::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/81/RAJ/2019	**23/DC/KG/2018-19**	**30-03-2019**

ख अपील आदेश संख्या(Order-In-Appeal No.):

RAJ-EXCUS-000-APP-029-2020

आदेश का दिनांक / Date of Order: **12.02.2020** जारी करने की तारीख / Date of issue: **12.02.2020**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता** & प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants** & Respondent :-

M/s Jyoti CNC Automation Ltd (Unit II), Plot No. 2839, Kalawad Road, Lodhika GIDC Metoda Jamnagar-361140.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवेट जमा की ली गई गलत राशि

(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Jyoti CNC Automation Ltd., Rajkot (hereinafter referred to as 'Appellant') filed appeal No. V2/81/Raj/2019 against Order-In-Original No. 23/DC/KG/2018-19 dated 30.03.2019 (hereinafter referred to as 'impugned order'), passed by the Dy. Commissioner, Central GST Division, Rajkot-II (hereinafter referred to as 'adjudicating authority').

2. The brief facts of the case are during scrutiny of ER-1 Returns, it was found that the appellant had cleared inputs 'as such' at a higher value under the cover of Central Excise invoices as compared to their purchase value. The appellant was required to pay amount equal to Cenvat credit taken on purchase of inputs as per the provisions of Rule 3(5) of Cenvat Credit Rules, 2004 (hereinafter referred to as 'Rules'). However, it was revealed that the appellant had charged Central Excise duty at ad-valorem rates on the transaction value by utilizing Cenvat credit, which was higher than purchase value while clearing the inputs 'as such' and collected the said duty from their buyers which was higher than the amount of Cenvat credit taken on such purchase. As per Section 11D(1) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') every person who has collected any amount in excess of duty assessed or determined and paid on the excisable goods under this Act or Rules made there under from the buyer of such goods in any manner as representing duty of excise was/is required to forthwith pay the amount so collected to the credit of the Central Government.

2.1 Show Cause Notice No. IV/3-44I/D/2017-18 dated 18.5.2018 was issued to the appellant, *inter alia*, calling them to show cause as to why Central Excise duty of Rs. 41,28,440/- should not be recovered from them under Section 11D(2) of the Act along with interest under Section 11DD of the Act. The Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed demand of Rs. 41,28,440/- under Section 11D(2) of the Act along with interest under Section 11DD of the Act.

3. Aggrieved, the Appellant preferred the present appeal, *inter alia*, on the following grounds:

(i) The provisions of Section 11D of the Act states that mere excess collection of excise duty or collection of amount representing as excise duty as described under sub-section (1) of (1A) is not sufficient nor a valid basis for issue of Show Cause Notice in terms of sub-section (2) of the Section 11D would arise and powers there under to do so can only be exercised only if the person specified under sub-section (1) or (1A) fails to pay the amount collected by him as excise duty or representing as excise duty to the credit of the Central Government as otherwise prescribed therein; that in present case, it is not alleged that the appellant has not paid to the credit of government, the amount of excise duty alleged to have been collected in excess by it from the customers on the inputs removed as such; that in fact vide para 6 of the Show Cause Notice, it was clearly admitted that the appellant was depositing Central Excise duty so charged from the buyers with the Government and these facts have also been accepted and acknowledged by the adjudicating authority for non imposition of penalty under Rule 15 of the Rules read with Section 11AC of the Act read with Rule 25 of the Rules and the lower adjudicating authority refrained from imposing any penalty on the appellant.

(ii) That the allegation vide the Show Cause Notice to the effect that the utilization of Cenvat credit for the purpose of payment of unauthorized collection of Central Excise duty was not permitted under Cenvat Credit Rules, 2004 was also devoid of any substance inasmuch as there has been no unauthorized collection of any excise duty by them from its buyers since the duty was charged and paid on the removal of inputs as such under the cover of Central Excise invoices and on the basis of its transaction value; that for sake of argument even if it is assumed that they were only required to reverse the proportionate Cenvat credit on the inputs removed as such, the Central Excise duty charged on ad valorem basis thereon can at worst be considered as 'irregularity' and not an 'illegality'; that at the state of removal of inputs as such, such duty was charged and the Cenvat credit was utilized for the purpose of payment thereof as is permissible vide sub-rule (4) of Rule 3 of CCR, 2004; that if there is any wrong utilization of Cenvat credit for the purpose of the alleged unauthorized collection of excise duty, the correct and proper action rested in the initiation of proceedings for the recovery of Cenvat credit wrongly utilized in terms of the provisions of Rule 14 of the Rules read with Section 11AC of the Act, which Show Cause Notice

fails in the present case by proposing recovery under Section 11D(2) of the Act.

(iii) The adjudicating authority has accepted the plea that the appellant had deposited the amount of duty as indicated in the invoices during the relevant period by making a debit entry in the Cenvat credit account and further that the amount collected in the guise of Central Excise duty from its customers was already deposited with the government exchequer and also accepted that the amount collected have not passed on any unintended benefit in the form of higher Cenvat credit to the buyer nor sought to encash the Cenvat credit by paying higher duty; that the confirmation of demand vide the impugned order is illegal and without authority of law.

(iv) The Appellant further submitted that the provisions of Section 11D of the Act would come into play only if any person who is liable to pay excise duty has collected any amount in excess of the central excise duty assessed or determined and paid on any excisable goods, from the buyers in any manner as representing excise duty. In the present case, there is no 'assessment' or 'determination' of the central excise duty liability by the competent authority in any manner in respect of the inputs removed as such by the Appellant in terms of Rule 3(5) of the CCR, 2004. In fact, the concept of 'assessment' as defined vide Rule 2 (b) of the Rules and understood in the context of the scheme of law has no relevance nor can be applied in so far as the removal of inputs as such in terms of Rule 3(5) of CCR,2004 is concerned in as much as, the provision merely requires the reversal of proportionate credit on such removal of inputs. Merely because the Appellant had discharged central excise duty liability on the basis of transaction value of inputs removed as such, it cannot be said that there has been an 'assessment' or 'determination' of the excise duty payable by the Appellant on inputs removed as such. Secondly, even if it is assumed, for the sake of argument, that there is an 'assessment' of its duty liability on inputs removed as such by the Appellant and there has been an excess collection of the amount as excise duty, undisputedly, the entire amount so collected by the Appellant has been paid/deposited with the government exchequer by utilisation of CENVAT credit as permitted vide Rule 3(4) of CCR, 2004.

(v) That findings of the adjudicating authority vide para 21.2 and 21.3 of the impugned order are devoid of merits and cannot be sustained inasmuch as

the entire amount collected by them as excise duty has been deposited with the Government exchequer. The payment made through the debit in the Cenvat Credit account, undisputedly, is a legal and proper discharge of the duty liability as is the settled law and also accepted by the lower adjudicating authority. There is a clear contradiction in the observations recorded by the lower adjudicating authority vide para 21.4 and those recorded vide para 25.1 of the impugned order. Under these circumstances, the very premise of the demand disappears and the same cannot be sustained in law.

(vi) That reliance placed by the adjudicating authority on the decision of the Hon'ble Gujarat High Court rendered in the case of Inductotherm (India) Pvt. Ltd. - 2012 (283) ELT 359 (Guj.) is entirely misplaced inasmuch as the facts involved in the said case were clearly distinguishable; that the Respondent therein had resorted to the practice of paying the higher amount as duty on the inputs removed as such in order to encash the accumulated Cenvat Credit. However, in the present case, there is no such finding recorded whatsoever by the adjudicating authority against the Appellant though the show cause notice had proceeded on the basis of this allegation.

(vii) That invocation of the provisions of Section 11D(2) of the Act is absolutely illegal, without authority of law and the impugned order is liable to be set aside as being untenable in law to that extent and relied upon following case laws:

(a) Rasoi Ltd. - 2009 (247) ELT 174 (Tri - Kolkata);
(b) Lamicoat International Pvt. Ltd. - 2015 (324) ELT 411 (Tri - Delhi);
(c) S.S. Crop Care Ltd.- 2010 (255) ELT 149 (Tri - Delhi);
(d) Sterlite Industries - 2008 (225) ELT 397 (Tri-Ahmd);

4. In hearing, Shri Shailesh Sheth, Advocate and Shri Maulik Gandhi, Company Secretary of the Appellant appeared on behalf of the Appellant and reiterated the submission of appeal memorandum and requested to allow their appeal. They sought one week's time for submission of additional submission. However, even after lapse of one month, the Appellant has not submitted additional submission nor requested for extension of time. I, therefore, find it fit to decide the appeal on the basis of submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submission made during the personal hearing.

The issue to be decided in the present case is whether the Appellant collected amount of Rs. 41,28,440/- representing as duty of Central Excise, in excess of duty assessed, from their buyers on the inputs cleared as such and if yes, whether the same is required to be recovered from the Appellant along with interest or not.

6. On going through the impugned order, I find that the appellant had cleared inputs 'as such' during the period from September, 2016 to June, 2017 at higher value under cover of Central Excise invoices as compared to their purchase value and paid the Central Excise duty on transaction value through Cenvat credit in contravention of Rule 3(5) of the Cenvat Credit Rules, 2004; that the Appellant cleared inputs 'as such' without carrying out any manufacturing activity under Section 2(f) of the Act barring the appellant from charging any Central Excise duty on the said transaction value; that any amount collected in excess of duty assessed from their customers is required to be deposited in cash under Section 11D of the Act.

7. I find that the Appellant has not disputed that they cleared inputs 'as such' at value higher than the purchase price without following the provisions of Rule 3(5) of the Cenvat Credit Rules, 2004, which are reproduced as under:

> "When inputs on which Cenvat credit has been taken, are removed as such from the factory, or premises of the provider of input services, the manufacture of the final product or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs and such removal shall be made under the cover of an invoice referred to in Rule 9 of the Central Excise Rules, 2002."
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> (Emphasis supplied)

7.1 Considering the above provisions, the Appellant was required to pay an amount equal to Cenvat credit availed while clearing inputs 'as such'. However, if the inputs are sold at a higher price than purchase price and if Central Excise duty is paid through Cenvat credit on the value of sale price, as has happened in the present case, then what is to be done is no more *res-integra* in view of the judgment of the Hon'ble Gujarat High Court passed in the case of Inductotherm (I) Pvt Ltd reported as 2012 (283) E.L.T. 359 (Guj.), wherein the Hon'ble High Court has held that when a manufacturer removes / sales goods "as such" at a higher price than purchase price and collects Central Excise duty on "transaction value" then such manufacturer has to reverse equal amount of CENVAT credit which was availed at the time of receipt of such

goods and the balance duty is required to be paid through Personal Ledger Account (i.e. in cash / bank) only even though CENVAT credit balance is available in the books of accounts. The relevant portion of the judgment is reproduced as under:

> **"14.** Bearing in mind the above statutory provisions, if we revert to the facts of the case, the case of the Department is that the respondent-assessee cleared certain goods without undertaking any manufacturing activity. Such clearance was made at an inflated price. Certain charge was collected from the purchaser on the basic price in the guise of excise duty. The respondent though surrendered the entire amount so collected to the Department in the form of debiting the credit in the Cenvat account, according to the Department, this was in breach of Rule 3(4) of the Rules, 2002 and thereafter Rule 3(5) of the Rules, 2004. Since there was no manufacturing activity, no question of collection of excise duty would arise and therefore, the entire amount so collected had to be deposited in terms of Section 11D of the Act.
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> **15.** To our mind, there is considerable force in such contention. It is not in dispute that the respondent cleared the goods as such. Since no manufacturing activity was undertaken, question of collection of excise did not arise. While clearing the goods after 1-3-2003, the respondent had to follow the procedure laid down in the amended Rule 3(4) of Rules, 2002 and thereafter Rule 3(5) of the Rules of 2004. Such rules required that on clearance of goods on as such basis, the assessee should have paid an amount equal to the credit availed in respect of such inputs and that such removal should have been made under the cover of an invoice referred to in Rule 9. To the extent the respondent reversed the Cenvat credit in its account on clearance of goods without any manufacturing activity on the credit taken upon purchase of goods, even the Department raises no objection. It is the later portion, namely, collection of higher amount in the guise of excise duty and depositing it with the Department in form of Cenvat credit which is at issue. Firstly, Rule 3(5) of the Rules did not permit collection of higher excise duty from the purchaser or deposit thereof with the Department in form of Cenvat credit.
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> **16.** In fact, since no manufacturing activity was undertaken by the respondent, the goods removed on as such basis were not thereafter exigible to excise duty. The respondent under the statutory provisions applicable, therefore, could not have collected any charge from the ultimate purchaser in form of excise duty. The question of adjusting Cenvat credit for depositing such amount so collected did not arise.
>
> **17.** We may recall that Rule 3(4) of the Rules, 2004 provides for cases where Cenvat Credit can be utilized for payment of duties. None of the clauses (a) to (e) thereof would cover a situation where the amount has been collected from the purchaser under the title of excise duty which can never be categorized as such since no manufacturing activity was carried out by the respondent. Utilization of Cenvat credit for such purpose, therefore, was wholly impermissible. The decisions of the Apex Court cited before us and that of the Rajasthan High Court, at best may suggest that the payment made through Cenvat credit is as good as actual payment, however, such payment should be for the purpose for which it is authorized under the Rules. In the case of Dai Ichi Karkaria Ltd. (supra) relied on by the respondent, the Apex

Court observed as under :

> "17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

18. With this background, we if peruse Section 11D of the Central Excise Act, 1944, it emerges that under sub-section (1) thereof, every person who is liable to pay duty under the Act or the Rules made thereunder and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods from the buyer of such goods, in any manner as representing duty of excise shall forthwith pay the amount so collected to the credit of the Central Government. Sub-section (2) of Section 11D provides, inter alia, that if such amount is not credited, the Central Excise Officer may issue a notice requiring such person to show cause why the same should not be paid by him to the Central Government. Sub-section (3) of Section 11D authorizes the Central Excise Officer to determine the amount so payable and thereupon such person shall pay the same.

19. From the above statutory provisions, it can be seen that whenever any duty has been collected in excess of excise duty payable or in any manner as representing duty of excise, such person has to pay the same to the Central Government forthwith. In the present case, the respondent had collected certain amount from the purchasers representing the same as excise duty. Undisputedly, such amount could not have been collected as excise duty. The same, therefore, had to be forthwith paid to the Central Government in terms of Section 11D of the Act. The same not having been done, the Department was within its right to seek recovery thereof.

20. The view of the Tribunal that in any case the respondent could have encashed the unutilized credit in the Cenvat account and that therefore the same did not make any difference to the Department, in our view, suffers from fallacy. Firstly, as noted, Rule 5 of the Rules, 2004 permitted refund of Cenvat credit under certain circumstances which provides that such refund shall be allowed subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification. It can, thus, be seen that grant of refund is neither automatic nor a matter of course. Nothing has been brought on record to suggest that the respondent was entitled to such refund as a matter of right. Secondly, utilization of Cenvat credit for the

purpose of payment of unauthorizedly collected so called excise duty was not permissible under the Rules. The contention of the Department that by doing so, the respondent passed on Cenvat credit to the purchaser to be availed by them ultimately which credit such purchasers were not entitled to, cannot be brushed aside.

(Emphasis supplied)

8. As per the facts emerging from impugned order, the appellant in their invoices for the goods cleared 'as such' had depicted the said amount as representing Central Excise duty and had collected the same from their buyers by ignoring the provisions of Rule 3(5) of the Rules to facilitate the buyers to avail more Cenvat credit and to en-cash the unutilized Cenvat credit lying in balance in their Cenvat credit account. Therefore, the facts of this case are similar to the above case decided by the Hon'ble Gujarat Higher Court. Therefore, I hold that the appellant is liable to pay Central Excise duty of Rs. 41,28,440/- under Section 11D(2) of the Act along with interest under Section 11DD of the Act.

9. Now, I examine various case laws relied upon by the Appellant as under:

(i) In the case of Rasoi Ltd -2009 (247) ELT 174, the period involved is from 20.09.1991 to 30.09.1994 i.e. prior to Cenvat Credit Rules, 2004 and speaks about money credit and paper credit and also hold that *"However, while selling the final product the manufacturer collected the entire duty including the portion adjusted against the paper credit i.e. money credit from the customers. Therefore the Appellants are liable to pay the amount collected from the customers as duty under Section 11D of the Central Excise Act."* Therefore, the said case law is not applicable looking to the facts of present case.

(ii) In the case of Lamicoat International Pvt Ltd - 2015 (324) ELT 411, issue involved is regarding export of goods and the Hon'ble Tribunal held that provisions of Section 11D are not applicable, whereas in the present case, the provisions of Section 11D are applicable.

(iii) In the case of S. S. Crop Care Ltd. -2010 (255) ELT 149, the issue involved is regarding inputs removed /transferred to another unit/job worker by paying duty adopting value @110%, and hence, facts are distinguishable from the present case.

(iv) The case of Sterlite Industries -2008 (225) ELT 397 is regarding provisional assessment and hence, not applicable to the facts of the present case.

10. In view of above, I uphold the impugned order and reject the appeal.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

11. The appeal filed by the Appellant is disposed off as above.

12/12/2020

(GOPI NATH)
Commissioner(Appeals)

Attested

(V.T.SHAH)
Superintendent(Appeals)

By RPAD

To, M/s. Jyoti CNC Automation Ltd., Unit-II, Plot No. 2839, Kalawad Road, Ladhika GIDC, Metoda, Rajkot.	सेवा में, मे. ज्योति सीएनसी ऑटोमेशन लिमिटेड, यूनिट-II, प्लॉट संख्या २८३९, कालावड़ रोड, लोधीका जीआईडीसी, मेटोडा, राजकोट.

प्रति:-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) उप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट-2 मण्डल को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।