रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद– 380015.

क फाइल संख्या : File No : **V2(MRS)5/STC-III/2016/Appeal-I** 4349 to 4353

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-194-16-17**
दिनाँक Date **22.12.2016** जारी करने की तारीख Date of Issue 6.1.17

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise Ahmedabad

ग _____, आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No **AHM-STX-003-ADC-MSC-041-15-16** dated **25.01.2016** Issued by: Additional Commissioner, Central Excise, Din: Kalol, A'bad-III.

ध अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The **Appellants**/Respondents

M/s. Electrothem India Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) 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 is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amcunt 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.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 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 Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. 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.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम

(ii) सेनवैट जमा की ली गई गलत राशि

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

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

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten 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.**

(4)(i) इस s.dwR me.,इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, 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."

ORDER-IN-APPEAL

M/s Electrotherm (India) Ltd., Survey No.72, Village: Palodia, Taluka: Kalol (hereinafter referred to as 'the appellant') has preferred the present appeal, being aggrieved by the Order-in-Original No. AHM-STX-003-ADC-MSC-041-15-16 dated 25/01/2016 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated, the facts of the case are that the appellant is engaged in the manufacture of Induction Melting Furnace and its components and is holding Central Excise registration No.AAACE2669LXM001. The appellant is also holding Service Tax registration No.AAACE2669LST003 for providing taxable services under the category of 'Maintenance and Repair service', Business Auxiliary service', 'Transport of Goods by road service' and also as Input service distributor.

3. The appellant had entered into a Silent Consortium Agreement dated 26/09/2005 with M/s HYL Technologies, SA, Mexico (hereinafter referred to as 'M/s HYL') for installation of new Direct Reduction Plant, using technology of M/s HYL, for M/s Al-Nasser Industrial Enterprises, LLC at Abu Dhabi. The leader of the consortium was M/s HYL as per the agreement and the scope of work of both the appellant and M/s HYL involved supply and engineering of various goods/materials for installation of the said Plant. Further, as per this agreement, the appellant, for their share of work, would submit complete invoice documents to M/s HYL, who would submit the same to the customer and on receipt of payment from the customer, M/s HYL would make payment to the appellant.

4. On the basis of inquiry with the appellant, it was revealed that M/s Petron Emirates Contg. & Mfg. Co., Abu Dhabi (hereinafter referred to as 'M/s Petron')' had raised various bills/invoices on the appellant for erection of structures, equipments, for fabrication and installation' etc., for modification work, for man power supply with equipment, for electrical and instrumentation work, for rent of flats etc. and the amounts were charged in Dirhams. As per the sub-contract agreement dated 20/04/2007 between the appellant and M/s Petron, the scope of the sub-contract involved structural erection work, equipment and piping works, electrical work, instrumentation work and other miscellaneous work like refractory, painting, insulation work etc. Further as per this agreement, for additional/modification work, the appellant was required to pay on the basis of day work rate and equipment charges as quoted in the agreement including rate/charge for various technical persons like welders, fitters, grinders, cutters, helpers and for use of cranes etc. and these charges were quoted on hourly basis and the payment was to be made in Dirhams.

5. On the basis of inquiry and statement of Shri Sandeep Pandya, who was the project coordinator of the project tendered on 23/09/2013 and statement of Shri Sumit

Jain, Accounts Manager of the appellant tendered on 04/02/2014, it had appeared that the appellant had received services from M/s Petron, a foreign company, not having any business establishment in India, for undertaking installation of Plant in a foreign land, which included various taxable services like erection / commissioning, modification, man power supply, supply of tangible goods etc. The invoices were raised separately for each service and for miscellaneous work like addition/modification etc. the required man power and tangible goods were also separately provided and rates for the same were quoted and paid separately. As per the provisions of clause (i) and (ii) of Rule 3 of **Taxation of Services (provided from outside India and received in India) Rules, 2006**, specified services which are provided from outside and performed in India are notified as taxable services. Further, as per clause (iii) thereof, the services specified therein if provided from outside India and are received by a recipient located in India then such services are notified as taxable services. The services provided by M/s Petron for which the appellant had made payments appeared to fall under the category of 'Man power supply services' with or without equipment and 'supply of tangible goods services' that were 'taxable services provided from outside and received by a recipient located in India', as specified in **clause (iii) of Rule 3 of Taxation of Services (Provided from outside India and received in India) Rules, 2006**. As per Rule 2(1)(d)(iv) of Service Tax Rules, 1994, the person liable for paying service tax in relation to any taxable services provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Finance Act, 1994 is the recipient of such services. Also as per the clarification issued by CBEC vide Circular No.275/7/2010-CX 8A dated 30/06/2010, "*in case of taxable services received outside India by a person, who is resident in India or has place of business/business establishment in India, service tax liability arises with effect from 18/04/2006 as in the case of INSA, where services were received outside India for use in ships and vessels located outside India.*"

6. Therefore, in terms of Section 66A of the Finance Act, 1994, the services of Man power supply provided by M/s Petron and received by the appellant appeared to be taxable services and the appellant being deemed service provider of the said services appeared to be liable to pay service tax. On the basis of inquiry it was revealed that during the period April-2009 to August-2010, the appellant had made payment amounting to Dirhams 12,69,811/- which on conversion into Indian rupees worked out to **Rs.1,60,39,662/-** and the service tax liability was determined to be **Rs.16,52,085/-**. Further, it also appeared that during the period 2010-2011, the appellant had short-paid service tax to the tune of Rs.5,33,180/- under the category of Business Auxiliary services as recipient of such services from outside India, which was paid up on 06/10/2014 but they were liable to pay interest on this short paid amount.

7. Accordingly, a Show Cause Notice F.No.IV/16-13/PI/Gr.IV/2013-14 dated 15/10/2014 was issued to the appellant that was adjudicated by the adjudicating

authority vide the impugned order confirming the demand for Service Tax amounting to Rs.16,52,085/- under Section 73(1) of the Finance Act, 1994 on the taxable value of Rs.1,68,39,662/- paid by the appellant to M/s Petron during 2009-10; confirming the recovery of interest under Section 75 ibid on the confirmed amount of Rs.1,68,39,662/- as well as on the short-payment of Rs.5,53,180/-; appropriating the interest amount of Rs.2,87,919/- already paid by the appellant; imposing penalty of Rs.5,000/- on the appellant under Section 77(1)(a) ibid for failure to obtain/amend registration; imposing penalty of Rs.5,000/- on the appellant under Section 77(2) ibid for failure to assess the correct tax liability and imposing penalty of Rs.16,52,085/- on the appellant under Section 75 ibid.

8. The main grounds invoked by the appellant in the present appeal are as follows:

- The demand has been confirmed in the impugned order without discharging the burden of correct classification. The classification is at the heart of the matter and alone will decide the application of import of service tax rules and consequent demand.
- The demand is made on the basis of invoices of service provider. The period of invoice is from September-2009 to March-2010. This period is prior to the negative tax regime where Section 66A was in force. From reading the definition under Section 66A, it becomes clear that the transaction can come within the ambit only if manpower is supplied temporarily. The service provider should be manpower recruitment or supply agency. In the present case no manpower was supplied. The employees continue to be the employees of the service provider ad they were working under the supervision and control of the service provider.
- The entire agreement was for the execution of the entire work. It was only for the limited purpose of calculating the amount of consideration to be paid in certain specified situation i.e. where additional work became necessary that per hour or per piece rate was decided.
- The manner of calculating the consideration cannot in any way imply that the workers were supplied and such workers then worked under the appellant's supervision and control. The primary requirement that service provider was supplying the personal who worked under their supervision and control was not satisfied. In this regard, they have enclosed the Affidavit of their Manager handling the project.
- Once the services were not classifiable under manpower supply service, the question of services become taxable service and consequently attracting provisions of Section 66A does not arise. The demand is therefore, not tenable and is required to be set aside. Once the demand is not tenable, the question of interest or penalty does not arise.

- The demand is barred by limitation. The notice is dated 15/10/2014 covering the period up to March 2010. Therefore, the period is beyond the normal period of limitation.
- All the payments made in foreign currency, per se, are not taxable. In order to attract tax, there has to be taxable service. In the present case, taxable services were not rendered. The period is prior to 2012 i.e. prior to negative tax regime. During the material period, only specified category of service was taxable and the category of the present service was not taxable. In the present proceedings the department has not discharged the obligation to show that the services were taxable. Merely referring to the description in the invoices without examining other factors cannot lead to any presumption to taxability. Therefore, extended period cannot be invoked. The appellant had a view which flowed from elementary reading of the provisions and facts of the case and therefore, there was no question of suppression of facts. Hence extended period and consequent penalty under Section 78 are liable to be set aside.
- As regards the demand for interest on late payment of Service Tax of Rs.5,53,180/-, the demand for short-paid duty had been calculated on account of difference in value declared in ST-3 return and the details of foreign exchange remittance. It is obvious that there is no tax on remittance in foreign currency. The difference per se, can be a starting point of enquiry and cannot be the sole basis for demand. The demand on this account is incorrect and when under the instruction of Audit officer, such demand was deposited, it does not amount to acceptance of the liability. The demand has to be raised and sustained by showing taxability of the transaction. The amount deposited, therefore, is required to be refunded. Since the tax is not payable, the question of penalty or interest does not arise. The credit of said service is also available and thus the matter is revenue neutral and therefore, there was no tax liability or any liability for interest and penalty.
- Penalty under section 78 cannot be imposed since the demand is barred by limitation.
- Penalty under section 77 also does not arise since the appellant was already registered with Service Tax and were filing returns.

9. Personal hearing in the appeal was held on 20/12/2016. Shri S.J. Vyas, Advocate appeared on behalf of the appellant and reiterated the grounds of appeal and submitted that ingredients of manpower supply was not there and department should decide the classification.

10. I have carefully gone through the facts of the case on records and submissions made by the appellant. The issue for decision before me is whether the services received by the appellant from M/s Petron, towards the installation of a new Direct Reduction Plant in Abu Dhabi qualify as 'taxable service' and whether the appellant was

liable to pay Service Tax under reverse charge mechanism in the capacity of being a recipient of services based in India for services rendered outside the country. The attendant issues to be decided is whether the demand is barred by limitation and whether the levy of interest and the imposition of penalties under section 77(1) & (2) and section 78 of the Finance Act, 1994 is justified in the present case.

11. The undisputed fact of the case is that the appellant had entered into a sub-contract with M/s Petron to enable them to fulfill the terms of the Silent Consortium Agreement dated 26/09/2005 that they had made with M/s HYL of Mexico who were also the provider of technology for installation of a new Direct Reduction Plant for M/s Al-Nasser Industrial Enterprises at Abu Dhabi. It is also undisputed that M/s Petron had raised several invoices on the appellant as per the rates and charges quoted in the terms of the sub-contract and the appellant had made payment amounting to Dirhams 12,69,811/- which on conversion into Indian rupees worked out to **Rs.1,60,39,662/-.** The adjudicating authority has held that the services received by the appellant from M/s Petron are specified services qualifying as taxable services under clause (iii) of Rule 3 of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006***. On going through the grounds of appeal, I find that the applicability of the said Rules, especially clause (iii) of Rule 3 thereof has not been challenged by the appellant. The appellant has challenged the fact that the adjudicating authority had classified the services provided by M/s Petron as services falling under the category of 'Supply of Manpower and Recruitment Agency'. The appellant has also averred that classification is at the heart of the matter. However, they have not claimed any specific classification for the services provided by M/s Petron to negate the classification arrived at by the adjudicating authority in the impugned order. Such being the case, I find that in order to determine the taxability of the impugned services in the present case, the issue is required to be examined keeping in view the provisions of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006***.

12. The said Rules are notified vide Notification No. 11/2006-S.T., dated 19-4-2006 and the contents thereof are as follows:

Taxation of Services (Provided from Outside India and Received in India) Rules, 2006

In exercise of the powers conferred by sections 93 and 94, read with section 66A of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely :-

1. Short title and commencement. — (1) These rules may be called the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions. — In these rules, unless the context otherwise requires, –

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "input" shall have the meaning assigned to it in clause (k) of rule 2 of the CENVAT Credit Rules, 2004;

(c) "input service" shall have the meaning assigned to it in clause (l) of rule 2 of the CENVAT Credit Rules, 2004;

(d) "output service" shall have the meaning assigned to it in clause (p) of rule 2 of the CENVAT Credit Rules, 2004;

(e) "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated the 18th July, 1986 and S.O. 643(E), dated the 19th September 1996;

(f) words and expressions used in these rules and not defined, but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. **Taxable services provided from outside India and received in India.** — Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services, —

(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh) and (zzzr) of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;

(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India :

Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;

(iii) specified in clause (105) of section 65 of the Act, but excluding, —

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule,

be such services as are received by a recipient located in India for use in relation to business or commerce.

4. **Registration and payment of service tax.** — The recipient of taxable services provided from outside India and received in India shall make an application for registration and for this purpose, the provisions of section 69 of the Act and the rules made thereunder shall apply.

5. **Taxable services not to be treated as output services.** — The taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availing credit of duty of excise paid on any input or service tax paid on any input services under CENVAT Credit Rules, 2004.

On studying the above Notification, it can be seen that Rule 3 of the said Rules specifies 'Taxable services provided from outside India and received in India'. Rule 3(i) covers such services *"as are provided or to be provided in relation to an immovable property situated in India"*. Rule 3(ii) pertains to such services *"as are performed in India"* The present case, where the services has been received in Abu Dhabi by the appellant does not fall either under the scope of Rule 3(i) or Rule 3(ii) as the impugned services does not pertain to immovable property in India or the same is not performed in India. The impugned services have been received by the appellant who is located in India for use in relation to their business of providing services in Abu Dhabi. Therefore, the present case is covered under **Rule 3(iii) of *Taxation of Services (Provided from Outside India and Received in India) Rules, 2006*** which specifies the category to be ***"such services as are received by a recipient located in India for use in relation to business or commerce"***.

13. On examining clause (iii) of Rule 3 of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006***, it is seen that it covers all services specified in clause (105) of section 65 of the Act excluding sub clause (zzzo) and sub clause (zzzv). It also excludes services falling under clauses (i) and (ii) of Rule 3 of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.*** As held supra, the services do not fall under clauses (i) or (ii) of Rules 3 ibid as the impugned service does not pertain to immovable property in India or the same is not performed in India. Further, the excluded sub clause (zzzo) pertains to service provided *"to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for domestic journey or international journey"* and sub clause (zzzv) pertains to service provided "*to any person, by any other person, in relation to transport of such person embarking from any port or other port in India, by a cruise ship"*. The impugned services covered in the present case are neither pertaining to sub-clause (zzzo) nor sub clause (zzzv) of clause (105) of section 65 of the Act. As per the sub-contract agreement dated 20/04/2007 between the appellant and M/s Petron, the scope of the sub-contract involved structural erection work, equipment and piping works, electrical work, instrumentation work and other miscellaneous work like refractory, painting, insulation work etc. Thus it is clear that the impugned services do not fall under the exclusion clause of Rule 3(iii) of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006***. Therefore, by virtue of the fact that the impugned service falls outside of the ambit of the exclusions specified in Rule 3(iii), the same is rendered as taxable service under Rule 3(iii) of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.***

14. The adjudicating authority has confirmed classification of the impugned services as 'Man power supply service' under section 65(105)(k) and as 'Supply of tangible goods service' under section 65(105)(zzzzj) of the Finance Act. The appellant in the grounds of appeal has averred that classification of the service has to be determined

before confirming the taxability of the services. However, the appellant has not claimed any specific classification for the impugned services or given any valid ground to challenge the classification confirmed in the impugned order. It is not the claim of the appellant that the impugned services fall under the ambit of the exclusion clause under Rule 3(iii) of ***Taxation of Services (Provided from Outside India and Received in India) Rules, 2006***. As discussed supra, the impugned services are clearly out of the ambit of the excluded services under the said Rule 3(iii) and hence the service tax liability on the services is liable to be upheld. As the demand for service tax is correct, the demand for interest thereon is also correct and valid. Penalty has been imposed on the appellant under section 77(1)(a) of the Finance Act, 1994 for failure to obtain / amend service tax registration and under section 77(2) ibid for failure to assess the correct tax liability. The appellant had cleared failed to get their service tax registration amended and add the impugned services and they had also failed to assess the correct tax liability and pay the same in respect of the impugned services. Therefore, these penalties are also liable to be upheld. Further, the appellant has challenged the invoking of extended period for confirming the demand for service tax on the impugned services but they have not given any valid ground to show how the impugned services had escaped payment of service tax. It is an admitted fact that the appellant on the basis of a sub-contract agreement dated 20/04/2007 with M/s Petron had obtained services in Abu Dhabi and the payments were made in Dhirams. The liability resting on the appellant for paying service tax as recipient based in India on foreign soil remained suppressed in as much as the appellant had failed to obtain the registration for the impugned services and had failed to assess the tax liability correctly leading to non-payment of service tax on the impugned services. It was only on the basis of the inquiry conducted by the department that the details of such transactions were unearthed leading to the demands covered and confirmed in the impugned order. Therefore, the invoking of extended period is proper in the present case and consequently penalty imposed under section 78 in the impugned order is also valid and justified.

15. As regards the demand for interest on the short-payment of service tax on Consultation, Sales commission, Sales promotion etc. under the category of Business Auxiliary services, it can be seen that the service tax liability amounting to Rs.5,33,180/- for the period 2010-2011 was paid on 12/07/2014 through CENVAT account. On being pointed out that the payment through CENVAT account was not proper, the notice had paid up the said amount through e-payment challan on 06/10/2014. The appellant has also paid interest amount of Rs.2,87,919/- on the delayed payment. In the grounds of appeal, the appellant has averred that the said amount was paid up on the behest of Audit and was liable to be refunded but as per the records, no refund claim has been filed in this regard. Therefore, the delayed payment of service tax will attract interest at applicable rates. Thus the levy of interest confirmed in the impugned order on delayed payment is liable to be upheld.

16. On the basis of the above findings, I hold that no case is made out for any intervention in the impugned order and consequently I reject the appeal filed by the appellant.

17. अपीलकर्ता द्वारा दर्ज अपील का निपटारा उपरोक्त तरीके से किया जाता हैं. The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त (अपील्स-१)
Date: /01/2017

Attested

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To
M/s Electotherm (India) Ltd.,
S.No.72, Village: Palodia,
Taluka: Kalol.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner, Central Excise (System), Ahmedabad-III.
4. The Deputy Commissioner, Service Tax Division, Gandhinagar, Ahmedabad-III.
5. Guard File.