	806814	10843466
2017-18					
APRIL	696304	258360	0	39483	994147
MAY	1221714	0	0	22531	1244245
JUNE	874617	193234	22876	52631	1143358
TOTAL	2792635	451594	22876	114645	3381750

3. The assessee during the course of audit have stated that the invoices on which they had availed cenvat credit were destroyed in a fire accident dated 30.04.2019. The assessee referred to a panchnama drawn on 30.4.2019 by the Police Officials of Bavla Police Station. It was found from the panchnama drawn on 30.4.2019 that there is no mention of loss of documents and therefore, it appeared that the panchnama would not become an evidence for the loss of the invoices.

4. Rule 9(1) of the Cenvat Credit Rules, 2004 ('Cenvat Rules') specifies that the Cenvat Credit shall be taken by the manufacturer or the provider of output service on the basis of documents as mentioned from clause (a) to (g) of the said Rules. Rule 9(5) of the Cenvat Rules says that "the manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, Cenvat credit taken and utilized, the person from

whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer or provider of output service taking such credit". Further Rule 9(6) of the Cenvat Rules read as "the manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, Cenvat credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer or provider of output service taking such credit."

5. It was found that the assessee have failed to submit the details/documents in respect of the Cenvat credit availed by them. Hence, they have contravened the provisions of Rule 9(1) of Cenvat Rules read with Rules 9(5) and Rule 9(6) of the Cenvat Rules. Therefore, the wrongly availed cenvat credit and utilised by them totally amounting to Rs.1,42,25,216/- (Rs.1,08,43,466/- during 2016-17 and Rs.33,81,750/- during 2017-18 (April 2017-June 2017) appeared to be recoverable from the assessee, under the provisions of Section 11A(4) of the Central Excise Act, 1944 ('Act') read with the provisions of Rule 14(1)(ii) of the Cenvat Rules. It was also found that interest is recoverable from the assessee, under the provisions of Section 11AA of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Rules. As there is a case of availment of cenvat credit without duty paying documents, it was also appeared that there is an intent to wrongly avail the cenvat credit. It, was, therefore, found that penalty under Section 11AC(1)(c) of the Act read with the provisions of Rule 15(2) of the Cenvat Rulesand Rule 25 of the Central Excise Rules, 2002 ('Rules') would also be imposable on the assessee.

Revenue Para No 2:Short payment of Central Excise duty

6. On reconciliation of income shown in their P&L A/c with the sales income shown in their ER1 returns for the financial year 2016-17, it appeared that there is a difference in the value on which the duty of excise has not been paid. The details of the reconciliation and the short payment of duty is tabulated below:

Financial year	2016-17 (Rs)
Sales Value as per Balance Sheet	247475813
Add : Sales return	0
Discount	0
scrap sale	5798194
agency charges	0
Total Gross Sales :	253274007
Less : Excise duty paid	12758015
Vat paid	0
Gross Sales (excluding duty/tax) :	240515992
Less : Labour /Job work Income (if any)	39550
(high sea sales)	0
Foreign Exchange Fluctuation	129893
As such sales	3952321
difference b/w fob values of export in ER-1 and commercial invoice	0
non excisable good sales	0
Total Net Excise Sales as per Balance-Sheet : Domestic sales + Export sales	236394228
Sales figure as per E.R.1 returns : Home Consumption + Export	225675394
Difference if any (--) EXCESS INCOME AS PER P&L A/C	10718834
Central Excise duty on excess income (sales)	643130

7. It is seen from the above table that the sales shown as per the balance sheet is more than the sales reflected in their ER1 register. The assessee had not given any plausible explanation about the differential values shown in the balance sheet as compared to their ER1 returns, during the course of audit. It, therefore, also found that duty is payable on the differential value, as tabulated above. From the foregoing facts and discussions, it was found that the assessee have contravened the provisions of:

- Rule 4(1) of the Rules read with the provisions of Rule 8(1) of the Rules as they have failed to pay the duty of excise on the differential value;
- Rule 5(1) of the Rules as they failed to determine the appropriate rate of duty on the clearances made by them;
- Rule 6(1) of the Rules as they have failed to assess their duty correctly on the clearances made by them; and
- Rule 12 of the Rules as they have failed to file their returns properly.

8. Hence by not paying the appropriate duty on the differential value and not disclosing the same to the department, the assessee has suppressed the material facts with an intention to evade payment of duty. Accordingly, the differential duty of Rs 6,43,130/- is to be demanded and recovered from the assesse, under the provisions of Section 11A(4) of the Act by invoking the extended period of time. It was also found that the assesse is liable to pay interest under the provisions of Section 11AA of the Act. It further found that the assessee has suppressed the material facts and had an intent to evade the payment of duty. Therefore, the assessee would be liable for penal action under the provisions of Section 11AC(1)(c) of the Act read with the provisions of Rule 25 of the Rules.

Revenue Para No 3: Short payment of Service tax as a recipient

9. During the course of verification of records and reconciliation of service tax paid under the reverse charge mechanism ('RCM') on Goods Transport Agency Services ('GTA') and Legal services, it was observed that they had shown lesser value in ST3 as compared to the expenses shown in their financial records. The detailed reconciliation and the differential service tax payable is tabulated below:

(Rs in actuals)

	Subject	2016-17	2017-18 (upto June)
GTA	Expenses as per Financial accounts	8094677	1600495
	Invoices less than >750	20968	5430
	Paid in ST-3	7941038	1561469
	Difference	132671	33596
	S.T. on difference	5970	1512
LEGAL	Expenses as per Financial accounts	10000	0
	Paid in ST-3	0	0
	Difference	10000	0
	S.T on difference	1500	0

10. The relevant text to Notfn No 30/2012-ST dated 20.6.2012, as amended is reproduced as under:

> *"In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 15/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 213(E),*

dated the 17th March, 2012, and (ii) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 36/2004-Service Tax, dated the 31st December, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 849(E), dated the 31st December, 2004, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely :—

I. The taxable services, -

(A) (ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is, -

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);
(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;
(c) any co-operative society established by or under any law;
(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;
(e) anybody corporate established, by or under any law; or
(f) any partnership firm whether registered or not under any law including association of persons;

(A) (iv) provided or agreed to be provided by, [(B) an individual advocate or a firm of advocates by way of support services"

(II) The extent of service tax payable thereon by the person who provides the service and any other person liable for paying service tax for the taxable services specified in paragraph I shall be as specified in the following table, namely: -

TABLE

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
2	in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Nil	100%
5	in respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services directly or indirectly	Nil	100%"

11. The person liable to pay service tax under the reverse charge mechanism has also been stipulated under Rule 2(1)(d) of the Service Tax Rules, 1994 ('Service Tax Rules'), which reads as under:

"[(d) "person liable for paying service tax", -

(B) in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

(I) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;
(III) any co-operative society established by or under any law;
(IV) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;
(V) any body corporate established, by or under any law; or
(VI) any partnership firm whether registered or not under any law including association of persons"

(D) in relation to service provided or agreed to be provided by,-

[(II) a firm of advocates or an individual advocate other than a senior advocate by way of legal services

12. It was found that in terms of the provisions of Section 68(2) of the Finance Act, 1944 ('Finance Act') read with the provisions of Rule 2(1)(d)(B) of the Service Tax Rules in respect of GTA Services and the provisions of Rule 2(1)(D)(II) of the Service Tax Rules in respect of legal services and Notfn. No 30/2012-ST dated 20.6.2012, as amended, the service recipient was liable to pay 100% of the service tax.

13. From the foregoing facts and discussions, it was seen that that the assessee have contravened the provisions of:

- Section 68(2) of the Finance Act read with Rule 6 of the Service Tax Rules as they have failed to pay service tax at the rate specified in Section 66B of the Finance Act in such manner and within such period as may be prescribed;
- Section 70 of the Finance Act read with Rule 7 of the Service Tax Rules as they have failed to assess their tax liability properly and failed to file proper returns as prescribed.

14. The assessee have not disclosed the correct value to the revenue in respect of the receipt of GTA services and legal services during the financial year 2016-17 and 2017-18 (upto June 2017). They have short paid the service tax on the GTA and legal services on RCM basis and not shown the correct details in any of the records/returns before the audit objection was detected. It, therefore, they have suppressed the value of services received with an intent to evade the payment of service tax. Accordingly, the proviso to Section 73(1) of the Finance Act is applicable for invoking the extended period of 'five years' for recovery of service tax amounting to total Rs 8,982/- (GTA services - Rs 5,970/-(2016-17) + Rs 1,512/- (2017-18(upto June 2017)) and legal services - Rs 1,500/-(2016-17)). The assessee has not paid the service tax amounting to Rs 8,982/- as discussed above and therefore, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Finance Act. The said act of not disclosing the correct value for the GTA and legal services received by them and not paying the service tax on these services on RCM basis as discussed above, the assessee has suppressed the value of services with an intention to evade the payment of service tax. It, therefore, the assessee would also be liable for penal action under the provisions of Sections 78(1) of the Finance Act. The assessee have paid the service tax amounting to Rs 8,982/- alongwith interest of Rs 5163/- and penalty of Rs 775/- on 19.3.2021 vide challan CPIN numbered 21032400355271. However, they have not provided the DRC 03 for this payment.

15. A communication was sent to the assessee on 25.1.2021 conveying the objections. The asseessee under their reply dated 17.3.2021 (received on 22.3.2021) have stated that they had rightfully taken the admissible cenvat credit. It was contended that the panchnama and other related documents mention the extent of damage/destruction due to the fire accident. The assessee submitted that non-mention of the destruction of documents in the police panchnama should not fatal to the admissibility of cenvat credit to them. For the objection on difference on reconciliation, the assessee attached a working sheet to show that there was no difference and therefore, the assessee have stated that there was no liability to duty.

A pre consultation was held on 5.4.2021. Mr Jenil Vora, Director in the assessee firm and Mr Vinod Hakani, Advocate appeared on behalf of the assessee in virtual mode. They reiterated the contentions of their letter dated 17.3.2021. The rulings in the case of IFB Industries Ltd reported at 2017 (47) STR 329(T) was cited to say that cenvat credit was eligible to them.

16. The availability of invoices is a legal condition as per the provisions of Rule 9(1) of the Cenvat Rules in order to determine the availability and eligibility of cenvat credit to the assessee. It also noticed that the police panchnama dated 30.4.2019 does not mention anything about destruction of documents in the fire accident. They have not produced any other relevant documents to show that the documents were also lost in the fire. Accordingly, without having duty paying invoices, cenvat credit would not be eligible to the assessee. In the case of IFB Industries Ltd cited by the assessee, the Appellate authority in his Order has observed that he has scrutinized the invoices. The fire occurred at the premises of IFB after this Appellate Order was passed. In the present case, the verification of the cenvat invoices could not be carried out even for the first time. Accordingly, the facts mentioned in the case of IFB Industries are different to the facts of the present case and therefore the case law of IFB Industries cannot be made applicable. On the issue of short payment of duty, the differential duty has been worked out on the basis of detailed reconciliation made during the course of audit. Though the assessee have given their own reconciliation sheet and its working sheets, the assessee have not produced detailed documents which were verifiable. Therefore, the assessee's argument that there was no short payment appears to be incorrect. On the issue of short payment of service on GTA and Legal Services, they have stated that they have paid the service tax amounting to Rs 8,982/- alongwith interest of Rs 5163/- and penalty of Rs 775/- vide challan CPIN No 21032400355271. However, they have not provided the DRC 03 for the payment. It was also seen that the amount of penalty @ 15% for the service tax amounting to Rs 8,982/- works out to Rs 1,347/- and therefore the the payment of penalty made by them amount to Rs 775/- seems to be incorrect.

17. In view of the above, Show Cause Notice was issued to M/s Big Box Containers Pvt Ltd, called upon to show cause as to why:

i. wrongly availed cenvat credit and utilised by them amounting to Rs 1,42,25,216/- (Rupees One crore forty two lacs twenty five thousand two hundred sixteen only), should not be demanded and recovered from them under the provisions of Section 11A(4) of the Act read with Rule 14(1)(ii) of the Cenvat Rules;

ii. the duty of excise amounting to Rs 6,43,130/- (Rupees Six lacs forty three thousand one hundred thirty only),should not be demanded and recovered from them, under the provisions of Section 11A(4) of the Act;

iii. interest should not be charged and recovered from them, under the provisions of Section 11AA of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Rules on the proposed recovery at (i) above;

iv. interest should not be charged and recovered from them under the provisions of Section 11AA of the Act on the proposed demand at (ii) above;

v. penalty should not be imposed on them under the provisions of Section 11AC(1)(c) of the Act read with the provisions of Rule 15(2) of the Cenvat Rules on the demand at (i) above;

vi. penalty should not be imposed on them under the provisions of Section 11AC(1)(c) of the Act on the demand at (ii) above;

vii. penalty should not be imposed on them under the provisions of Rule 25 of the Rules on the proposed demand at (i) and (ii) above;

viii. service tax should not be demanded and recovered from them amounting to Rs 7,482/- (Rupees Seven thousand four hundred eighty two only) on GTA services, under the proviso to Section 73(1) of the Finance Act;

ix. service tax should not be demanded and recovered from them amounting to Rs 1,500/- (Rupees One thousand five hundred only) on legal services, under the proviso to Section 73(1) of the Finance Act;

x. penalty should not be imposed on them under the provisions of Section 78(1) of the Finance Act on the demand at (viii) and (ix) above; and

xi. interest should not be charged and recovered under the provisions of Section 75 of the Finance Act on the proposed demand at (viii) and (ix) above;

DEFENCE REPLY

18. The assessee vide letter dated Nil filed their reply to SCN wherein they denied all the averments and allegations made vide the SCN and in particular that the assessee has contravened the provisions of the Rule 9(1) of the CCR,2004 read with rule 9(5) of the CCR,2004 and Rule 4(1), 5(1), 6(1), Rule 12 read with the provisions of Rule 8(1) of the Rules by availing Cenvat credit wrongly by suppressing the material facts from the Department. They further contended that the fact which is forthcoming from the records and ongoing process in the matter is enough to hold that the issue has been dealt with hurriedly and without understanding the subject in true spirit. The undisputed facts are that the assessee could not submit the details/documents in respect of Cenvat credit availed by them at the time of audit as the same was not available due to fire broke out in the factory on 28.04.2019 and hence as an evidence, they submitted a panchnama drawn on 30.04.2019 by the Officers of Bavla Police Station (containing 1 to 9 Gujarati and 1 to 8 translated in English duly notarized. The facts relating to fire accident was intimated to the department by the assessee prior to audit vide letter dated 13.05.2019, intimating that "major fire broke out in our manufacturing unit situated at survey No.881/1, Vill. Rajoda, Sarkhej-Bavla Highway, Taluka Bavla, Ahmedabad 382220 which destroyed all our raw materials, finished goods and everything. It is a total loss to our factory" They further submitted that over and above, by a deed in the form Affidavit dated 24.12.2020 was solemnly affirmed before NOTORY, Gujarat State, India by noticee i.e.Arvind Kirtilal Vora, Director of M/s. Big Box Containers P. Ltd that " all the machineries & its spare parts, plant shade, RM & FG stocks, alongwith all our books of accounts which were stored in our factory plant premises, including original copies of sales & purchase invoice, C forms, H Forms, CT3 & ARE 1 Forms, Export & SEZ invoices & its re warehousing Certificates, Advance Licence/EPCG Licence and it related documents as well as other original documents pertaining to VAT, Excise, Income Tax, GST, Import /Export and other Books of accounts".

19. They have also mentioned that it is very surprising that the department has not challenged the Fire Accident, but has challenged only about the documents. It can easily be established from Police panchnama dated 29.04.2019 that everything which were lying in the factory premises has been destroyed due to fire Accident. They have also invited attention to page 7 of the panchnama dated 29.04.2019 that "and the company as fire took place the company's machinery and raw material and finished goods etc be burnt and iron angles and iron sheet which bent and broken and wiring be burnt" It means that rest everything which has not been mentioned in panchnama in details have been destroyed /burnt. It is also matter of common understanding that the temperature, which had scaled up so high during the fire, being able to destroy even machinery, iron angles and iron sheets, would have been burnt piece of papers to ashes. Now the assessee collected all the invoices for the period from April

2016 to June 2017 from their different suppliers/sellers. Month-wise statements showing all details of the concerned invoices are prepared and submitted for verification.

20. They have also relied upon case law of M/s. Biopac India Corporation Ltd, The Hon'ble Tribunal has expressed its view in favour of the appellant tax payer and has allowed the appeal by saying the action cannot be taken against appellant in as much as they were not intentionally involved in defrauding exchequer and reversal of credit is not required. They have also relied upon the case law reported in 2008(24) ELT 548(Tri-Ahmedabad), 2014(307)ELT 516 (Mad). It was further submitted that they have always availed and utilized the Cenvat credit in a lawful manner only and thus there has never been any contravention of the provisions of the Act/Rule attracting any imposition of penalty Since no amount is required to be recovered under section 111 A of the Act read with Rule 14 of CER,2004 proposal for recovery of interest and penalty is also no sustainable. The assessee has undisputedly filed all the ER1s which have been checked/scrutinized by the department without raising any query which established that the department had found nothing adverse as regards Cenvat credit availed by them.

21. As regards revenue para No.2, a reconciliation with P & L and sales shown in ER 1 are reconciled and the difference has been explained for which they have furnished various documents such as P&L account for the year 2016-17, Ledger discount of sales ledger, job charges ledger, ER-1 of January 2017, Credit Note ledger and reconciliation for the year 2016-17. And according to which the difference has been reconciled.

22. As regards observation in Revenue Para No.3 of Audit Report as to liability of service tax along with the interest and penalty, the noticee have paid the service tax amounting to Rs.8982/- along with interest of Rs.5871/- and penalty of Rs.775/- on 2408.2021 vide challan CPIN numbered 21082400467228. However the assessee now provided the DRC for this payment.

23. They further contended that the present case, the noticee never suppressed from any information from the department and true and complete details of all transactions were recorded correctly in the books of accounts and therefore extended period of limitation under Section 11 A of the Act and simultaneous proposal of imposition of penalty under section 11AC of the Act, is totally baseless. Further they contended that in view of the above legal position the demand of RS.1,42,25,216/- and Rs.6,43,130/- raised against the noticee is not sustainable in law as well as in facts since the noticee has not a availed any amount of CENVAT credit incorrectly and not short paid any Central Excise duty as discussed in para supra. And accordingly the assessee requested to drop the proceedings under this SCN.

PERSONNEL HEARING

24. Personnel Hearing was granted to the assessee on 16.02.2022. Shri V.H.Hakhani, duly authorized, attended personnel hearing on behalf of the assessee. He has stated that they have submitted written reply dated 18.10.2021 and reiterated the same, for consideration and requested to drop further proceedings.

DISCUSSION AND FINDINGS.

25. I have carefully gone through the case records, SCN, submission of reply and the arguments put forth at the time of personal hearing by the said assessee. I find that a total of 3 objections were raised in the audit verification against the assessee. The objections related to wrong availment of Cenvat credit of Rs.1,42,25,216/-, short payment of excise duty of Rs.6,43,130/- and non payment of service tax of Rs.8,983/- from the period from 2016-17 to June 2017. They have also debited an amount of Rs

15,628/- on the objection relating to non payment of service tax as per Para 3 of the audit report. The audit of the assessee was carried out for the period from April 2016 to June 2017. In this case the points to be discussed are

1. whether the wrongly availed and utilised Cenvat credit of Rs.1,42,25,216/-is recoverable or not under the provisions of Section 11A(4) of the Act read with Rule 14(1)(ii) of the Cenvat rules.
2. Whether the unpaid duty of excise amounting to Rs.6,43,130/-should be demanded and recovered or not under the provisions of 11A(4) of the Act and
3. Whether the unpaid service tax of Rs.7,482/- on GTA services should be demanded and recovered under proviso to section 73(1) of Finance Act, 1944 or not.

26. For the sake of clarity, I would like to discuss the matter point wise. The first point to be decided is whether the wrongly availed and utilised Cenvat credit of Rs.1,42,25,216/-is recoverable or not under the provisions of Section 11A(4) of the Act read with Rule 14(1)(ii) of the Cenvat rules. Herein this point, during the period of Audit and on verification of records related to availment of cenvat credit, it was seen that the assessee had not submitted any invoices on which cenvat credit was availed by them. It was found that cenvat credit would not be admissible to the assessee without the cover of duty paying documents. Under Rule 9 of Cenvat Credit Rules, certain documents have been prescribed for availment of Cenvat credit which is reproduced as under:

As per Rule 9(1) of the Cenvat Credit Rules, 2004, certain documents have been prescribed for availment for cenvat credit, which reads as follow:-

Rule 9 : Documents and accounts.- (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(a) an invoice issued by-

(i) a manufacturer for clearance of -

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty.

Explanation.- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

(c) a bill of entry; or

(d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or

(e) a Challan evidencing payment of service tax by the person liable to pay service tax under sub-clauses (iii), (iv), (v) and (vii) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or

(f) an invoice, a bill or Challan issued by a provider of input service on or after the 10th day of, September, 2004; or

(g) an invoice, bill or Challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

27. From the above provisions of law it appears that cenvat credit is eligible on the basis of invoices of manufacturer, registered dealer or service provider or an input service distributor

28. Further, Rule 9(6) of the CCR 2004 stipulates that the burden of proof regarding admissibility of cenvat credit shall lie upon the manufacturer or provider of output service taking such credit. In this era of self assessment, the onus of taking legitimate cenvat credit has been passed on the assessee in terms of the said rule. In other words, it is the responsibility of the assessee to take cenvat credit only if the same is admissible. The assessee in his defence reply in para 6, has stated that the assessee has collected all the invoices for the period from April 2016 to June 2017 from their different suppliers/sellers. Monthwise statements showing all details of the concerned invoices are prepared and submitted for verification at the time of adjudication process.

29. The details list of cenvat credit furnished by the assessee is tabulated as under:

(Rs in actuals)

Month	Cenvat credit not admissible				
	Central Excise	Service Tax	Capital Goods	Additional Duty of Excise	Total
2016-17					
APRIL	1084275	1866	0	58379	1144520
MAY	703488	2916	0	38329	744733
JUNE	701202	111162	0	32123	844487
JULY	1220397	31569	0	436555	1688521
AUG	797939	54934	0	16356	869229
SEPT	476912	126825	0	6381	610118
OCT	723751	103993	10895	18878	857517
NOV	447654	148141	0	30069	625864
DEC	643375	18968	0	18101	680444
JAN	669888	81211	16007	15375	782481
FEB	564135	71812	570	31488	668005
MARCH	1201433	0	21334	104780	1327547
TOTAL	9234449	753397	48806	806814	10843466
2017-18					
APRIL	696304	258360	0	39483	994147
MAY	1221714	0	0	22531	1244245
JUNE	874617	193234	22876	52631	1143358
TOTAL	2792635	451594	22876	114645	3381750

30. The said invoices submitted by the assessee were forwarded to the Jurisdiction office for verification of genuiness of invoices and requested jurisdiction office to furnish verification report of all the invoices forwarded to them. The Asstt.

Commissioner vide letter F. No. AR-V/Bigbox/FAR 893/2020-21 dated 29.04.2022 has verified all the invoices and stated that the assessee has correctly taken cenvat credit on the basis of the invoices submitted for verification. Therefore, as specified under *Rule 9(1) of the Cenvat Credit Rules, 2004, as the assessee has provided all the invoices on which they have availed cenvat credit for the period of dispute, the assessee is eligible for benefit of availment of Cenvat Credit and therefore, I allow the benefit of input credit to the assessee for an amount of Rs. 1.08,43,466/- for the financial year 2016-17 and Rs. 33,81,750/- for the period April 2017 to June 2017.*

31. In view of the above facts and findings, the Cenvat credit amounting to Rs. 1,42,25,216/- (inclusive of education cess and higher education cess) for the period from April 2016 to June 2017, as detailed above is admissible as specified under *Rule 9(1) of the Cenvat Credit Rules, 2004.*

32. The second point is to decide is whether the unpaid duty of excise amounting to Rs. 6,43,130/-should be demanded and recovered or not under the provisions of 11A(4) of the Act. On perusal of reconciliation of income shown in their P&L A/c with the sales income shown in their ER1 returns for the financial year 2016-17, it appeared that there is a difference in the value on which the duty of excise has not been paid. The details of the reconciliation and the short payment of duty is tabulated below:

Financial year	2016-17 (Rs)
Sales Value as per Balance Sheet	247475813
Add : Sales return	0
Discount	0
scrap sale	5798194
agency charges	0
Total Gross Sales :	253274007
Less : Excise duty paid	12758015
Vat paid	0
Gross Sales (excluding duty/tax) :	240515992
Less : Labour /Job work Income (if any)	39550
(high sea sales)	0
Foreign Exchange Fluctuation	129893
As such sales	3952321
difference b/w fob values of export in ER-1 and commercial invoice	0
non excisable good sales	0
Total Net Excise Sales as per Balance-Sheet : Domestic sales + Export sales	236394228
Sales figure as per E.R.1 returns : Home Consumption + Export	225675394
Difference if any (--) EXCESS INCOME AS PER P&L A/C	10718834
Central Excise duty on excess income (sales)	643130

33. It is seen from the above table that the sales shown as per the balance sheet is more than the sales reflected in their ER1 register. The assessee had given a reconciliation statement justifying the difference pointed out in the Show Cause Notice. On perusal of the said reconciliation state, I find that the assessee could not establish the reason for the difference in the value between the net sales as per balance sheet (domestic + export) and sales figure as per ER1 return for the relevant period. They have also not supplied any supporting documents in this regard. In the absence of the convincing reply to explain the difference alongwith supporting documents, the Central Excise duty of Rs.6,43,130/- on the differential value of Rs. 10718834/- is payable and therefore the same is also required to be recovered. In view of the above facts, I find that the assessee have contravened the provisions of:

- Rule 4(1) of the Rules read with the provisions of Rule 8(1) of the Rules as they have failed to pay the duty of excise on the differential value;
- Rule 5(1) of the Rules as they failed to determine the appropriate rate of duty on the clearances made by them;
- Rule 6(1) of the Rules as they have failed to assess their duty correctly on the clearances made by them; and
- Rule 12 of the Rules as they have failed to file their returns properly.

34. As the assessee has not paid the appropriate duty on the differential value and not disclosing the same to the department, the assessee has suppressed the material facts with an intention to evade payment of duty. Therefore, the differential duty of Rs 6,43,130/- demanded is required to be confirmed under the provisions of Section 11A(4) of the Act by invoking the extended period of time. It was also found that the assessee is liable to pay interest under the provisions of Section 11AA of the Act. It further found that the assessee has suppressed the material facts and had an intent to evade the payment of duty. Therefore, the assessee would be liable for penal action under the provisions of Section 11AC(1)(c) of the Act read with the provisions of Rule 25 of the Rules.

35. The third point is regarding non payment of service tax paid under the reverse charge mechanism ('RCM') on Goods Transport Agency Services ('GTA') and Legal services, it was observed that they had shown lesser value in ST3 as compared to the expenses shown in their financial records. On perusal of SCN, I find that during the course of verification of records and reconciliation of service tax paid under the reverse charge mechanism ('RCM') on Goods Transport Agency Services ('GTA') and Legal services, it was observed that they had shown lesser value in ST3 as compared to the expenses shown in their financial records. The detailed reconciliation and the differential service tax payable is tabulated below:

(Rs in actuals)

	Subject	2016-17	2017-18(upto June)
GTA	Expenses as per Financial accounts	8094677	1600495
	Invoices less than >750	20968	5430
	Paid in ST-3	7941038	1561469
	Difference	132671	33596
	S.T. on difference	5970	1512

LEGAL	Expenses as per Financial accounts	10000	0
	Paid in ST-3	0	0
	Difference	10000	0
	S.T on difference	1500	0

36. In the instant case, the assessee have not disclosed the correct value to the revenue in respect of the receipt of GTA services and legal services during the financial year 2016-17 and 2017-18 (upto June 2017). They have short paid the service tax on the GTA and legal services on RCM basis and not shown the correct details in any of the records/returns before the audit objection was detected. It, therefore, they have suppressed the value of services received with an intent to evade the payment of service tax. Accordingly, the proviso to Section 73(1) of the Finance Act is applicable for invoking the extended period of 'five years' for recovery of service tax amounting to total Rs 8,982/- (GTA services - Rs 5,970/-(2016-17) + Rs 1,512/- (2017-18(upto June 2017)) and legal services - Rs 1,500/-(2016-17). The assessee has not paid the service tax amounting to Rs 8,982/- as discussed above and therefore, interest is to be charged and recovered from the assessee under the provisions of Section 75 of the Finance Act. The said act of not disclosing the correct value for the GTA and legal services received by them and not paying the service tax on these services on RCM basis as discussed above, the assessee has suppressed the value of services with an

intention to evade the payment of service tax. It, therefore, the assessee would also be liable for penal action under the provisions of Sections 78(1) of the Finance Act.

37. On perusal of reply to SCN, the assessee submitted that they have paid the service tax amounting to Rs 8,982/- alongwith interest of Rs 5163/- and penalty of Rs 775/- on 19.3.2021 vide challan CPIN numbered 21032400355271. However, they have not provided the DRC 03 for this payment. It was also seen that the amount of penalty @ 15% for the service tax amounting to Rs 8,982/- works out to Rs 1,347/- and therefore the payment of penalty made by them amount to Rs 775/- is incorrect. In their reply to SCN they have mentioned that they are submitting DRC 03 as proof of payment. However they have provided copy of challan only as Exhibit -6 instead of DRC 03. Accordingly in the absence of DRC 03, contention of the assessee that they have paid the service tax cannot be accepted.

38 In view of the above findings, I pass the following order:

(i) I confirm the Central Excise duty of Rs. 6,43,130/- on differential value of Rs.1,07,18,834/- for the period 2016-17 and be recovered from them in terms of the provisions of Section 111A(1)(4) of the Central Excise Act, 1944 as stated in Para 2 of the Audit Report .

(ii) I confirm the Demand of Service Tax of Rs. 7,482/- (Rs. Seven Thousand Four Hundred Eighty Two only) on GTA Services, under the proviso to Section 73(1) of the Finance Act, 1994 as stated in Audit Para NO. 3.

(iii) I confirm the Demand of Service Tax of Rs. 1,500/- (Rs. One Thousand Five Hundred) on Legal Services, under the proviso to Section 73(1) of the Finance Act, 1994 as stated in Audit Para NO. 3.

(iv) I drop the demand of Rs.1,42,25,216/- (Rupees One crore forty two lacs twenty five thousand two hundred sixteen only), and allow the assessee to take Cenvat credit as *per Rule 9(1) of the Cenvat Credit Rules, 2004 as detailed in para 1 of the Audit Report.*

(v) I order to recover interest from them, under the provisions of Section 11AA of the Act read with the provisions of Rule 14(1)(ii) of the Cenvat Rules on the proposed recovery at (i) (ii) & (iii) above;

(vi) I impose penalty of Rs. 6,43,130/- under the provisions of Rule 25 of the Cenvat Excise Rules read with Section 11AC(1)(c) of the Act on the demand at (i) above;

(vii) I impose penalty of Rs. 7482/- on them under the provisions of Section 78(1) of the Finance Act on the demand at (ii) above;

(viii) I impose penalty of Rs. 1500/- on them under the provisions of Section 78(1) of the Finance Act on the demand at (iii) above;

39 In terms of Section 11AC(1)(b) of Central Excise Act, 1944, if M/s. Big Box Containers P. Ltd pays the central excise duty determined at Sl.No.(i) above and interest payable thereon within 30 days of the date of communication of this order the amount of penalty liable to be paid by M/s. Big Box Containers P. Ltd shall be twenty five percent of the penalty imposed subject to the condition that such reduced penalty is also paid within the period so specified.

40 I further order that in terms of Section 78 (1) of the Finance Act, 1994 if M/s. Big Box Containers P. Ltd pays the amount of Service Tax as determined at Sl. No. (ii) & (iii) above and interest payable thereon within

thirty days of the date of communication of this order, the amount of penalty liable to be paid by M/s. Big Box Containers P. Ltd shall be twenty-five per cent of the penalty imposed subject to the condition that such reduced penalty is also paid within the period so specified.

(R. Gulzar Begum)
Additional Commissioner
Central GST & Central Excise
Ahmedabad North

By Regd. Post AD./Hand Delivery
F.No.V.48/15-252/OA/2021

Date: 19.05.2022

M/s. Big Box Containers Pvt Ltd
Survey No 881/1, Opposite Gallops SEZ
Near Hotel Kankavati, Village: Rajoda, Sarkhej-Bavla Road
Ahmedabad 382 220

Copy to:

1. The Commissioner of CGST & C.Ex., Ahmedabad North.
2. The Deputy Commissioner Division-V, Central Excise & CGST, Ahmedabad North.
3. The Superintendent, Range-V, Division-VII, Central Excise & CGST, Ahmedabad North
4. The Superintendent(system) CGST, Ahmedabad North for uploading on website.
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