केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

वस्तु एवं सेवा कर भवन,
सातवीं मंजिल,पॉलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

GST Building ,7th Floor,,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

☎ : 079-26305065

टेलेफैक्स : 079 - 26305136

क फाइल संख्या :File No : **V2/187/GNR/2018-19** /12439 To 12444

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-027-19-20**

दिनाँक Date :**16-09-2019** जारी करने की तारीख Date of Issue: 23/09/2019

आयुक्त (अपील) द्वारा पारित

Passed by Commissioner (Appeals) Ahmedabad

ग **अपर** आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश **:AHM-CEX-003-ADC-PMR-004-005-18-19** दिनाँक : **31-01-2019** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-PMR-004-005-18-19,** Date: **31-01-2019** Issued by: Additional Commissioner,CGST, Div:RRA,HQ, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Nirma Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

\भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे 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 adjournment authority shall beer a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) 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।

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.

(6)(i) 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।

(6)(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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER IN APPEAL

This appeal has been filed by M/s Nirma Ltd, Mandali, Block No.161 B, Ahmedabad-Mehsana Hihway, Ambaliayasan, Mehsana, Gujarat [for short-'appellant'] against Order-in-Original No.AHM-cex-003-ADC-PMR-004 to 005-18-19 dated 28.03.2018 [for short-impugned order'] passed by the Assistant Commissioner of Central GST, Mehsana Division, Gandhinagar Commissionerate [for short-'the adjudicating authority'].

2. Briefly stated, the facts of the case are that during the course of audit of the records of the appellant, it was noticed that they received various services from M/s Ambica Carriers, Patan, Gujarat [for short-M/s Ambica] for management of transport vehicles as well as passenger vehicles owned by the appellant as per terms and conditions; that as per terms and conditions, the scope of services provided by M/s Ambica includes management, repair, maintenance of transport vehicles, for which M/s Ambica to provide requisite manpower including drivers, cleaners and maintenance staff. The expenditures incurred by M/s Ambica were reimbursed by the appellant. It appeared that though the appellant paid various charges to M/s Ambaica as reimbursement, the appellant considered only certain charges for the payment of service tax under Reverse Charge Mechanism (RCM). As it appeared that the total expenditure incurred by the appellant is towards the services provided by M/s Ambica and they have not discharged service tax on gross amount paid, show cause notice dated 27.09.2017 for the period of 2012-13 to December 2015, involving demand of service tax of Rs.1,70,45,601/- and show cause notice dated 10.08.2016 pertains to the period of January 2016 to June 2017, involving demand of service tax amounting to Rs.45,47,878/- were issued to the appellant. The said show cause notices also proposes for recovery of interest and imposition of penalty under Section 76, 77(2) and 78 of Finance Act, 1994 (FA). The adjudicating authority, vide impugned order has confirmed the demand of service tax with interest and further imposed penalty under sections 77 and 78 of the Finance Act, 1994.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- It is not the case of the department that service tax has not been paid on the services rendered by them; that they paid service tax on the Manpower Supply service and the fixed amount towards supervision charges. The case of the department that service tax has not been paid on the reimbursement charges and the adjudicating authority has held that amount reimbursed is consideration towards the service rendered.
- The agreement between the appellant and M/s Ambica provides that they shall be paid the expenses incurred at actual towards vehicles owned by service receiver and expenses such as diesel, petrol etc incurred on vehicle are not related to service rendered. Therefore the tax confirmed is

not only incorrect, illegal and contrary to the provisions of Section 67 of FA and service tax valuation Rules.

- Higher Appellate Authority and the Court have consistently held that reimbursement expenses, which has no nexus with the services so provided and incurred on behalf of the service provider could not be included in the valuation of the service as per the provisions of Section 67 of FA. The appellant relies on various case laws in support of their arguments.
- As per agreement, M/s Ambica is acting as 'pure agent'. Hence provisions of Rule 5(2) of Service Tax (Determination of Value), Rules, 2006 is applicable.

4. Personal hearing in the case was held on 21.08.2019. Shri Vikram Singh Jhala and Shri M.A.Patel, Authorized representatives appeared on behalf of the appellant and reiterated the submissions/grounds of appeal. They further submitted that they have submitted written submission during earlier hearing before the appellate authority which may be taken into account while deciding the case.

5. I have gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. I have also considered the appellant's submission dated 15.05.2019 submitted earlier.

6. I find that the limited issue to be decided in the instant appeal is as to whether the appellant is liable to pay service tax under RCM on the gross amount paid by them to M/s Ambica towards service viz. management, repair and maintenance of transport vehicles owned by the appellant etc, as per terms and conditions.

7. I find that the allegation against the appellant is that out of gross amount paid to their service provider M/s Ambica, they considered only few charges for the payment of service tax under RCM which is wrong as per Section 67 of the Finance Act, 1994 read with Rule 5 of the Service Tax (Determination of Value), Rules, 2006; that as per provisions of Section/Rule ibid, all consideration received by a service provider towards any service, should be included in the gross taxable value. The adjudicating authority has contended that any expenditure incurred towards provision of taxable service is liable to be considered as part of taxable value; that if the expenses which are integral part of activities to be rendered by the service provider will be considered as reimbursable expenses, the very aspect of the Government to collect service tax on the taxable service provided will be defeated. He further contended that M/s Ambica has not acted as a 'pure agent' for the appellant in terms of Rule 5 supra. On other hand, the contention of the appellant is that as per agreement between the appellant and M/s Ambica, the appellant paid actual expenses incurred towards vehicles owned by them and

expenses such as diesel, petrol etc incurred on vehicle are not related to service rendered.

8. I find that Section 67 of the Finance Act, 1994, states as follows [wef 1st May, 2006] :

"67. Valuation of taxable services for charging service tax.

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation: For the purpose of this section,

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

I further find that in Finance Act, 2015 (w.e.f 14.05.2015), in section 67 of the 1994 Act, in the *Explanation*, for clause (a), the following clause has been substituted, namely :—

'(a) "consideration" includes —

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service,

except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'.

Further, Rule 5 of the Service Tax (Determination of Value), Rules, 2006 states that:

RULE 5. Inclusion in or exclusion from value of certain expenditure or costs. — *(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-

(i) .....

9. From the above, I find that as per explanation to Section 67 of the Finance Act, 1994, "consideration" means "any amount that is payable for the taxable services provided or to be provided and in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him". I further find that from 14.05.2015, the clause for consideration has been amended and it includes- "any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed". The amendment made w.e.f 14.05.2015 appears to be indicated to the fact that the inclusion of reimbursable expenditure or cost incurred by the service provider and charged in the course of providing service is not taxable prior to that date.

10. I find that as per details submitted by M/s Ambica to the appellant i.e copy of invoices and statement of expenses incurred towards vehicles expenses i.e Fuel expenses, Road Tax/RTO charges etc for which the appellant has reimbursed the amount, it appears that the total amount paid to M/s Ambica is nothing to do with the taxable services provided by M/s Ambica. The question of demanding tax on the said amount by including it in the value of taxable service is legally not correct till the amendment of explanation to Section 67 supra.

11. Rule 5 of the Service Tax (Determination of Value), Rules, 2006 supra stipulates that "where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall

be included in the value for the purpose of charging service tax on the said service". The said rule further excludes the expenditure or costs incurred by the service provider as a 'pure agent' of the recipient of service if all the conditions prescribed are satisfied. Rule 5 of the Rules, 2006 supra brings that the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees also form part of 'gross amount charged. However, the Hon'ble High Court of Delhi in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. [2013 (29) S.T.R. 9 (Del.)], held that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service. The Hon'ble court has held that Rule 5(1) of the Rules 2006 supra runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is *ultra vires.* The Hon'ble Court held as follows:

> ***18.*** *Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax.* ***We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires****. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427 :-*
>
> *"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."*
>
> *Thus Section 94(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation*
>
> *[emphasis supplied]*

I further find that the department, being aggrieved by the aforesaid judgment, filed an appeal before the Hon'ble Supreme Court of India. The Hon'ble Court has held that:

29. *In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service.* ***Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax****. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and,* ***therefore, has to be prospective in nature****. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under :*

> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
>
> *28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> *29. The obvious basis of the principle against retrospectively is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."*

30. *As a result, we do not find any merit in any of those appeals which are accordingly dismissed.*

[emphasis added]

12. As it has been held by the Hon'ble Supreme Court that *reimbursable expenses* cannot form a part of the valuation of taxable services till 14.05.2015, the question of adding reimbursable expenditure to the gross amount charged in terms of Section 67 of the Finance Act, 1994, for the period prior to 14.5.2015 does not arise in the instant case. Thus, the demands confirmed by the adjudicating authority vide the impugned OIO, along with interest, and penalty under section in respect of period prior to 14.05.2015 is not sustainable and required to be set aside. I do so. However, for the demand pertaining to the remaining period, the said decision is not applicable and by virtue of amended provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax.

13. The appellant has further submitted that the issue involved in the instant case has already been decided by the Appellate Authority in the case of M/s Ambica, vide OIA No.AHM-EXCUS-003-APP-105-18-19 dated 01.10.2018; that in the said case, the issue relating to demand of short payment service tax made by M/s Ambic on gross amount paid by M/s Nirma Ltd i.e the appellant has been set aside by holding that reimbursable expenses cannot be form a part of valuation of taxable service. I find that the period involved in the said OIA is pertaining to the period prior to 14.05.2015, hence, by following decision of Hon'ble Supreme Court supra, the appellate authority has allowed the case of M/s Ambica. In the instant case, I find that the period involved is from 2012-13 to June 2017. Therefore, the ratio of the Hon'ble Supreme Court is applicable upto the period 14.05.2015 and for the remaining period, the said decision is not applicable.

14. I find that the appellant has further contended that M/s Ambica acts as a 'pure agent' and accordingly, as per provisions of Rule 5(2) of Service Tax (Determination of Value), Rules, 2006, the expenditure incurred shall be excluded from the value of taxable service. I find that as per explanation to rule ibid, "pure agent" means a person who -

(a) *enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*

(b) *neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*

(c) *does not use such goods or services so procured; and*

(d) *receives only the actual amount incurred to procure such goods or services;*

And the expenditure or costs incurred by the service provider as a pure agent of the recipient of service shall be excluded from the value of the taxable service if all the following conditions are satisfied:-

(i) the service provider acts as a pure agent of the recipient of service when he takes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorizes the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

From the documents furnished by the appellant, I do not find any material evidence to state that the service provider i.e M/s Ambica acts as a 'pure agent' of the appellant. The adjudicating authority has noted that the appellant has not made any contractual agreement authorizing M/s Ambica as a 'pure agent' to make payment or cost behalf of the appellant and obligation to make payment by M/s Ambica personal. I find merit consideration in the contention of the adjudicating authority, looking into the definition of 'pure agent' and conditions prescribed for acting as a 'pure agent', especially, the appellant has failed to furnish any material evidences showing the service provider-M/s Ambica as their 'pure agent'.

15. In view of above discussion, from 14.05.2015, the appellant is liable to pay service tax on gross amount paid to their service provider M/s Ambica. Accordingly, the appellant is also liable to pay interest amount on short payment. As regards penalty, looking into the fact and circumstances of the case, the appellant is also liable to pay penalty pertaining to the short payment of tax involved after 14.05.2015.

16. In view of the foregoing discussion, I hold that the service tax with interest and applicable penalty imposed upto 14.05.2015 is not sustainable and I set aside the same. For the remaining period, I uphold the service tax with interest and penalty. Therefore, I partly allow the appeal filed by the appellant.

17 . The appeal filed by the appellant stands disposed of in above terms.

(Gopi Nath) 16/9/19
Commissioner (Appeals)
Date : .09.2019

Attested

(Mohanan V.V)
Superintendent (Appeal),
Central Tax,Ahmedabad.

BY R.P.A.D

To,
M/s Nirma Ltd, Mandali,
Block No.161 B, Ahmedabad-Mehsana Hihway,
Ambaliayasan, Mehsana, Gujarat

Copy to:-

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Pr. Commissioner, Central Tax, Gandhinagar.
3. The Joint Commissioner, CGST, Gandhinagar
4. The Asstt. Commissioner, (Systems), CGST, Hq., Gandhinagar
5. The Assistant Commissioner, Mehsana Division.
6. Guard file.
7. P.A file.