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DIN : 20201256YO000000DD3E

केन्द्रीयकरउपायुक्तकार्यालय,सिकंदराबादमालएवमसेवाकरमण्डल,
सिकंदराबादमालएवमसेवाकरआयुक्तालय।
OFFICE OF THE DEPUTY COMMISSIONER OF CENTRAL TAX,
SECUNDERABAD GST DIVISION, SECUNDERABAD GST COMMISSIONERATE
Address: SALIKE SENATE, D.No: 2-4-416 & 417, RAMGOPALPET,
M.G. ROAD, SECUNDERABAD- 500 003
Contact No. 7901243130 mail- cgst.secdiv@gov.in

C.No.V/15/01/2020-ST(Adjn.) Date:11.12.2020
DIN : 20201256YO000000DD3E

Order in Original No.12/2020-ST

Sub: Service Tax- Non-payment of Service Tax under reverse charge mechanism on Freight and Legal Services and availment of Cenvat Credit on common input services and non-payment of 7% on exempted services by M/s B&C Estates, 5-4-187/3&4, Soham Mansion, M.G.Road, Raniganj, Secunderabad, Telangana – 500003 during the period from April, 2014 to June, 2017- Regarding.

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M/s B&C Estates, 5-4-187/3&4, Soham Mansion, M.G.Road, Ranigunj, Secunderabad, Telangana – 500003 holding Service Tax Registration No. AAHFB7046ASD001 (hereinafter referred to as "the assessees" or "M/s B&C") are engaged in the activity of Construction of Residential Complex Services as defined under the Finance Act, 1994.

2. During the course of audit and verification of ledgers with ST-3 Returns, it was observed that Service Tax is being discharged on taxable services viz, construction of residential complex services provided on the amounts received against the flats which were sold before the receipt of occupation certificate. It was also observed that certain amounts were deducted from the value of taxable services as exempted service. Upon enquiry, a statement showing the details of flats sold after receipt of OC i.e. Occupancy Certificate was produced by the assesssee on which exemption was claimed by the assesssee. Perusal of the statement reveals that 07 flats were sold after receipt of OC during the period 01.10.2014 to 30.06.2017. The total receipt from the sale of the above 07 flats is Rs.2,94,69,000/-. No Service Tax was paid on the consideration received from the sale of the above flats on the ground that the said flats w sold after receipt of Completion Certificate from the proper authority. M/s are also availing Credit of Service Tax paid on Input Services. Fro

scrutiny of the invoices on which input service credit was availed it appears that Cenvat Credit of Service Tax paid on common input services like Architect, Security Services, Professional Charges, have been availed for provision of both taxable and exempted services and such Cenvat Credit was utilized for payment of service tax. It is observed that though both taxable and exempted services were provided but no option has been exercised by M/s B&C Estates as provided under Rule 6(3)A of the Cenvat Credit Rules, 2004.

3. In terms of Rule 6(3) of the Cenvat Credit Rules, 2004, where a person is engaged in provision of both taxable and exempted services and avails Cenvat Credit on input services which are common to both taxable and exempted services, the service provider has the option to reverse that portion of the Cenvat Credit attributable to exempted service or pay 6% of the value of exempted goods or 7% of the value of exempted services.

4. Subsequently vide Notification 13/2016 CE (NT) dated 01.03.2016* which came into effect from 01.04.2016) has amended the above provisions and for ease of reference the same is reproduced hereunder:

> *(3) (a) A manufacturer who manufactures two classes of goods, namely :-*
>
> *(i) non-exempted goods removed;*
>
> *(ii) exempted goods removed;or*
>
> *(b) a provider of output service who provides two classes of services, namely:-*
>
> *(i) non-exempted services;*
>
> *(ii) exempted services, shall follow any one of the following options applicable to him, namely :-*
>
> *(i) pay an amount equal to six per cent. of value of the exempted goods and* ***seven per cent. of value of the exempted services*** *subject to a maximum of the total credit available in the account of the assessee at the end of the period to which the payment relates; or*
>
> *(ii) pay an amount as determined under sub-rule (3A).*

5. As it appears from the above provisions, that a provider of both non-exempted and exempted services who avails common input services has to pay 7% of the value of the exempted services rendered during the period. M/s B&C vide their letter dated 14.02.2020 submitted that as per the provisions of Rule 6(3) of the Cenvat Credit Rules 2004 which stood amended as per Notification 13/2016 CE (NT) dated 01.03.2016 they were not required to pay 7% of the value of the exempted services as they have not availed any credit of input service as on 01.04.2016. In the instant case M/s B&C Estates have constructed residential complex service by availing Cenvat credit of inputs purchased and have sold some flats on payment of duty. However, by getting the Occupancy Certificate the same very flats were being sold without payment

of Service tax. Since credit has been availed on the total project, it is but appropriate that they use Cenvat Credit to the proportion they have paid tax on and reverse proportion of credit for which they are claiming exemption. In the instant case M/s B& C have not exercised their option and have neither reversed proportionate credit attributable to exempted services nor paid 7% of the value of the exempted services, thereby it amounts to double benefit which is not permissible as per the above provisions and the very purpose of Rule 6(3) would be defeated. Since M/s B&C have provided both taxable and exempted services and have not followed the procedure prescribed under Rule 6(3) of the Cenvat Credit Rules, 2004, they are liable to pay an amount of Rs.18,20,344/- which is equal to the 7% on the total sale consideration received from the sale of the above 7 flats in terms of Rule 6(3) of the Cenvat Credit Rules, 2004 read with Notification 13/2016 CE (NT) Dated 01.03.2016 .

6. It was further observed from the Balance Sheet submitted by M/s B&C Estates, that an expenditure of Rs.89,315/- in the F.Y. 2014-15 (Oct, 2014 to Mar, 2015), Rs.84,062/- in the F.Y. 2015-16, Rs.45,150/- in the F.Y. 2016-17 and Rs.4,050/- in the F.Y. 2017-18 (upto June, 2017) was incurred towards **Legal Expenses** and no Service Tax was paid on such expenditure. M/s. B&C Estates being a Partnership Firm, Service Tax under partial reverse charge under proviso to Section 68(2) of Finance Act, 1994 in terms of Notification No. 30/2012 dated 20.06.2012 to the extent of service tax is payable by the person who receives the service as per Sl. No.5 of Table of the above said notification.In the instant case M/s. B&C Estates being the service recipient, Service Tax is to be paid by M/s. B&C Estates.

7. It was further seen from the Balance Sheet thatan expenditure of Rs.4,52,017/- in the F.Y. 2014-15 (Oct, 2014 to Mar, 2015), Rs.2,51,980/- in the F.Y. 2015-16, Rs.2,89,044/- in the F.Y. 2016-17 and Rs.71,605/- in the F.Y. 2017-18 (upto June, 2017) was incurred M/sB&C towards **Transportation Charges** and no Service Tax was paid on such expenditure. M/s. B&C Estates being a Partnership Firm, Service Tax under partial reverse charge under proviso to Section 68(2) of Finance Act, 1994 in terms of Notification No. 30/2012 dated 20.06.2012 to the extent of service tax is payable by the person who receives the service as per Sl. No.2 of Table of the above said notification after availing 70% abatement as per Sl. No.7 of Notification No. 26/2012 dated 20.06.2012 as amended vide Notification No.8/2016-ST dated 01.03.2016 w.e.f. 01.04.2016 wherein the rate of abatement is reduced from 75% to 70%. In the instant case M/s. B&C Estates being the service recipient, Service Tax is to be paid by M/s. B&C Estates.It appears that the Service Tax after proper abatement on above amount to the tune of Rs.13,967/- @12.36% for the F.Y. 2014-15 (Oct, 2014 to Mar, 2015), Rs.10,961/- @14.50% for the F.Y. 2015-16, Rs.13,007/- @15.00% for the F.Y. 2016-17 and Rs.3,223/- @15.00% for the F.Y. 2017-18 (upto June, 2017)

totalling to Rs.41,158/- to be paid along with applicable interest and penalty under Section 75 & 78 of Finance Act, 1994.

8. Further, During the course of verification of ST-3 returns, it was observed that half-yearly ST-3 Returns had been belatedly filed by M/s B&C during the period as given in the table below. It was further observed that in some cases **Late Fee** had been fully or partially paid by the assessee. However, there is short payment of such Late Fee due. The details of short payment, not payment or excess payment of Late Fee on delayed filing of ST-3 Returns for the period from 04/2014 to 06/2017 are as follows:

Sl. No.	Period of ST-3s	No. of Days (Delay)	Late Fee Payable	Late Fee Paid	Late Fee Dues
1.	Apr – Sep, 2013	21	Rs.500/-	NIL	Rs.500/-
2.	Oct – Mar, 2014	32	Rs.1,200/-	Rs.1,200/-	Rs.1,200/-
3.	Oct – Mar, 2015	34	Rs.1,400/-	Rs.1,200/-	Rs.200/-
4.	Apr – Sep, 2015	104	Rs.8,400/-	Rs.2,300/-	Rs.6,100/-
5.	Oct – Mar, 2016	62	Rs.4,200/-	Rs.4,500/-	(-) Rs.300/-
6.	Oct – Mar, 2017	380	Rs.20,000/-	Rs.25,000/-	(-) Rs.5,000/-
7.	Apr – Jun, 2017	274	Rs.20,000/-	NIL	Rs.20,000/-
				TOTAL =	**Rs.22,700/-**

9. During the verification of challans and ST-3s, it was noticed that there was delay in payment of service tax during the financial years as given in the table below. It was further observed that in some cases **interest** had been paid by the assessee. However, there is short payment of such interest due. The details of short payment or non-payment of interest on delayed payment of Service Tax for the period from 04/2014 to 06/2017 are as follows:

Sl. No.	Period of ST-3s	Interest Payable	Interest Paid	Interest Due
1.	Oct – Mar, 2014	Rs.19,778/-	Rs.16,062/-	Rs.3,716/-
2.	Apr – Sep, 2015	Rs.56,638/-	Rs.42,338/-	Rs.14,300/-
3.	Oct – Mar, 2016	Rs.1,59,792/-	Rs.1,30,902/-	Rs.28,890/-
4.	Apr – Sep, 2016	Rs.1,30,066/-	Rs.84,416/-	Rs.45,650/-
5.	Oct – Mar, 2017	Rs.1,33,914/-	Rs.49,708/-	Rs.84,206/-
6.	Apr – Jun, 2017	Rs.10,314/-	Rs.3,27,050/-	Rs.3,16,736/-
			TOTAL =	**Rs.4,93,498/-**

9.1. In view of the foregoing, M/s. B& C Estates were issued with a show cause vide C.No. Audit/CR-I/10/2017-18/SAG-14 Dated 14.05.2020 requiring them to reply to the DeputyCommissioner of Central Taxes SECUNDERABAD

GST Division, Salike Senate, D.No.2-4-416 & 417, Ramgopalpet, M.G.Road, SECUNDERABAD - 500003within thirty days from the date of receipt of this notice as to why:-

(i) An amount of **Rs 20,62,830/-** (Rs Twenty Lakhs Sixty Two Thousand Eight Hundred and Thirty Only) which is equal to the 7% on the total sale consideration received from the sale of the 7 flats after issuance of occupation certificate during the period 2016 to 2017, should not be recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994;

(ii) Service Tax amounting to **Rs. 30,608/-**(Rupees Thirty Thousand Six Hundred and Eight Only) [inclusive of applicable cesses] as detailed in the show cause notice, should not be demanded from them in terms of the proviso to Section 73(1) of Finance Act, 1994 as amended for the Legal Services under Reverse Charge Mechanism;

(iii) Service Tax amounting to **Rs. 41,158/-**(Rupees Forty One Thousand One Hundred and Fifty Eight Only) [inclusive of applicable cesses] as detailed in the show cause notice, should not be demanded from them in terms of the proviso to Section 73(1) of Finance Act, 1994 as amended towards Goods Transport Agency Services,under Reverse Charge Mechanism;

(iv) Late fee of **Rs 21,000/-** (Rupees Twenty One Thousand Only) should not be demanded towards Late fee for delayed filing of ST-3 Returns under Rule 7 of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994;

(v) An amount of Rs **4,93,498/-** (Rupees Four Lakhs Ninety Three Thousand Four Hundred and Ninety Eight Only) as discussed in Para 9 above, being the interest short paid on delayed payment of service tax should not be demanded from them under Section 75 of the Finance Act, 1994

(vi) Interest at applicable rate(s) should not be demanded / recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of Finance Act, 1994 on the amount demanded at (i) above;

(vii) Interest at applicable rate(s) should not be demanded / recovered from them under Section 75 of Finance Act, 1994 on the amount of Service Tax demanded at (ii) & (iii) above;

(viii) Penalty should not be imposed on them equivalent to the amount demanded at (i) above, Rule 15(3) of the Cenvat Credit Rules, 2004, read with Section 78 of Finance Act, 1994 for wilful suppression of the facts with intent to evade payment of service tax;

(ix) Penalty should not be imposed on them equivalent to the amount demanded at (ii)& (iii) above under Section 78 of Finance Act, 1994for wilfullsuppression of the facts with intent to evade payment of service tax.

Personal Hearing :

10. A Personal Hearing was conducted on 29.07.2020 by video conference and Shri Lakshman Kumar Kadali, Chartered Accountant and shri. Jaya Prakash.M attended and submitted their reply to the Show Cause Notice and

reiterated the contents orally. In their reply letter dated 15.07.2020,they stated that they are a partnership firm inter alia engaged in the construction business and registered under Service Tax vide Registration No. AAHFB7046ASD001. During the subject period, the project namely 'Mayflower Grande' was executed in Block `A` and `B`. The project was completed, and Occupancy certificates ('OC' for short) was received on 25th February 2016 (For Block-A) and 11th April, 2016 (Block-B). Copy of occupancy certificates are enclosed as Annexure to the reply to Notice. They had been regularly discharging applicable service tax on flats sold before receipt of occupancy certificate. They had sold 07 flats after receipt of Occupation Certificate and have not paid any service tax thereon. The details of the flats sold after receipt of occupancy certificate is enclosed as Annexure to their reply.

10.1. They further added that they have procured various services for construction work and the availed CENVAT Credit of service tax paid thereon. However, no CENVAT Credit has been availed on services received after receipt of occupancy certificates in the months of February 2016 and April 2016 (Copy of ST-3 returns for the period April 2016 to June 2017 is enclosed as Annexure to the reply.In this regard, they submit that Rule 6, ibid applies when there is provision of taxable & exempted services. They submit that the transaction of selling the flats after OC was not a service in terms 'service' definition given under section 65B (44) of the Finance Act, 1994 read with the Section 66E(b) of Finance Act, 1994. Once, the impugned transaction is not 'service' the same cannot be treated as 'exempted services'. Consequently, the Rule 6, ibid do not apply.

10.2. In this regard, they relied on jurisdictional CESTAT decision in case of M/s.Prajapathi Developers Vs CCT 2019-TIOL-806-CESTAT-HYD wherein it was held that;

> "Rule 6 required reversal of proportionate amount of CENVAT credit wherever the input services or inputs were used both for provision of taxable as well as exempted services. There was no provision during the relevant period for reversal of credit where common inputs or input services were used for provision of taxable services and also activities which do not amount to services at all. It is nobody's case that the appellant has availed credit on the inputs and input services used exclusively in activities which do not amount to service. If that be so, they would not have been entitled to the credit of service tax paid or duty paid in view of Rule 2(l) and Rule 3 of CENVAT Credit Rules, 2004. There was a gap in the law during the relevant period inasmuch as one could have availed complete credit of the common inputs and input services which are used in providing taxable services and not activities which do not amount to service at all and the assessee could have used only a small fraction of common inputs/ input services in providing

taxable services and rest in activities which do not amount to service at all and still would have been entitled to full credit of the tax paid. This was rectified by insertion of explanation (3) to Rule 6(1) with effect from 01.4.2016 vide notification 13/2016-CE (NT) dated 01.3.2016. This explanation however was not given retrospective application in the notification. I am unable to agree with the learned departmental representative that since this explanation is keeping in line with the spirit of the entire scheme of CENVAT Credit Rules, 2004 that credit is available only when tax is paid, it should be treated as having retrospective application."

10.3. Further they submit that in the instant case, they had not availed any CENVAT Credit in the year in which the occupancy certificate is received and the same is evident from the ST-3 returns filed during the period April 2016 to June 2017. Therefore, there is no requirement to reverse any CENVAT Credit as alleged by impugned notice.

10.4. They state , without prejudice to the above, that impugned SCN proposed to demand 7% of the value of flats sold after receipt of occupancy certificate as the They had not opted for proportionate reversal option under Rule 6(3) of CENVAT Credit Rules, 2004. In this regard, they submits that Rule 6(3), ibid gives 3 options and assessee has free choice to choose any one of those three options. In any of the three options given in Rule 6(3), ibid there is no provision that if the assessee does not opt any of the option at a particular time, then option of payment of 6%/7% will automatically be applied. It is a choice of the assessee which option to be availed. In the present case, if at all it is treated as exempted service, without prejudice to the grounds taken above, they wish to avail the option under rule 6(3)(ii) read with rule 6(3A), therefore Revenue cannot insist to avail the option of Rule 6(3)(i) and demand huge amount of tax which is otherwise not payable by the assessee. They further submit that when the options have been provided, the department has no say for choice of the assessee, the assessee has liberty to choose any of the option and department has no role to decide regarding any other option available in these rules. In this regard reliance is placed on following decisions which has dealt with similar facts & circumstances and held that option of proportionate reversal u/r. 6(3)(ii), ibid shall be given. They rely on the judgement of The Hon'ble High Court of Telangana in case of Tiara Advertising Vs. Union of India 2019 (30) GSTL 474 (Telangana) "Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilized wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-

in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced."

10.5. They further rely on the following case laws: Mercedes Benz India Pvt Ltd Vs CCE 2015(40) S.T.R. 381 (Tri. - Mumbai) ,Aster Pvt Ltd Vs CCE, Hyderabad 2016-TIOL-1035-CESTAT-HYD,Rathi Daga Vs. CCE, Nashik [2015(38) STR 213 (Tri. Mum.)

10.6. It is further submitted that the Rule 6(3AA) of CENVAT Credit Rules, 2004 enables to choose the option even at the time of adjudication. Hence, if at all reversal of Credit is required under Rule 6, ibid then they wish to opt Rule 6(3)(ii) of the Rules, ibid i.e.,

ii) "the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specifiedin sub-rule (3A)".

10.7. They added that mere non-observance of procedure cannot take away the substantial benefit [Non-Exercising option u/r 6(3)(ii)]. In this regard reliance is placed on Sambhaji v. Gangabai — 2009 (240) E.L.T. 161 (S.C.) wherein it was held that "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

10.8. They further relied on Mangalore Chemicals & Fertilizers Ltd Vs DC 1991 (55) E.L.T 437 (S.C) ,Dhampur Sugar Mills Ltd Vs CCE, Meerut 2010 (260) E.L.T 106 (Tri-Del) ,BSNL v. CCE 2012 (28) S.T.R. 624 (Tri. - Chennai) , Kathiravan Pipes Pvt. Ltd. Vs. CESTAT, Chennai 2007 (5) STR 9 Mad.

10.9. Further, in respect of **Legal expenses**, they stated that they were incurred towards purchase of Non-Judicial Stamp Papers, Renewal of Licenses, Chartered Engineer Fees, project EC's etc., which were accounted in the ledger namely 'Legal Expenses', but not towards payment of legal charges to any advocate. Since Service Tax under reverse charge mechanism is applicable only on amounts paid to advocate towards legal services, they had not paid any service tax on the said expenses. Copy of ledger account with narration is enclosed as Annexure to their reply.

10.10.Further, in respect of **Transportation charges**, Noticee submits that, as submitted in the background facts, Noticee has incurred certain expenses towards transportation of goods from individual truck owners, auto-rikshaw and accounted the same under 'transportation charges' ledger. Since service tax under reverse charge mechanism is applicable only on services received from Goods Transport Agency in terms of Notification No. 30/2012 dated 20.06.2012, Noticee has not paid any service tax on the transportation charges paid to individual who amounts to Goods Transport Operators as they have not issued any consignment note.

a) Noticee submits that the impugned notice vide Para 6.2 alleged that *"it appears that subsequent to the introduction of Negative List from 01.07.2012 service tax is payable by the recipient of service irrespective whether consignment note is issued or not as there is no mention of the same in the above provision of law'.*

b) In this regard, Noticee submits that as per Section 65B (26) of the Finance Act, 1994, Goods Transport Agency (GTA) means *"any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called".*

c) From the above referred definition, it is clear that to become a Goods Transport Agency it should satisfy the following cumulative conditions

   a. Service should be in relation to transport of goods by road and
   b. Issues consignment note, by whatever name called

Unless the above conditions are satisfied cumulatively, the service received shall not amount to 'Goods Transport Agency Service'. This shows that the issue of consignment note is one of the mandatory condition to become a Goods Transport Agency. Hence, the allegation of the impugned notice that after introduction of negative list, transportation charges are liable under reverse charge irrespective of issuance of consignment note is not correct and the same needs to be dropped.

d) Noticee submits that amounts classified under the ledger 'transportation charges' are payments made to Auto-Rickshaws, trollies, etc. i.e., from Goods Transport Operators (GTO) but not to Goods Transport Agency. It may be noted that GTO has not issued any consignment note or any document therefore they cannot be treated as GTA. Therefore, the question of service tax liability does not arise.

e) Without prejudice to above, Noticee submits that alleged transportation charges are not liable for service tax in view of the transaction amount being below Rs. 750/- or 1500/- as the case may be. Noticee submits that small consignments involving Rs. 750/- per consignee or 1500/- per vehicle are exempted in terms of Notification No. 34/2004-S.T. dated 03.12.2004 and Notification No. 25/2012-ST dated 20.06.2012 as amended. In this background, Noticee submit that the transactions involving transportation charges below Rs.750/- per consignee or 1500/- per vehicle shall be exempted. Hence, the demand needs to be re-quantified to that extent.

f) In this regard, they placed reliance on the following case laws:

   a. Birla Ready Mix v. Commissioner — 2013 (30) S.T.R. 99 (Tribunal)
   b. Shanti Fortune (India) (P.) Ltd. v. CCE [2010] 24 STT 464 (Chennai – CESTAT)

c. Lakshminarayana Mining Co. v CST [2010] 24 ST 61 (Bang – Tri)
d. Bellary Iron & Ores Pvt. Ltd. vsCommr. of C. Ex., Belgaum 2010 (018) STR 0406 Tri. -Bang
e. L.G. Polymers India Pvt. Ltd. vs Commissioner of C. Ex., Visakhapatnam 2010 (020) STR 0834 Tri. -Bang

10.11. In respect of **Payment of Interest** they submits that the impugned notice has alleged that there is a delay in payment of service tax thereby there is a short payment of interest during the disputed period and proposed to demand an amount of Rs. 4,93,498/-. In this regard, Noticee submits that though there is a delay in payment of service tax, Noticee had paid appropriate interest periodically and there is no short payment of interest. They further submits that during the period April 2017 to June 2017, the interest payable as per Notice is Rs.10,314/-, however, the interest paid during such period is Rs.3,27,050/-. Therefore, there is an excess payment of interest of Rs. 3,16,736/-. In this regard, they submits that the impugned notice had considered such excess payment as short payment of interest thereby there is an excess demand to that extent. They submits that the impugned notice has proposed to demand short payment of interest of Rs.1,76,762/- for the period October 2013 to March 2017 and there is an excess payment of interest of Rs. 3,16,736/- during the period April 2017 to June 2017 as submitted in the preceding paragraphs. If the excess payment is adjusted against the short payment of interest, even then there would be excess payment of interest of Rs. 1,39,974/- (3,16,736-1,76,762). This shows that there is no short payment of interest as alleged in impugned notice. Hence, the demand to that extent needs to be dropped.

10.12. They further submit that the impugned notice has proposed to demand an amount of Rs. 22,700/- towards short payment of **Late Fees** for the period October 2014 to June 2017. In this regard, Noticee submits that they have received a letter dated 10.07.2018 from the Range Office stating that they have reviewed the ST-3 returns for the period April 2012 to June 2017 and required the Noticee to pay an amount of Rs.1,500/- towards short payment of late fees for the period October 2014 to March 2015 and April 2016 to September 2016. Further, there is no allegation of short payment regarding remaining periods.

10.13. Noticee submits that in response to above letter, Noticee had paid the said amounts and intimated the same to department vide their letter dated 18.08.2018 and the issue regarding short payment of Late Fees is closed. However, the impugned notice without considering the same as again issued the notice for short payment of late fees. Hence, the proposal

of demand in instant notice is not warranted and the same needs to be dropped.

11. Discussion and Findings :

I have gone through the records of the case, the Notice, written submissions made by the assessee,Record of the Personal Hearing and the case laws cited/relied upon by the Assessees.I find that the assesses have availed Cenvat Credit on common input services from the beginning of their residential project till the time they got Occupancy Certificate. They have discharged the Service Tax in respect of flats sold before obtaining Occupancy Certificate from the competent authorities but in respect of 07 flats sold after the Occupancy Certificate they have neither availed Cenvat Credit nor paid any Service tax.

I find that I have to pass an order in respect of the following points:

1. Availment of CenvatCredit on common inputs for providing Dutiable and Exempted Services by the assesses and reversal of Cenvat Credit @ 7% of value of Exempted Services. (*para 5 above*)
2. Service Tax applicable on the LEGAL EXPENSES incurred by the assesses and tax liability under Serial No.5 of Notification 30/2012-ST dated 20.06.2012.(*para 6 above*)
3. Service Tax applicability on TRANSPORT CHARGES incurred by the assesses under Serial No.2 of Notification 30/2012-dated 20.06.2012.(*para 7 above*)
4. Demand of Late Fee for delayed filing of ST-3 Returns.(*para 8 above*)
5. Demand of INTEREST on delayed payment of service tax.(*para 9 above*)

11.1 Reversal of Cenvat credit @7% of Value of Exempted Services:

Whether the Assessees are required to reverse Cenvat Credit availed during the period when output service was taxable before receipt of Completion Certificate, since such services were availed to construct entire property, and portion of such property did not attract Service Tax after receipt of Completion Certificate is to be determined.I disagree with the assesses claim that the sale of flats after obtaining Occupancy Certificate is not service at all. The Notification no.13/2016-CE (NT) had defined Exempted service.

11.1.a Explanation 3 to Rule 6(1) of CCR,2004.

" For the purposes of this rule, exempted services as defined in clause (e) of rule 2 shall include an activity, which is **not a service** as defined in section 65B(44) of the Finance Act, 1994.".

11.1.b The above Explanation 3 has been inserted in Rule 6, *ibid* w.e.f. 01.04.2016 to specify that 'exempted service' includes an activity which is not a 'service' defined u/s. 65B(44).The matter of taxability of builders is

riddled with many questions, discussions and clarifications issued by CBIC from time to time and contradicting judicial pronouncements. I find that the inclusion of NON-Service activities into the definition of exempted services is with a view to bring clarity to the ongoing discussions of reversal of credit in the judicial forums by the CBIC. Hence, the argument of the assesses that the sale of flats after Occupation Certificate is not a service, while the same activity is service before obtaining Occupation Certificate is not tenable and sustainable.

11.1.c Hence,I find that the assesses have to reverse the Cenvat Credit in respect of those 07 flats on which exemption is being claimed. The various case laws cited by the assessee are different in circumstances than the one at hand. The above interpretation would be in line with the overall objective of Rule 6(1) that no Cenvat Credit of input services used in the manufacture of exempted goods or provision of exempted services should be taken/allowed. However, the Show Cause Notice demands 7% of value of exempted service, in as much as the assesssee did not exercise the option under Rule 6(3)(Explanation 1). However,The assesssee requests option to reverse proportional Cenvat Credit which is attributable to exempted service in his reply(Para 20) filed at the time of Personal Hearing. I find that the said rule 6(3) does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Further, there is no time limit specified in the Rule 6(3) for exercising the option.I find that in view of plethora of judicial pronouncements it is an established practice that the substantive benefit can not be denied just as the assessee did not complete the procedural formality of intimating the department. Tribunal, Hyderabad's decision in the case of Aster Pvt Ltd Vs Commissioner of Customs and CE, Hyderabad-III [2016 (43) STR 411 (Tri-Hyd)], relied upon by the assessee also, in the case of M/s Aster, in similar circumstances of availment of credit on common inputs and common input services used for dutiable and exempted goods, Hon'ble Tribunal allowed reversal of proportionate Cenvat credit involved in the inputs/input services used for exempted goods in terms of Rule 6(3A) of CCR, 2004, though the assessees have not exercised to avail the option under Rule 6(3A) of rules ibid. The order of the Hon'ble Tribunal has been accepted by the Department.

11.1.d Further in the case of Mercedes Benz India Pvt Ltd Vs CCE 2015(40) S.T.R. 381 (Tri. - Mumbai), relied upon by the assessee also, the tribunal held that the department cannot restrict the option to be availed by the assesssee under Rule 6(3) of CCR, 2004.

> "The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in

relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied."

11.1.e Hence, respectfully following judicial discipline, the request of the assessee for reversal of proportionate Cenvat Credit calculated as per Rule 6(3A) can be conceded to.

11.1.f The provisions of Rule 6(3A) of Cenvat Credit Rules,2004 prescribe formula for calculating proportionate Cenvat credit to be reversed in cases where the manufacturer /service provider has both dutiable and exempted goods or services. The provisions read as under.

"The amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total

CENVAT credit taken on input services during the financial year;

11.1.g In the present case the total value of exempted services provided by the assessee (M) is Rs. 2,94,69,000/-. The total value of taxable and exempted services provided by the assessee(N) for the period is Rs. 83,48,74,856/-. The total CENVAT credit taken on input services (P) during the period is Rs.4,66,329/-The worksheet for arriving at the above values is prepared and placed as annexure to the OIO. Going by the formula above the amount of Reversal of Cenvat Credit attributable to exempted services is (M/N)*P i.e.,

(Rs. 29469000/Rs.834874856)**X** 466329 = Rs. 16,460/-.

Hence I find that the assesses are required to reverse the amount of Rs.16,460/- towards exempted services provided during the period Further, I propose to demand interest at appropriate rate on the amount reversible as stated above from 01.04.2014 to the date of payment. Further, the assessees should have exercised the option 6(3)(ii) earlier and not at the time of adjudication. Despite audit pointing out the assessee did not reverse the proportionate Cenvat Credit voluntarily. Hence, for the non compliance to Rule 6(3) of Cenvat Credit Rules, 2004, I propose to impose penalty under Section 77 of Finance Act,1994.

11.2 Service Tax applicable on the LEGAL EXPENSES incurred :

In respect of legal charges, I find that that as per the serial No.5 of Notification No. 30/2012 dated 20.06.2012, only the services provided by individual advocate or a firm of advocates are liable for the service tax 100% in

the hands of the recipient under Reverse Charge Mechanism. Perusal of the Legal expenses ledger account for the relevant period, I find that the charges were incurred for purchase of NON-Judicial Stamp papers,, Stamp duty charges, Documentation and Encumbrance certificate charges. Since the Noticee has not incurred any legal expenses by way of fees to an advocate during the disputed period, payment of service tax under reverse charge mechanism is not warranted and that part of the notice needs to be dropped.

11.3 Service Tax applicable on the Transportation Charges incurred :

In respect of the Transport Charges the assessees submit that they have undertaken transportation of goods with individual truck owners, auto-rikshaw and accounted the same under 'transportation charges' ledger. Since service tax under reverse charge mechanism is applicable only on services received from Goods Transport Agency in terms of Notification No. 30/2012 dated 20.06.2012, Noticee has not paid any service tax on the transportation charges paid to individual who amounts to Goods Transport Operators as they have not issued any consignment note. I have gone through the ledger account given by the assesses at the time of personal hearing. I find that they have paid the amounts aggregated for a month to a truck drivers. Further I find that hamalicharges(goods loading and unloading charges) are also included in the ledgers.

11.3.1 I concur with the assesses that conjoint reading of Rule 2(1)(d) of Service Tax Rules, 1994 and Rule 4B of rules ibid, issue of consignment note is mandatory to impose service tax on the service recipient. Thus, issue of consignment note is a sine qua non to fasten the service tax liability. In this regard reliance is placed on NandganjSihori Sugar Co. Ltd. v. CCE 2014 (34) S.T.R. 850 (Tri. - Del.) wherein it was held that *"When the transports did not issue consignment notes or GRs or Challans or any documents containing the particular as prescribed in Explanation to Rule 4B of the Service Tax Rules, 1994, the Transporters cannot be called 'Goods Transport Agency" and, hence, in these cases, the service of transportation of sugarcane provided by the transporters would not be covered by Section 65(105)(zzp). In view of this we hold that there will be no Service Tax liability on the appellant sugarcane mills, as they have not received the service from a Goods Transport Agency. In view of this the impugned orders are not sustainable and the same are set aside. In many cases, the transporters has not issued any 'consignment note' thereby there is no service tax liability to that count.*

11.3.2 Without prejudice to above, I find that alleged transportation charges are not liable for service tax in view of the transaction amount being

below Rs. 750/- or 1500/- as the case may be. The small consignments involving Rs. 750/- per consignee or 1500/- per vehicle are exempted in terms of Notification No. 34/2004-S.T. dated 03.12.2004 and Notification No. 25/2012-ST dated 20.06.2012 as amended. In this background, I find that the demand for Service tax on Reverse Charge mechanism under Goods Transport Agency does not sustain.

11.4 Demand of Late Fee for delayed filing of ST-3 Returns:

I find that the notice has proposed to demand an amount of Rs.22,700/- towards short payment of late fees for the period October 2014 to June 2017. However, I find that there is excess demand for the period Oct to Mar'14 of Rs. 1,200/-(the late fee payable is shown as Rs. 1200/- and paid as Rs.1200 Hence the demand is to be Rs.0). Hence, giving discount wrong demand as stated above I find that the assesses are liable to pay an amount of Rs. 21,500/- (Rs.22,700/- Minus Rs.1,200/-).

11.5 Demand of Interest for delayed filing of ST-3 Returns:

In respect of demand for interest, I find from the table in the Show Cause Notice at para no 9 the interest paid by the assessee for the October'14 to June'17 is shown as 6,50,476/- where as interest payable for the corresponding period is shown as Rs.5,10,502/-.

11.5 a Thus, I find that there is no short payment of interest as alleged in impugned notice. Hence, the demand to that extent needs to be dropped.

11.5.b Hence, in view of the averments above, I pass the following order.

(i) I demand an amount of **Rs.16,460/- (**Rs Sixteen Thousand four hundred and Sixty Only) which is the proportionate Cenvat Credit to be reversed for the period April'2014 to June'2017, from M/s B & C Estates under Rule 6(3A)(iii) read with proviso to Section 73(1) of the Finance Act, 1994;

(ii) I impose Penalty of Rs. 10,000/- for non compliance to Rule 6(3) of Cenvat Credit Rules, 2004, under Section 77 of Finance Act, 1994.

(iii) I demand interest on Rs.16,460/-on the proportionate Cenvat Credit to be reversed for the period April'2016 to actual date of payment @ 18% as per Section 75 of Finance Act, 1994.

(iv) I drop demand for Service tax on Legal Services under Reverse Charge Mechanism;

(v) I drop demand for Service tax on Goods Transport Agency Services under Reverse Charge Mechanism;

(vi) I demand **Rs.21,500/-** (Rupees Twenty One Thousand five hundred Only)towards Late fee for delayed filing of ST-3 Returns under Rule 7 of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994;

(vii) I drop the demand for interest on late payment of Service Tax;

(viii) I do not propose to impose Penalty in respect of the amount demanded on Legal Charges&Goods Transport Agency service, under Section 78 of Finance Act, 1994.

पी. एम. यशवंत/ P.M. YASHWANTH)
उपायुक्त/Deputy Commissioner
सिकंदराबाद मण्डल/Secunderabad Division

To
M/s. B&C Estates,
5-4-187/3&4, Soham Mansion,
M.G.Road, Ranigunj, Secunderabad,
Telangana – 500003.

Copy to:-

1. The Commissioner of Central Taxes and Central Excise, Secunderabad GST Commissionerate, GST Bhavan, Opp. L.B.Stadium, Hyderabad.

2. The Superintendent of Central Tax, Ramgopalpet-I GST Range, Ramgopalpet - I Range, Salike Senate, D.No.2-4-416 & 417, Ramgopalpet, M.G.Road, Secunderabad – 500003.

3. Master File.

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24/12/2020