आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलेफैक्स07926305136

DIN : **20211264SW0000814694**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1490/2021 /H957 T o H961

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-72/2021-22**
दिनाँक Date : **08-12-2021** जारी करने की तारीख Date of Issue 10.12.2021

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **PLN-AC-STX-04/2020-21** दिनाँक: **04.02.2021** issued by Assistant Commissioner, CGST& Central Excise, Division Palanpur, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s Pooja Marketing
60, Old Market Yard,
Palanpur, Banaskantha-385001

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।

Any person aggrieved by this Order-In-Appeal 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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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 :

(i) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे 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.

(क) 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) 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.

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

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

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।

(c) 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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गत:–

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

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद–380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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 a court fee stamp of Rs.6.50 paise 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.

(49) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(Demand) एवं दंड(Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है.**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(cxxx) amount determined under Section 11 D;
(cxxxi) amount of erroneous Cenvat Credit taken;
(cxxxii) amount payable under Rule 6 of the Cenvat Credit Rules.

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।

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

The present appeal has been filed by M/s. Pooja Marketing, 60, Old Market Yard, Palanpur, District : Banaskantha, Gujarat – 385 001 (hereinafter referred to as the appellant) against Order in Original No. PLN-AC-STX-04/2020-21 dated 04-02-2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Palanpur, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant is holding Service Tax Registration No. AAEFP9923DSD001 under the categories of Repairs, reconditioning, restoration or decoration or any other similar services of any motor vehicle. During the course of audit on records of the appellant, by departmental audit officers for the period of F.Y. 2016-17 and F.Y. 2017-18 (upto June, 2017) it was observed that the appellant, authorized dealer of M/s.Ashok Leyland, had received income like incentive scheme, discount income, vehicle scheme etc. It was noticed that the income shown by the appellant was nothing but income received in the form of incentive income/vehicle scheme/other income etc. from the manufacturer i.e. Ashok Leyland Limited (ALL) upon exceeding the target/promotion/marketing of the sales of the vehicle as a dealer of the manufacturer. It appeared that the appellant have earned the sales promotion incentives from the manufacturer on account of promotion and marketing of their product. It appeared that such income is sales promotion incentive and are extra consideration received from the vehicle manufacturer and the said activity falls within the ambit of services as per Section 65B (44) of the Finance Act, 1994. Accordingly, the appellant was required to pay service tax amounting to Rs.4,72,994/- on such income.

2.1 It was further observed during the course of the audit that the appellant was also engaged in the trading of duty paid goods. The said activity is covered under the negative list of services on which no service tax is payable. It was noticed that the appellant had availed Cenvat Credit

in respect of input services which were utilized commonly for providing both output service as well as trading activities. It was found that the appellant had not maintained separate records as stipulated under Rule 6 (2) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004) and neither had they filed the option in terms of Rule 6 (3A) of the CCR, 2004. Therefore, the appellant was liable to pay an amount equal to 7% of the value of the exempted services. Accordingly, it appeared that the appellant was liable to pay an amount of Rs.80,149/- in terms of Rule 6 (3) of the CCR, 2004.

2.2 The appellant was issued a SCN bearing No.229/19-20 dated 24.12.2019 from F.No. VI/1(b)-281Poojamarketing/IA/18-19/AP-63 wherein it was proposed to :

- recover the service tax amounting to Rs.4,72,994/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994;
- impose penalty under Section 78 of the Finance Act, 1994;
- recover the proportionate credit cenvat amounting to Rs.80,149/- under the proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR, 2004 along with interest under Section 75 of the Finance Act, 1994.
- impose penalty under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004.

3. The said SCN was adjudicated vide the impugned order and the demand for service tax as well as cenvat credit was confirmed along with interest. Penalties were also imposed under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:

- They are the authorized dealer of Ashok Leyland Ltd and during the service and repair of vehicles they sell spare parts, lubricants and oils of the vehicle.
- While demanding service tax, the SCN or the impugned order did not adduce any evidence that the said income are related to commission received from the manufacturer towards sale of the vehicle.
- The income shown as vehicle scheme is nothing but discount given by the manufacturer and supplier of lubricant towards purchase of vehicles and lubricant oils on outright basis and not supply on commission basis. The manufacturers offer special discounts for goods purchased and some of the discount are allowed in the invoices while some are allowed post sale. This discount is different from commission which is based on quantum of sale executed by agents.
- Merely because some incentives/discounts are received under various schemes of the manufacturer cannot lead to the conclusion that the incentive is received for promotion and marketing of goods. They get certain incentives in respect of sale target set by the manufacturer. These cannot be treated as business auxiliary service.
- The income shown as discount income was discount received for purchase of spare parts from the manufacturer and these were received on post sale basis. This has nothing to do with the marketing/promoting of the products of the manufacturer.
- The income booked under the mobile van charges is the amount charged towards towing the vehicle to their workshop and is not under business auxiliary service.
- The debit notes and other income is towards sale of scrap and waste oil and hence it is not a case of providing any taxable service.
- The manufacturer had cleared the vehicle after payment of central excise duty on the transaction value and subsequent reduction by way of discount does not alter the excise duty of a dealer and therefore, such reduction cannot be subject to service tax as it has already suffered central excise duty.

- The discounts received are for achieving target sales of vehicles during a particular period. Therefore, the allegation that the amount received is to be considered as commission is not correct.
- They rely upon the judgments in the case of : 1) Commissioner of Service Tax, Mumbai-I Vs. Sai Service Station Ltd – 2014 (35) STR 625 ; 2) Commissioner of ST, Mumbai Vs. Jaybharat Automobiles Ltd – 2016 (41) STR 311 (Tri.-Mumbai); 3) Sharyu Motors – 2016 (43) STR 158 (Tri.-Mumbai); 4) Satnam Auto – 2017 (52) STR 303; 5) My Car Pvt Ltd – 2015 (40) STR 1018; 6) Toyota Lakozy Auto Pvt Ltd – 2017 (52) STR 299 (Tri.-Mumbai); 7) Empire Motors Pvt Ltd – 2016 (46) STR 243 (Tri.-Ahmd).
- They also rely upon OIA No. AHM-EXCUS-003-APP-20-2020-21 dated 26.07.2020 passed by the Commissioner (Appeals), Ahmedabad in the case of Raj Motors and OIA No. VAD-EXCUS-01-APP-080-81-2020-21 dated 20.08.2020 passed by the Commissioner (Appeals), Vadodara.
- Regarding reversal of proportionate credit it is submitted that they are not engaged in trading of goods as contemplated and alleged in the SCN. In certain cases before sale of the vehicle, some activities like axle brake setting etc. with spare parts is required to be done and they carried out such activities and raise invoices along with applicable service tax.
- Sample copy of Invoice No. 139 dated 26.05.2017 and Invoice No. 927 dated 31.03.2017 are submitted. The invoices shows the actual activities i.e. insertion of parts etc. in the trucks and services have been done and service tax paid. Therefore, it is not covered under Rule 6 (3A) of the CCR, 2004.
- The demand is hit by the bar of limitation. Their records were audited periodically by the department and no objection was raised on the subject issues. Therefore, the allegations that they had not disclosed the facts is not correct. They rely upon the various case laws in this regard.
- They were under the bonafide belief that purchase and sale of vehicle is not liable to service tax. There was no malafide intention

to evade service tax, therefore, no penalty is imposable in view of the judgments of the various appellate authorities.

5. Personal Hearing in the case was held on 28.10.2021 through virtual mode. Shri M.H. Raval, Consultant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. I find that there are two issues involved in the present appeal, which are :-

I) Whether the income received by the appellant viz. incentive scheme, discount income, vehicle scheme, other income etc. Mobile van charges, debit notes, etc. are towards activity falling under Business Auxiliary Service and chargeable to service tax ?

II) Whether the appellant were liable to reverse Cenvat Credit on exempted services/trading activities during the F.Y. 2016-17 and 2017-18?

6.1 Regarding the first issue, I find that the appellant are an authorized dealer of the manufacturer of automobiles viz. Ashok Leyland Ltd. It is the contention of the department that the income received in the form of incentive income/vehicle scheme/other income etc. from the manufacturer i.e. Ashok Leyland Limited (ALL) upon exceeding the target/promotion/marketing of the sales of the vehicle as a dealer of the manufacturer are sales promotion incentives from the manufacturer on account of promotion and marketing of their product and therefore, falling within the ambit of services as per Section 65B (44) of the Finance Act, 1994. In this regard, I find that I have earlier decided a similar issue in the case of M/s. Raj Motors vide OIA No. AHM-EXCUS-003-APP-26-2020-21 dated 26.07.2020, the relevant part of which is reproduced as below :

"11. I have perused the copy of the incentive circular referred by the adjudicating authority in the impugned order. It is observed that TML has offered Monthly Incentive Scheme, Bonanza Incentive Scheme in the said Circular as per certain terms and condition. As per the offered scheme, incentives is payable monthly on achievement of target and bonus is payable on achievement of cumulative target for the periods given. Further, the said incentive circular is issued with certain terms and conditions to be fulfilled by the dealers. It is fact on records which is not disputed by the adjudicating authority that the appellant were selling the vehicles purchased from TML by issuing invoices in their name and the consideration received from their customers directly goes to their account only. This shows that TML has no ownership of the vehicles sold to the appellant and thereby it is clear that the vehicles were dealt by the appellant end only. It is the argument of the appellant that the transaction between them and TML is on principal to principal basis which find merit as the sale concluded by the appellant is not on behalf of TML. The adjudicating authority though admitting the fact that the transaction of purchase of vehicles by dealer from TML and subsequent sale thereof is on principal to principal basis, the subsequent incentives paid by TML is not considered on principal to principal basis. When the relationship between the appellant and TML is considered on principal to principal basis, I do not agree with the contention of the adjudicating authority that the incentives/commission received by the appellant under various schemes of TML, as mentioned in the incentive circular, are for promotion and marketing of vehicles manufactured by TML. Looking into the facts and incentive circular of TML issued to the dealers, the consideration received by the appellant which is described as incentive/commission by the adjudicating authority, better qualified as performance based trade discounts and it can in no way be referred as pertaining to any kind of sale promotion activity. When the amount received is not termed as "extra consideration" but only a "trade discount" towards sale of vehicles/achieving sales target, the activity of the appellant cannot be termed as "service"; In the circumstances, the question levying Service Tax does not arise on such amount after or prior to 01.07.2012 as per definition of "Business Auxiliary Service" [Section 65 (19) of the FA] or as per definition "Service" [Section 66 B (44) of the FA].

12. I find that the Hon'ble Tribunal, Mumbai has considered identical issue in the case of Commissioner of Service Tax, Mumbai-1

V/s Sai Service Station Ltd [2014 (35) STR 625]. By dismissing the appeal filed by the department, the Hon'ble Tribunal has held that the incentive received by the assessee for sale target set out as per circular issued by the manufacturer of vehicles, cannot fall under Business Aixuliary Service but are in the form of trade discount. The relevant paras 14 and 18 of the said decision are reproduced below:

> ***14.*** *In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. The assessee respondent is the authorized dealers of car manufactured by MUL and are getting certain incentives in respect of sale target set out by the manufacturer. These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service.*
>
> .....
>
> ***18.*** *In respect of sales/target incentive, the Revenue wants to tax this activity under the category of business auxiliary service. We have gone through the circular issued by MUL which provides certain incentives in respect of cars sold by the assessee-respondent. These incentives are in the form of trade discount. In these circumstances, we find no infirmity in the adjudication order whereby the adjudicating authority dropped the demand. Hence, the appeal filed by the Revenue has no merit.*

The said decision was followed by the Hon'ble Tribunal in the case of Commissioner of S.T Mumbai V/s M/s Jaybharat Automobiles Ltd [2016 (41) S.T.R. 311 (Tri. – Mumbai]; M/s Sharyu Motors [2016 (43) S.T.R. 158 -Tri. – Mumbai]; M/s Toyota Lakozy Auto Pvt. Vs. C.S.T., C.Ex., Mumbai-II & V [2017 (52) STR 299 (Tri.-Mumbai)]; the Hon'ble Tribunal, New Delhi in the case of M/s Satnam Auto [2017 (52) STR]; Rohan Motors Ltd. Vs. C.C.Ex., Meerut [2018 (96) Taxmann.com 31 (New Delhi-CESTAT)] and the Principal Bench of Hon'ble Tribunal, New Delhi in case of My Car Pvt Ltd [2015 (40) S.T.R. 1018 (Tri.-Del.)].

13. In view of above discussion and the factual substance along with ruling of the Hon'ble Tribunal, I agree with the arguments of the appellant that payments received by them as incentives towards achieving sale target cannot be considered as taxable additional consideration on promotion of vehicles. Therefore, I do not find any

merit in the impugned order passed by the adjudicating authority which is required to be set aside. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant."

6.2 I find that in the instant case too, the incentives received by the appellant is in the form of discount towards the vehicles, spare parts and lubricants purchased by them from the manufacturer. There is no dispute regarding the fact that the appellant are the authorized dealer of the manufacturer and not a commission agent. It is also not disputed that the vehicles, spare parts and lubricants are purchased by the appellant from the manufacturers on payment of excise duty. In view thereof, the incentives received by the appellant as discount from the manufacturers cannot be attributed to be towards any service provided by the appellant to the manufacturers. There being no element of service, the question of considering the incentive as consideration chargeable to service tax does not arise.

6.3 I find that the notice has also sought to charge service tax on other income viz. Mobile Van Charges, Debit notes etc. received by the appellant, as consideration towards Business Auxiliary Service. The appellant have contended that the Mobile Van Charges is the amount charged by them for towing of vehicle to their workshop and does not fall under Business Auxiliary Services. Regarding Debit Notes, the appellant have submitted that the same is towards sale of scrap and waste oil and no taxable service is involved. I find that no efforts have been made to ascertain the actual reasons for which the mobile van charges have been received by the appellant or why the debit notes were issued by them. Without adducing any justification, the notice has simply proceeded to treat them as consideration towards Business Auxiliary services. This is totally unjustified and cannot be sustained on this very ground. Additionally, I find that the charges towards towing of vehicles and amounts received from sale of waste oil and scrap cannot be attributed towards any taxable service and therefore, are not liable to service tax

under Business Auxiliary Service or under Section 65B (44) of the Finance Act, 1994.

6.4 I find that subsequent to the passing of AHM-EXCUS-003-APP-26-2020-21 dated 26.07.2020, there has been no change in the legal position and neither has the said OIA been stayed or overruled by any higher appellate authority. Therefore, by following my earlier decision, I hold that the incentive scheme, discount income, vehicle scheme, other income, Mobile van charges, debit notes, etc. received by the appellant are not towards activity of Business Auxiliary Service and accordingly, are not chargeable to service tax.

7. The other issue involved in the present appeal is whether the appellant were liable to reverse Cenvat Credit on exempted services/trading activities during the F.Y. 2016-17 and 2017-18 or otherwise. The appellant have contended that they are not engaged in any trading activity as alleged. They are carrying out repairing and servicing of the trucks with spare parts and they have raised invoices wherein service tax has been paid by them. The appellant have also submitted two invoices on sample basis in support of their contention.

7.1 I find that while it is alleged that various common input services were utilized by the appellant for providing both taxable output service as well as trading activities, nowhere in the SCN or in the impugned order, the common input services, in respect of which credit is sought to be reversed, are not spelt out. Therefore, I find that the allegation against the appellant is very vague and not specific. Be that as it may, a similar issue has recently been decided by me in the case of M/s.Cartec Motors Pvt Ltd vide OIA No.AHM-EXCUS-002-APP-34/2021-22 dated 12.11.2021, the relevant part of which is reproduced as below :

> **"8.** As regards the first issue, I find that the demand pertains to the period F.Y. 2015-16 to F.Y. 2017-18 (upto June, 2017). The entire demand of Rs.5,62,347/- has been raised on the ground that the appellant, for discharging their tax liability, had availed & utilized Cenvat credit of service tax paid on rent of their premises which was

used for rendering taxable and exempted services, without maintaining separate accounts. Therefore, in terms of the provisions of Rule 6(3) of the CENVAT Credit Rules (CCR), 2004, they were required to reverse proportionate amount of Cenvat credit utilized in exempted services i.e. trading activity. The appellant on the other hand are contending that they were not indulging in trading activities but were providing Works Contract Service and were showing the value of parts and materials used in repairing and servicing of the vehicles and value of labour charges separately in the invoices and have availed Cenvat credit of only input services exclusively used in the activity of workshop, hence, they were covered under Rule 6(2) of Cenvat Credit Rules, 2004 vide Notification No.3/2011-CE (NT) dated 1.04.2011.

8.1 To examine the claim of the appellant, Clause (54) of Section 65B of the F.A., 1994, defining Works Contract, is reproduced below:

> *"**works contract**" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;*

In terms of above definition, transfer of property of goods involved for carrying out repair, maintenance, renovation or alteration of any movable property shall be covered under works contract. CBEC Education Guide on taxation of service at para 6.8.2, clarified that a contracts for repair or maintenance of motor vehicles shall be treated as 'works contracts', if property in goods is transferred in the course of execution of such a contract. The service tax has to be paid in the service portion of such a contract. The manner for determining the value of service portion of a works contract from the total works contract has been given in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. As per sub-rule (i) of the said Rule 2A, the value of the service portion in the execution of a works contract is the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract. Thus, the gross amount does not include the value of transfer of property in goods involved in the execution of the said works contract.

8.2 It is not disputed that the appellant has not paid VAT on sale of goods (spare parts and consumable) nor is in dispute that the appellant were not showing labour charges separately in their invoices. Thus, considering the above definition and the clarification given above, I find force in appellant's contention that the service rendered by them was covered under Works Contract Service. Further, in terms of Section 66E (h) of the F.A., 1994, only service portion in the execution of a works contract shall constitute declared service. It is observed from the case records that the payment of service tax on labour charges and VAT payment on sale of spare parts & consumables are not disputed. Hence, I do not find any merit in the contention of the adjudicating authority that the appellant were indulging in the trading of spare parts & consumables.

8.3 When the above argument of the department does not hold any ground, I find that provisions of Rule 6(3) of the CENVAT Credit Rules, 2004, cannot be made applicable to the present issue as the appellant is providing works contract service and not indulging in trading activity like sale and purchase of spare parts & consumables. Hence they are not required to reverse the proportionate amount of CENVAT credit utilized. Once the demand is not sustainable, question of demanding interest and imposing penalty does not rise. I, therefore, find that the demand of Rs.5,62,347/- is not legally sustainable."

7.2 In the instant case, I find from the invoices submitted by the appellant that they are paying VAT on the spare parts and in respect of the amount charged towards labour, the appellant are paying service tax. Therefore, the ratio of my above decision in the case of Cartec supra, is squarely applicable to the facts of the present case. Consequently, I hold that the demand for reversal of Cenvat Credit raised against the appellant is not legally sustainable.

8. In view of the above discussions and findings, the impugned order is set aside and the appeal of the appellant is allowed.

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

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

(Akhilesh Kumar)
Commissioner (Appeals)

Date: .12.2021.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Pooja Marketing,
60, Old Market Yard,
Palanpur, District : Banaskantha,
Gujarat – 385 001

Appellant

Respondent

The Assistant Commissioner,
CGST & Central Excise,
Division- Palanpur,
Commissionerate : Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
   (for uploading the OIA)
4. Guard File.
5. P.A. File.