



**::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::**  
**O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,**

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan,  
 रेस कोर्स रिंग रोड, / Race Course Ring Road,  
 राजकोट / Rajkot - 360 001



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रजिस्टर्ड डाक ए.डी. द्वारा :-

DIN-20221264SX0000999C36

क	अपील / फाइल संख्या/ Appeal / File No.	मूल अदेश / OIO No.	दिनांक/ Date
	V2/55/RAJ/2022	26/D/AC/2021-22	22-02-2022

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

**RAJ-EXCUS-000-APP-395-2022**

आदेश का दिनांक / Date of Order:	<b>26.12.2022</b>	जारी करने की तारीख / Date of issue:	<b>28.12.2022</b>
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श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
 Passed by Shri Shv Pratap Singh, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,  
 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 Appellant & Respondent :-  
**M/s. Krishna Developers, Anurag Apartment, Ent. 0028, Kalawad Road, Opp.  
 TVS Show Room, Rajkot-360002.**

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 निम्नलिखित 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण  
 (सिस्टेम्स) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 360002 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali  
 Bhawan, Asarwa Ahmedabad-360002 in 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) नियमवली, 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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/- रुपये 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 duty demand/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, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत  
 निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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/-  
 रुपये 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 fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is  
 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, 1994 की 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 Form 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 Commissioner authorizing 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 अपील 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" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 8 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 स्थान अर्ज़ी एवं अपील को लागू नहीं होगा।।

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 को पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर 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 छूट (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 an 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 outside India export to Nepal or Bhutan, without payment of duty.

- (iv) सनिहित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं।।

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 संशोधन 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 को 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।।  
जहां 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 आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी को लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थान आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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 संबंधित मामलों को सम्मिलित करने वाले नियमों को और 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](http://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](http://www.cbec.gov.in)



## अपील आदेश /ORDER-IN-APPEAL

M/s Krishna Developers, Anugrah Apartment, Ent.0028, Kalawad Road, Opp. TVS Show Room, Rajkot-360 002 (*hereinafter referred to as appellant*) has filed appeal No. V2/55/RAJ/2022 'against Order-in-Original No. 26/D/AC/2021-22 dated 22.02.2022 (*hereinafter referred to as 'impugned order'*) passed by the Assistant Commissioner, Central GST Division, Rajkot-I (*hereinafter referred to as 'adjudicating authority'*).

2. Briefly stated, the facts of the case are that the appellant was engaged providing taxable service in the category of 'Construction of Complex' service and availed Cenvat credit on input services. During the course of audit, it was observed that out of total 24 units constructed, only 3 (three) units were sold before receipt of completion certificate on 02.12.2016. Since the dwelling sold after receipt of completion certificate, it appeared that the appellant had provided taxable and exempted services and in terms of rule 6(3) of Cenvat Credit Rules, 2004 the appellant was required to pay a sum equal to Rs.6,04,489/-. Therefore, a show cause notice dated 01.07.2020 was issued for recovery of the said amount and to impose penalty under rule 15(1) and/ or 15(3) of Cenvat Credit Rules, 2004. The adjudicating authority, vide impugned order, confirmed the demand and imposed penalty of Rs.6,04,489/- under rule 15(3) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994. He also imposed penalty of Rs.10,000/- under Section 77(2) of the Finance Act, 1994 and a penalty of Rs.200/- per day from 28.11.2018 till 1.12.2019 under Section 77(1)(c) of the Finance Act, 1994 for failure to comply with the provisions of Rule 5A(2) of the Service Tax Rules, 1994.

3. The appellant filed appeal wherein they, *inter alia*, contended that the findings of the adjudicating authority without specifying the provisions under which proportionate credit is liable to be recovered, once the credit is legally available, is not tenable. The appellant submitted that the adjudicating authority has erred in observing that the Cenvat credit reversed is an afterthought without any base and without producing any evidence. They contended that the finding of the adjudicating authority is based on his presumptions and assumptions. The appellant submitted that the adjudicating authority has erred in imposing penalty ignoring the fact that the amount stands reversed before issue of the show cause notice and even before the audit was conducted.

4. Advocate Paresh Sheth appeared for personal hearing on 13.12.2022 and reiterated the submissions made in the appeal. He submitted that before applying for cancellation of registration on 24.04.2017 they had reversed entire Cenvat credit amount of Rs.7,75,834/- on 23.04.2017 itself and in



*(Signature)*

their application dated 24.04.2017 they had mentioned this fact that they have discharged all their service tax liabilities upto the said date and there was no liability pending for payment of service tax. This fact has also been acknowledged by the adjudicating authority in paragraph 27 of the order-in-original. However, he has not accepted this plea of the appellant as submitted vide letter dated 28.10.2021 on the presumption that if the liability was already discharged why the same was not mentioned to the audit party. Another reason stated in the same paragraph is that the noticee has not submitted any ledger showing the reversal. This is contrary to the facts on record since paragraph 21 of the order-in-original already acknowledges the fact of submission of letter dated 28.10.2021, wherein enclosure of said statement is already mentioned in the last paragraph (Page 10 of the appeal). Therefore, he requested to set aside the order-in-original and allow the appeal. He relied on the case of law of Shanti Construction Co.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memoranda and written as well as oral submissions made by the Appellants. The moot questions to be answered is whether appellant was required to reverse Cenvat credit on input services used proportionately when the buildings constructed were sold after receipt of completion certificate/ building use permission and whether the amount of Cenvat credit reversed by the appellant at the time of surrender of registration can be considered as payment against the liability.

6. In this regard, a harmonious reading of Rule 3 and Rule 6 of Cenvat Credit Rules, 2004 suggests that entitlement to credit has to be examined only at the time of receipt of input service. 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. In this case, I find that, the appellant had availed Cenvat credit of input services when the service provided was taxable. They had not provided taxable as well as exempted services simultaneously so as to attract the provisions of rule 6 of Cenvat Credit Rules, 2004. I find that before obtaining the completion certificate, the service of the appellant was very much taxable during which period the appellant received input service. As per rule 4(7) of Cenvat Credit Rules, 2004 the credit of input services shall be allowed on or after the day on which the invoice, bill or challan is received. The 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 :**



*[Handwritten signature]*

*"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.*

From the above rule, it is clear that the assessee is not required to wait till output service is sold to the service recipient. The assessee 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 appellant has availed the credit after receipt of bill, challan in respect of input service. Therefore, the appellant 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 appellant is absolutely legal and correct in accordance with Rule 4(7) of Cenvat Credit Rules, 2004. At the time of taking credit, no exempted service existed. Therefore, there was no application of Rule 6. Since the appellant has surrendered the registration, the question of availing Cenvat credit does not arise and there is no allegation that the appellant had availed Cenvat credit after the service became exempted.

7. I also find that in case of service becomes exempted at a later stage, an assessee is obliged to reverse Cenvat credit of only inputs lying in stock or contained in the taxable service pending to be provided. It is conspicuous that 'input service' is not mentioned in the said rule. 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."*

*Signature*



It is clear from the above provision that if an output service becomes exempted at a later stage, the Cenvat credit lying in balance shall lapse and shall not be allowed to be utilized for payment of any other output taxable service. Therefore, the Cenvat credit availed in respect of 'input service' is not required to be paid back. In this regard, I find support in the case of *Alembic Ltd-2019 (29) G.S.T.L. 625 (Guj.)* wherein Hon'ble Gujarat High Court has held that;

*"16. The Tribunal therefore, on a harmonious reading of Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held 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. Sub-rule (7) of Rule 4 of the Rules held that the assessee is not required to wait till output service is sold to the service recipient and the assessee can take the credit immediately after the day on bill/challan of input service is received. In facts of the case, there is no dispute that the respondent availed the credit after receipt of bill/challan in respect of input service and, therefore, it 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 respondent is absolutely legal and correct and in accordance with Rule 4(7) of the Rules. As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service was exempted only after obtaining completion certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if any, received after obtaining the completion certificate. The respondent did not avail the Cenvat credit in respect of the services received after obtaining the completion certificate in respect of exempted service or avail proportionate credit attributed to the taxable output service. Therefore, Rule 6 has application for the period after obtaining the completion certificate. Rule 11(1), (2) and (3) of the Rules applicable to provision for manufactured goods to hold that in case of service becomes exempted at a later stage, 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 of the Rules 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."*

*17. From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no provision for payment of Cenvat credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future.*

*18. The Tribunal therefore, rightly held that once the respondent are not required to reverse any credit availed by them on valid input services availed during the period 2010 till obtaining of completion certificate, the said amounts reversed by them under protest cannot be retained by the revenue authorities and have to be refunded to the respondent.*

In view of above settled position of law, I hold that the appellant was not

*Signature*



required to reverse Cenvat credit and the demand is not sustainable. Even otherwise, the appellant was having an amount more than the amount of demand in their credit balance as observed by the adjudicating authority at paragraph 27 of the impugned order and the same was reversed by the appellant at the time of surrender of registration. Accordingly, I set aside the demand of Rs.6,04,489/- and the penalty of Rs.6,04,489/- imposed under rule 15(3) of Cenvat Credit Rules, 2004.

9. As regarding the imposition of penalty under Section 77(2) of the Finance Act, 1994, I hold that the penalty is not sustainable as there is no contravention on the part of the appellant.

10. I find that the adjudicating authority has imposed penalty of Rs.200/- per day under Section 77(1)(c) of the Finance Act, 1994 for failure to comply with the provisions of rule 5A(2) of the Service Tax Rules, 1994. As per provisions of Rule 5A(2) of Service Tax Rules, 1994 every assessee was required to make available the records to the officer within reasonable time. In the present case, the appellant had surrendered their registration on 24.04.2017 and hence it cannot be considered that they have contravened the provisions of Rule 5A as he was no longer an assessee of the department and the penalty is not sustainable.

11. In view of the above, I set aside the impugned order and allow the appeal.

१२. अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

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

सत्यापित / Attested

*(B.S. Kana)*

Superintendent  
Central GST (Appeals)  
Rajkot

*(Shiv Pratap Singh)*  
(शिव प्रताप सिंह/ SHIV PRATAP SINGH)  
आयुक्त (अपील)/Commissioner (Appeals)

By R.P.A.D.

सेवा में मेसेर्स कृष्ण डेवेलपर्स अनुग्रह अपार्टमेंट ईएनटी.००२८, कलावाड रोड, ऑपोजिट टीवीएस शो रूम राजकोट-360 002	To M/s Krishna Developers, Anugrah Apartment, Ent.0028, Kalawad Road, Opp. TVS Show Room, Rajkot-360 002
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प्रतिलिपि :-

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

