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 : **20220964SW0000222EB8**

स्पीड पोस्ट

क फाइल संख्या : File No.: GAPPL/COM/STP/404/2022 / 3547 - 3551

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-47/2022-23**
दिनाँक Date : **31-08-2022** जारी करने की तारीख Date of Issue 05.09.2022

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

ग Arising out of OIO No. **AHM-CEX-003-JC-MT-18-21-22** दिनाँक: **24.12.2021** passed by Joint Commissioner, CGST& Central Excise, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Green City Infrastructure**
   Block No. 1, Rakanpur, Kalol,
   Gandhinagar - 382721

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 :

(ii) 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 मामलें 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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.

(69) 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:

(cxc) amount determined under Section 11 D;
(cxci) amount of erroneous Cenvat Credit taken;
(cxcii) 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. Green City Infrastructure, Block No.1, Rakanpur, Taluka : Kalol, District : Gandhinagar – 382 721 (hereinafter referred to as the appellant) against Order in Original No. AHM-CEX-003-JC-MT-018-21-22 dated 24.12.2021 [hereinafter referred to as "*impugned order*"] passed by the Joint Commissioner, CGST, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. AAJFG8206DSD002 and were engaged in providing Construction Services of Residential as well as Commercial Complex. During the course of audit of the records of the appellant for the period from April, 2015 to June, 2017, by the Officer of Central Tax, Audit Commissionerate, certain details/documents were called for vide letters dated 17.03.2020, 26.06.2020 and 19.08.2020. However, no response was received from the appellant. Therefore, the Audit was concluded on the basis of the details/documents which were submitted earlier by the appellant. Six objections were raised in the course of the Audit, which are enumerated below.

2.1 On verification of the documents submitted by the appellant, it was observed that there was a delay in filing ST-3 Returns by the appellant during the period F.Y. 2015-16 (April- September), F.Y.2016-17 and F.Y. 2017-18 (April-June). However, the late fees amounting to Rs.23,800/- was not paid by them.

2.2 On verification of the documents submitted by the appellant, it was observed that there was a difference in the value of transportation expenses mentioned in the Trial Balance as compared to the gross value shown in their returns, which resulted in short payment of service tax amounting to Rs.4,132/- on GTA service under reverse charge during the period F.Y. 2015-16 to June, 2017.

2.3 It was also noticed that that the appellant had received Legal Consultancy Service from Advocate/Advocate Firm during July, 2015, however, they had not paid the service tax amounting to Rs.725/- under reverse charge.

2.4 Verification of the documents indicated that there was a difference in the amount of receipt of Advance against booking of Residential Flats mentioned in the Trial Balance as compared to their ST-3 returns which resulted in short payment of service tax amounting to Rs.5,79,762/- during the period F.Y.2015-16 to F.Y. 2016-17.

2.5 It was further observed that the appellant had taken and utilized cenvat credit of the service tax paid on input service but had not produced the original bills/invoices in respect of the services and had also not provided the proper record for receipt and consumption of the input services. Therefore, the cenvat credit amounting to Rs.72,82,566/- appeared to be recoverable from the appellant.

2.6 It was also noticed that the appellant had taken and utilized excess cenvat credit of service tax, amounting to Rs.1,39,300/-, paid on cancellation of services.

3. Subsequently, the appellant was issued a SCN vide F.No. GADT/TECH/SCN/ST/30/2020-TECH dated 09.10.2020 wherein it was proposed to :

- Demand and recover the late fee amounting to Rs.23,800/- in terms of Section 70(1) of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994.
- Demand and recover the service tax amounting to Rs.5,84,619/- (Rs.5,79,762/- + Rs.4,132/- + Rs.725/-) under the proviso to Section 73 (1) of the Finance Act, 1994.

- Disallow and recover the wrongly availed cenvat credit amounting to Rs.72,82,566/- in terms of Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004.
- Disallow and recover the excess credit of Rs.1,39,200/- in terms of Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004.
- Charge and recover Interest under Section 75 of the Finance Act, 1994 read with Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004.
- Impose penalty under Section 77 (1) (b), 77 (1) (c) (i) and (ii) and Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the Cenvat Credit Rules, 2004.

4. The said SCN was adjudicated vide the impugned order wherein :

- The late fee amounting to Rs.23,800/- was confirmed and ordered to be recovered in terms of Section 70(1) of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994. The late fee amounting to Rs.11,500/- paid by them was appropriated.
- The demand for service tax amounting to Rs.4,132/- was dropped.
- The demand for service tax amounting to Rs.725/- in respect of Legal Consultancy Service was confirmed along with interest and penalty under Section 78 (1) of the Finance Act, 1994.
- The demand for service tax amounting to Rs.5,79,762/- in respect of differential amount of Advance received was confirmed along with interest and penalty under Section 78 of the Finance Act, 1994.
- The cenvat credit amounting to Rs.10,83,449/- was confirmed under the proviso to Section 78 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) and Rule 15 (3) of the Cenvat Credit Rules, 2004.
- The demand for cenvat credit amounting to Rs.61,99,117/- was dropped.
- Penalty of Rs.10,83,449/- was imposed under Section 78 of the Finance Act, 1994.
- The demand for excess credit amounting to Rs.1,39,300/- was confirmed under the proviso to Section 78(1) of the Finance Act, 1994

read with Rule 14 (1) (ii) and Rule 15 (3) of the Cenvat Credit Rules, 2004.

- Penalty of Rs.1,39,300/- was imposed under Section 78 (1) of the Finance Act, 1994.
- Penalty of Rs.10,000/- each was imposed under Section 77(1) (b) and 77 (1) (c) (i) and (ii) of the Finance Act, 1994.

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

i) The SCN has been issued on 19.10.2020 raising demand for the period from April, 2015 to June, 2017 invoking the extended period. The SCN is time barred. They have filed returns from time to time. The SCN fails to substantiate the intention to evade payment of tax on their part, hence, extended period cannot be invoked. The SCN fails to prove the allegation of suppression of facts or malafide intention on their part. No positive act done by them has been shown in the SCN which proves the intention of either non-reversal of cenvat credit or non payment of service tax.

ii) They rely upon the judgment in the case of Span Commercial Co. Vs. CCE, Ahmedabad-I – Final Order No. A/10185/2020 dated 14.01.2020; Tata Consultancy Services Ltd. Vs. Commissioner; Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur – 2013 (288) ELT 161 (SC); Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut – 2005 (188) ELT 149 (SC); Concept Motors Pvt. Ltd. V. CST, Ahmedabad – Final Order No. A/11717/2018 dated 07.08.2018.

iii) The SCN is vague and incoherent and issued without invoking the provisions of CGST Law. Proceedings under the Finance Act, 1994 cannot be done in the GST regime where service tax is merged into GST.

iv) They rely upon the judgment in the case of Commissioner of C.Ex, Bangalore Vs. Brindavan Beverages (P) Ltd. – 2007 (213) ELT 487 (SC).

v) They have already paid the late fee amounting to Rs.11,500/- which has been accepted in the impugned order. The SCN fails to mention under which Section the late fees are being demanded. They rely upon the decision in the case of YCH Logistics (India) Pvt. Ltd wherein it was held that if tax is paid along with interest before issuance of SCN, the SCN shall not be issued.

vi) Regarding the allegation of non payment of service tax under RCM on Legal services received by them, it is submitted that they have received Professional services from the advocates and not legal services. In any case, the entire transaction was revenue neutral as they were eligible to claim cenvat credit of the tax paid. They rely upon the decision in the case of Commissioner Vs. Bhuwalka Pipes Pvt. Ltd. – 2014 (310) ELT 23 (Kar.); Lafarge India Pvt. Ltd. Vs. CST, Mumbai – 215-TIOL-81-CESTAT-MUM; Chaudhry Hammer Work Ltd. V. CCE, Ghaziabad – 2012 (280) ELT 461 (Tri.-Del.); Matrix Telecom P. Ltd. Vs. CCE, Vadodara-II – 2013 (32) STR 423 (Tri.-Ahmd.).

vii) Regarding the short payment of service tax amounting to Rs.5,79,762/-, it is submitted that it is the duty of the adjudicating authority to disprove their contentions. The adjudicating authority was bound to verify the calculations submitted by them and verify if it was in conformity with law. They rely upon the decision in the case of UOI Vs. Garware Nylon – 1996 (87) ELT 12 (SC). They submit copy of the reconciliation which shows the computation relied upon by them, which shows that there is no service tax payable by them.

viii) Regarding wrong availment of credit of service tax paid on input service without possession of documents, it is submitted that they had produced all the invoices in respect of cenvat credit of Rs.61,99,117/-. The remaining evidences to prove genuineness of their eligibility of cenvat credit are being submitted by them. It may be noted that through HDFC Bank, they had discharged and paid the liability under reverse charge.

ix) Regarding availment of excess credit on adjustment under Rule 6 (3), it is submitted that when the prospective members cancel their booking, it does not amount to sale. As per the Contract Act, 1872, a contract when cancelled becomes void. As a result, they had provided services to themselves and not to any other person.

x) The amount paid as service tax is nothing but excess payment of service tax and the same is required to be adjusted by taking credit under Rule 6 (3) of the Service Tax Rules, 1994. The adjustment done by them is in accordance with the law.

xi) The interest is not recoverable as the demand of service tax itself is not sustainable. They rely upon the decision in the case of Pratibha Processors Vs. UOI 1996 (88) ELT 12 (SC).

xii) Penalty under Section 77 of the Finance Act, 1994 is not applicable in the present case. They rely upon the decision in the case of Neon News Pvt. Ltd. – 2018 (9) TMI 1516.

xiii) They are not required to pay penalty under Section 78 of the Finance Act, 1994 as the department has not proved that they had suppressed facts or given wilful mis-statement. They rely upon the judgment in the case of Continental Foundation Jt. Venture V. CCE, Chandigarh-I – 2007 (216) ELT 177 (SC); Pahwa Chemicals Pvt. Ltd. – 2005 (189) ELT 257 (SC); Mysore Kirloskar Ltd. – 2008 (226) ELT 161 (SC).

xiv) CERA Audit is ultra vires the provisions of the Finance Act, 1994. They rely upon the decision in the case of Mega Cabs Pvt. Ltd. Vs. UOI & Others – 2016-TIOL-1061-HC-DEL-ST as well as various other judicial pronouncements.

xv) The adjudicating authority has relied upon the Stay Order passed by the Hon'ble Supreme Court in the case of UOI Vs. Mega Cabs Pvt. Ltd. – 2016 (44) STR J277 (SC). However, as per the judgment of the Hon'ble Supreme Court in the case of Shri Chamundi Mopeds Vs. Church of South India Trust Association – AIR 1992 SC 1439, a stay order does not wipe out the order passed by the lower court and it continues to operate in law.

6. Personal Hearing in the case was held on 02.08.2022 through virtual mode. Shri Bishan Shah, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

7. 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. The dispute involved in the present appeal relates to the confirmation of demand for service tax, denial of cenvat credit and ordering recovery of late fee. The demand pertains to the period F.Y.2015-16 to F.Y. 2017-18. There are multiple issues involved in the present appeal which are dealt with individually in the succeeding paragraphs.

8. **Imposition of Late Fee of Rs.23,800/-.** The appellant have contended that the SCN fails to mention the section under which the late fees are being demanded. They have also contended that if the self assessed tax is paid with interest before issue of SCN, penalty is not imposable. In this regard, I find that the SCN has invoked Section 70 (1) of the Finance Act, 1994 read with Rule 7 (C) of the Service Tax Rules, 1994 for recovery of late fees. The said Section 70 (1) of the Finance Act, 1994 is reproduced below :

> "Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed."

8.1 Rule 7 (C) of the Service Tax Rules, 1994 is reproduced below :

> "(1) Where the return prescribed under rule 7 is furnished after the date prescribed for submission of such returns, the person liable to furnish the said return shall pay to the credit of the Central Government, for the period of delay of-
>
> (i) fifteen days from the date prescribed for submission of such return, an amount of five hundred rupees;
>
> (ii) beyond fifteen days but not later than thirty days from the date prescribed for submission of such return, an amount of one thousand rupees; and
>
> (iii) beyond thirty days from the date prescribed for submission of such return an amount of one thousand rupees plus one hundred rupees for every day from the thirty first day till the date of furnishing of the said return'

Provided that the total amount payable in terms of this rule, for delayed submission of return, shall not exceed the amount specified in section 70 of the Act;"

8.2 It is observed that the SCN has at Para 4 detailed the calculation of the late fees and the same has been computed in terms of the provision of Rule 7 (C) of the Service Tax Rules, 1994. The appellant have not controverted the fact of delay in filing of returns by them. Further, in terms of the provisions of Section 70 (1) and Rule 7 (C) supra, the appellant were required to pay the prescribed amount of late fees on their own without any communication from the department. However, they have only paid an amount of Rs.11,500/-. The appellant have also not indicated the manner in which the said amount has been arrived at by them. The contentions of the appellant regarding no penalty being imposable when the amount of tax is paid with interest before issuance of SCN is not relevant to the issue on hand inasmuch as no penalty has been imposed on them for delayed filing of the returns. The SCN has only proposed recovery of the prescribed late fee and the same was ordered to be recovered vide the impugned order. In view thereof, I do not find any infirmity in the impugned order in so far as it pertains to ordering recovery of late fees amounting to Rs.23,800/- in terms of Section 70 (1) of the Finance Act, 1994 read with Rule 7 (C) of the Service Tax Rules, 1994.

9. **Confirmation of demand of service tax amounting to Rs.725/- under reverse charge on Legal Consultancy Service.** In this regard, I find that the appellant have contended that they have received Professional services from the advocates and not legal services. However, except for making this claim, the appellant have not submitted any documentary evidence in support of their claim either before the adjudicating authority or in the appeal memorandum. Therefore, in the absence of any evidence supporting their contention, I do not find any grounds for accepting their contention. Accordingly, the same is rejected and the confirmation of demand in this regard is upheld. The appellant have also taken the plea of revenue neutrality on the grounds that they would have been eligible for cenvat credit of the tax paid by them. However, I am of the considered view that revenue neutrality cannot prevent payment of the applicable service tax.

The appellant are legally bound to pay the service tax and, thereafter, avail cenvat credit, if otherwise admissible to them. Considering the above facts, I find that confirmation of demand of service tax, in this regard, vide the impugned order does not call for any interference and the same is upheld.

10. **Confirmation of demand of service tax amounting to Rs.5,79,762/- on Construction of Residential Complex Service.** In this regard, it is seen that the appellant have not made any submission on the calculation made by the Audit which is at Para 20 of the SCN. They have not offered any explanation which would show that the calculation adopted by the Audit is incorrect. On the contrary, the appellant have, before the adjudicating authority as well as in the appeal memorandum, submitted a reconciliation and claimed that the service tax payable by them was in the negative. However, as rightly observed by the adjudicating authority in Para 48.2 of the impugned order, the appellant have not submitted any document from their books of accounts corroborating and supporting the calculation submitted by them.

10.1 The appellant have contended that it is not their duty to disprove the calculations of the audit and that it was the duty of the adjudicating authority to verify the calculations submitted by them. They have also relied upon the judgment in the case of Garware Nylons, supra in their support. I do not find any merit in the contentions of the appellant. The department has made out its case in the SCN issued to the appellant wherein the manner in which demand of service tax has been arrived is detailed. It is for the appellant to refute the manner in which demand for service tax was arrived at. However, the appellant have failed to do so and neither have they submitted any explanation for the difference in the taxable value reflected in their financial statements as compared to the taxable value in the ST-3 returns filed by them. Merely submitting a different set of calculations, without any supporting documents, does not in anyway controvert the calculations arrived at by the audit and mentioned in the SCN for raising demand of service tax.

10.2 It is further observed that the adjudicating authority has recorded the submission of the appellant at Para D of Page 18 of the impugned order, which reads as "*The Noticee has checked the details as per SCN stating short payment of service tax. The Noticee would like to inform you that it has discharged all the liability as per service tax law. Please find herewith attached copy of the reconciliation for your ready reference as Annexure C.*" From the submission of the appellant, it is clearly seen that they have not in any manner refuted the calculations adopted in the SCN for raising demand of service tax and neither have they explained the reasons for the difference in the taxable value in their financial statements as compared to their ST-3 returns. The judgment relied upon by the appellant also does not support their case inasmuch as the department has discharged its onus by detailing the reasons for raising demand of service tax in the SCN issued to the appellant. In view of the above, I am of the considered view that the adjudicating authority has rightly confirmed the demand of service tax. The contention of the appellant is rejected being devoid of merit.

11. **Confirmation of demand of cenvat credit amounting to Rs.10,83,449/- which was availed without possession of valid documents.** It is observed that the cenvat credit was denied by the adjudicating authority as the appellant did not produce the documents on the strength of which the appellant had availed the cenvat credit. I find that the appellant have stated in the appeal memorandum that they are submitting documentary evidences to prove their eligibility to cenvat credit. I have perused the documents submitted by the appellant. The documents submitted by the appellant consists of (i) A bank statement of HDFC Bank, (ii) An invoice dated 30.5.2015 of Kamlesh Construction Company, (iii) Six Taxpayers Counterfoil in the name of the appellant issued by HDFC Bank and (iv) Two Taxpayers Counterfoil issued by HDFC Bank in the name of Vinod K. Solanki. On a detailed scrutiny of these documents, I find that the Bank statement of HDFC bank shows a debit entry of Service Tax. However, it is not clear whether the payment pertains to the service tax liability of the appellant on forward charge, which is not admissible as cenvat credit to the appellant, or whether the same is a payment of service tax on reverse charge. The invoice of Kamlesh

Constructions Company appears to be for services received by the appellant. Of the six Taxpayers Counterfoils in the name of the appellant, I find that five pertain to payment of only Krishi Kalyan Cess and Swachh Bharat Cess. It is not clear whether the payment pertains to the liability of the appellant to pay cess under forward charge or whether the same is payment toward cess under reverse charge. One Taxpayers Counterfoil which is in the name of the appellant pertains to payment of service tax on Transport of Goods by Road. The two Taxpayers Counterfoils in the name of the Vinod K. Solanki is in respect of Construction of Residential Complex for which service tax is payable under forward charge. Therefore, it is not clear how the appellant is claiming cenvat credit on the strength of the Taxpayers Counterfoils in the name of Vinod K. Solanki.

11.2 The appellant have failed to produce the proper documents establishing their claim for cenvat credit before the adjudicating authority and even the documents submitted by them in the appeal memorandum do not establish their eligibility to the cenvat credit. However, in the interest of natural justice, I am inclined to afford one more opportunity to the appellant to furnish the proper documents in support of their claim for cenvat credit. Therefore, I remand the matter back to the adjudicating authority and the appellant is directed to submit the proper documents, within 15 days of the receipt of this order, before the adjudicating authority who shall cause necessary verification and thereafter decide the matter afresh.

12. **Confirmation of demand of excess credit amounting to Rs.1,39,300/-.** In this regard, I find that the eligibility of credit in respect of the service paid on services which were subsequently cancelled is not in dispute. The SCN has at Para 31 tabulated the amount of credit to which the appellant were eligible for credit. The amount has been calculated on the basis of the documents submitted by the appellant and the calculation shows that the appellant had availed excess credit. However, the appellant have rather than submitting documents evidencing that the credit was correctly availed by them, merely submitted a calculation which shows credit amounting to

R.3,82,209/- in terms of Rule 6 (3) of the Service Tax Rules, 1994. They have contended that excess payment of service tax is required to be adjusted by taking credit in terms of the said rule. As stated earlier, there is no dispute on the issue of admissibility of credit where service tax has been paid in excess. The appellant have failed to put forth evidences to show that the credit of Rs.1,39,300/- was correctly taken by them. Therefore, I am left with no option but to uphold the impugned order confirming the demand in this regard.

13. The appellant have also raised the issue of limitation and contended that extended period of limitation cannot be invoked. I find that the appellant have in their returns, failed to furnish the true and correct details of the taxable value of services provided by them. Further, even during the course of the audit, the appellant have, inspite of repeated communications from the department, not submitted the documents and details called for. Clearly, the appellant have indulged in suppression of facts. It is also pertinent to mention that even in the course of the adjudication, the appellant have not submitted the documents to establish their bonafides. Considering these facts, I am of the considered view that the extended period of limitation is applicable and therefore, I reject the contention raised by the appellant in this regard.

14. The appellant have contended that interest under Section 75 of the Finance Act, 1994 is not payable by them as no service tax is payable and neither are they liable to reverse cenvat credit. In view of the discussion made in the foregoing paragraphs, wherein the confirmation of demand of service tax and credit under Rule 6 (3) of the Service Tax Rules, 1994 been upheld, the appellant are liable to pay interest under Section 75 of the Finance Act, 1994.

15. The appellant have also challenged the imposition of penalty under Section 77 of the Finance Act, 1994 and have relied upon the decision in the case of Neon News Pvt. Ltd., supra. They have also contended that the audit was conducted during the Covid-19 pandemic when the business operations

were not done. I find that the appellant have neither during the audit nor during the course of adjudication of the case submitted the documents called for. I further find that the calculations based on which the demand have been raised in the SCN were all on the basis of some details and documents submitted by the appellant. However, the appellant have in the course of the adjudication as well as in their appeal memorandum submitted different details and calculations which were, however, not supported by documents. This clearly is indicative of the fact that the appellant were not maintaining proper record which resulted in variation in the figures and details submitted to the audit as compared to those reported in their ST-3 returns. The appellant have also failed to submit the documents and details called for by the department. Therefore, they have violated the provisions of law and attracted the penal provisions under Section 77 of the Finance Act, 1994. Accordingly, I uphold the imposition of penalty under Section 77 (1) (b) for failure to maintain proper accounts and under Section 77 (1) (c) (i) and (ii) of the Finance Act, 1994 for failure to furnish the called for information and documents.

16. The appellant have also challenged the imposition of penalty under Section 78 of the Finance Act, 1994. In this regard I find that the appellant have suppressed the facts from the department inasmuch as the details contained in the ST-3 returns are at variance with the details contained in their financial statements and books of accounts. Further, despite being called upon to submit the documents and details, the appellant have failed to do so. These are indicative of the fact that the appellant were wilfully suppressing facts from the department. Therefore, the extended period of limitation has been held to be invokable. Consequently, the provisions of Section 78 of the Finance Act, 1994 are applicable and the adjudicating authority has rightly imposed penalty on the appellant under Section 78 of the Finance Act, 1994.

17. The appellant have contended that CERA audit is ultra vires as held in the case of Mega Cab Pvt. Ltd. V. UOI & Ors – 2016-TIOL-1061-HC-DEL-ST. However, the adjudicating authority has rightly observed that the said

decision has been stayed by the Hon 'ble Supreme Court – 2016 (44) STR J277 (SC). The appellant have relied upon the judgment in the case of Shri Chamundi Mopeds Vs. Church of South India Trust Association – AIR 1992 SC 1439 and contended that it was held in the case that a stay order does not wipe out the order of the lower court and the same continues to operate in law. I find that the reliance placed upon the said judgment by the appellant I totally misplaced. In the said case it was held that :

> "While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. **It only means that the order which has been stayed would not be operative from the date of the passing of the stay order** and it does not mean that the said order has been wiped out from existence." [Emphasis supplied]

17.2 In view of the above, I do not find any merit in the contention of the appellant as regard the legality of the CERA audit and, therefore, the same is rejected.

18. In view of the discussions hereinabove, I uphold impugned order to the extent mentioned below :

a) Recovery of late fee amounting to Rs.23,800/-.
b) Confirmation of demand of service tax amounting to Rs.725/- under reverse charge on Legal Consultancy Service.
c) Confirmation of demand of service tax amounting to Rs.5,79,762/- on Construction of Residential Complex Service.
d) Confirmation of demand of excess credit amounting to Rs.1,39,300/-.
e) Recovery of interest on the demand for service tax and excess credit availed.
f) Imposition of penalty under Section 77 (1) (b) and Section 77 (1) (c) (i) and (ii) of the Finance Act, 1994
g) Imposition of penalty under Section 78 of the Finance Act, 1994.

19. The impugned order insofar as it pertains to confirmation of demand for cenvat credit amounting to Rs.10,83,449/- is set aside and remanded

back to the adjudicating authority for decision afresh in light of the directions contained at Para 11.2 above.

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

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

(Akhilesh Kumar) 31st August, 2022
Commissioner (Appeals)

Attested:

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

Date: 31.08.2022.

BY RPAD / SPEED POST

To

M/s. Green City Infrastructure, Appellant
Block No.1, Rakanpur,
Taluka : Kalol,
District : Gandhinagar – 382 721

The Joint Commissioner, Respondent
CGST & Central Excise,
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)
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5. P.A. File.