आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

सत्यमेव जयते

NATION TAX MARKET

DIN:20230264SW0000333EBA

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/708/2022-APPEAL /8366-71

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-151/2022-23**
दिनाँक Date : **09-02-2023** जारी करने की तारीख Date of Issue 15.02.2023

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

ग Arising out of Order-in-Original No. **CGST/A'bad North/Div-VII/ST/DC/105/2021-22** दिनाँक: **21.01.2022**, issued by Deputy/Assistant Commissioner, CGST, Division-VII, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s K. B.Builders,
   B-434, Supath-II Complex,
   Nr. Juna Vadaj Bus Stand,
   Usmanpura, Ahmedabad-380013

2. Respondent
   The Deputy/ Assistant Commissioner, CGST, Division-VII, Ahmedabad North , 4th Floor, Shahjanand Arcade, Memnagar, Ahmedabad - 380052

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 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.

(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 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–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,Bahumali Bhawan,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 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 notwithstanding 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 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (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 सेवा कर 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:

(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.

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. K.B.Builders, B-434, Supath-II Complex, Nr. Juna Vadaj Bus Stand, Usmanpura, Ahmedabad–380 013 (*hereinafter referred to as "the appellant"*) against Order-in-Original No. CGST/A'bad North/Div-VII/ST/DC/105/2021-22 dated 21.01.2022 (*hereinafter referred to as "the impugned order"*) passed by the Deputy Commissioner, Central GST & Central Excise, Division-VII, Ahmedabad North (*hereinafter referred to as "the adjudicating authority"*). The appellant were holding Service Tax Registration No.ALTPS6506KSD001 and were availing CENVAT credit. They were also liable to pay service tax under Section 68(2) of the Finance Act (F.A), 1994, on taxable services received by them under Reverse Charge Mechanism (RCM).

2. Briefly stated, the facts of the case are that during the course of audit of the records of the appellant conducted by the officers of Central Tax Audit, Ahmedabad Commissionerate covering the period from April, 2014 to June, 2017, following observations were made under Final Audit Report No.44/2019-2020 :-

a) **Revenue Para-1**: On verification of financial records and ledgers, it was noticed that during the F.Y.2014-15, the appellant had constructed Community Hall at Thakkernagar in Ahmedabad for Ahmedabad Municipal Corporation (AMC) and availed the exemption under Sl.No.12 of Exemption Notification No.25/2012-ST dated 20.06.2012. As the Community Hall was intended to be used for commercial purpose, it appeared that the said exemption was not admissible. As per the documents made available to the audit, it was seen that the appellant had received an income of Rs.1,03,06,721/- against the Work Order dated 20.02.2014, on the which the service tax liability of **Rs.5,09,564/-** was worked out.

b) **Revenue Para-2**: During the scrutiny of records of the F.Y. 2016-17, it was noticed that the appellant had provided Works Contract Service valued at Rs.1,51,14,113/- to M/s. Industrial Extension Bureau (iNDEXTb) under Work Order No.1EB/MD/GM(MM)/MM/Civil-Maintenance/2016-17 dated 29.11.2016. The appellant provided civil repairs and maintenance services to iNDEXTb and have availed 60% abatement on the value of the works contract on the premise that that the said activity are covered under 'original works' as provided under Explanation 1(a) to Rule 2A of the service Tax (Determination of value) Rules, 2006. It appeared that the civil repairs and maintenance services rendered by the appellant to iNDEXTb does not

fall under 'original works'. Hence, the appellant were required to discharge the service tax on 70% of the gross amount charged for the works contract. Accordingly, they were required to discharge the tax liability of Rs.15,86,982/- out of which the appellant had already discharged liability of Rs.9,06,846/-. So, the remaining differential amount was worked out to the tune of **Rs.6,80,135/-**.

c) **Revenue Para-3**: Scrutiny of ledgers/records of CENVAT credit for the period F.Y. 2015-16 revealed that the appellant has availed and utilized CENVAT credit amount of Rs.48,803/- paid on input service. The appellant could not produce the documents listed under Rule 9 of the CCR, 2004, related to CENVAT credit availed. Thus, it appeared that the credit availed was without proper cover of the duty paying documents and hence was ineligible.

2.2 A Show Cause Notice (in short SCN) No.110/2019-20 dated 06.09.2019 was therefore issued by the Deputy Commissioner, Circle-III, CGST, Audit, Ahmedabad vide F.No.VI/1(b)555/Cir-III/AP-18/18-19, proposing Service Tax demand of Rs.5,09,564/- alongwith interest. 70% on the gross amount of Rs. 1,51,14,113/- charged was proposed to be considered as taxable value and total service tax liability of Rs.15,86,982/- was arrived. However, as the appellant had already discharged the Service Tax amount of Rs.9,06,846/-, the same was proposed to be appropriated against the total Service Tax liability of Rs.15,86,982/- and unpaid amount of Rs.6,80,135/- was proposed to be demanded alongwith interest. Demand of wrongly availed CENVAT credit amounting to Rs.48,803/- alongwith interest was also proposed. All the above demands were proposed alongwith interest under proviso of Section 73(1) & Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under the provision of Section 78(1) of the F.A., 1994 was also proposed on the above demands.

2.3 The said SCN was adjudicated vide the impugned order, wherein the total Service Tax demand of Rs.12,38,502/- (Rs.5,09,564/-, Rs.6,80,135/- and Rs.48,803/-) were confirmed alongwith interest. Penalties equivalent to service tax demands confirmed were also imposed.

3. Being aggrieved with the impugned order, the appellant have preferred the present appeals on the grounds elaborated below:

- The Community Hall for AMC is primarily intended to be used for creating facility for the benefit of public at large, not for commerce, hence the appellant are entitled to the exemption granted under SI No. 12(a) of Notification No.25/2012-ST dated 20/6/2012. They placed reliance on the decision passed on the case of Manisha Projects Pvt. Ltd. -2019 (24) G.S.T.L. 741 (Tri. - All.).
- The 'Original work' is defined under Explanation 1(a) of Rule 2A of Service Tax (Determination of Value) Rules, 2006 and means, all new constructions; all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable and erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise. The said definition does not include the civil repairs and maintenance work carried out in this case by the appellant for M/s. Industrial Extension Bureau (iNDEXTb). Hence, the works contract service of civil repairs and maintenance provided by the appellant to iNDEXTb would attract provisions of Rule - 2A (ii) (A) of Service tax (Determination of Value) Rules, 2006, where the appellant is required to pay Service tax on fourty per cent of the total amount charged for the entire works contract, which was rightly complied & deposited service tax during the impugned period.
- Denial of CENVAT credit on the basis of assumption that documentary evidence was not produced is not sustainable. They placed reliance on catena of decisions allowing the same. Madhava Laxmi Mills Ltd-2006(3) STR 147; Nexus Computers- 2005 (190) ELT 55 CESTAT; System India- 2008 (232) ELT 459 etc.
- Extended period of limitation cannot be invoked in the present case since there is no suppression, willful mis-statement on the part of the appellant. Hence, the notice is time barred. They relied on following decisions.
  - 2017 (50) S.T.R. 265 (Guj.)- Surat Municipal Corporation
  - 2017 (51) S.T.R. 273 (Tri. - Del.) - Bajarang Lal Shrimal Engineers & Contractors
- They were under the bonafide belief that the activities are exempted. They relied on Steel Cast Ltd-2011 (21) STR 500 (Guj). Therefore, penalty under Section 78 is not imposable.
- As the issue involves interpretation of statutory provisions of statute or exemption notification. Unless malafide intention is proved suppression cannot be invoked and penalty is also not impossible. They placed reliance on Bharat Wagon-(146) ELT 118 (Tri-Kolkata), 2001(135) ELT 873 (Tri-Kolkata), 2001(129) ELT 458 (Tri-Del).

4. Personal hearing in the matter was held on 06.01.2023. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant. He re-iterated the submissions made in the appeal memorandum. He also submitted additional written submission dated 06.01.2023.

4.1 In the additional submission, he has re-iterated the submissions of the grounds of appeal and also submitted a copy of Work Order dated 29.11.2016 issued by iNDEXTb entrusting the work for various civil maintenance to be executed at Mahatma Mandir, Gandhinagar and a copy of Work Order issued by AMC. He also relied on decisions passed in the case of M/s. Jatan Construction Pvt Ltd- 2019(24) GSTL 552 (Raj), Bajrang Lal Shrimal Engineers & Construction- 2017 (51) STR 273 (Tri-Del).

5. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum, additional written submissions dated 06.10.2023 as well as the submissions made at the time of personal hearing. The issues to be decided in the present appeal are:-

a) Whether the appellant is eligible for the benefit of exemption claimed under Sl No. 12(a) of Notification No.25/2012-ST dated 20/6/2012 in respect of construction of Community Hall for AMC?

b) Whether the civil repairs and maintenance services carried out by the appellant should be considered taxable under 'Original Work' or under 'Maintenance & Repair service'?

c) Whether the CENVAT credit availed on inputs service without production of documents is admissible or not?

The demand pertains to the period F.Y.2014-15 to F.Y. 2017-18 (upto June, 2017)

6. On the **first issue**, it is observed that the appellant has constructed the Community Hall for AMC and availed the exemption under Sl No. 12(a) of Notification No.25/2012-ST dated 20/6/2012 during the F.Y.2014-15 to F.Y. 2017-18 (upto June, 2017) under the belief that the construction of community hall was not intended for commerce, industry or any business or profession. Relevant text of the notification is re-produced below:-

Notification No. 25/2012-ST dated 20.6.2012

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning,

installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

6.1 It is observed that the Ahmedabad Municipal Corporation is a local body and is responsible for the civic infrastructure and administration of the city of Ahmedabad. They have to perform certain obligatory service and discretionary services. The obligatory services include to name a few; Erection of boundary of city defining city limits, Watering, Scavenging and Cleansing of all public streets and places, Sewage services, Drainage services Fire services, Health & Medical services, Street Lighting services, Maintenance of a monuments & open spaces Identification of streets & houses, Construction or acquisition of public markets and slaughter houses, Primary education services, Health and hygiene services, Construction, maintenance and alteration of bridges, Water supply services etc. The discretionary services on the other hand include construction and maintenance of maternity homes & infant welfare houses, maintenance of central laboratories, Swimming pool and other public health services, Tree plantation on road sides, Construction and maintenance of public parks and gardens, **Construction and maintenance of theaters, community halls and museums** etc. Thus, from the above, it is clear that the construction of community hall is not an obligatory service but a discretionary service hence the same can be for business also. The AMC Community Halls are generally given on rent for conducting social functions for which AMC collects charges. As far as the civil structures constructed by the AMC are meant for use for business or commerce also, it cannot be assumed that the Community Halls were meant predominantly for use other than for commerce, industry, or any other business or profession, when the same does not fall under their obligatory services.

6.2 Further, the appellant have also failed to produce any documents in support their argument that the hall was meant predominantly for use other than for commerce, industry or any other business or profession. It is a well settled position of the law that a person who claims the exemption has to prove that he satisfies all the conditions of the Notification so as to be eligible to the benefit of the same. Hon'ble Supreme Court in the case of *Commissioner of Customs (Import), Mumbai* v. *Dilip Kumar & Company*— 2018 (361) E.L.T. 577 (S.C.) has held that burden to prove entitlement of tax exemption in terms of the Notification is on the person claiming such exemption. As the appellant could not produce any documents to justify their

above argument, I find that the non-payment of tax claiming ineligible exemption cannot be considered as a bonafide belief.

6.3 Further, I find that the exemption granted under Sl. No.12(a) covered under Notification No.25/2012-ST, was withdrawn with effect from 1st April, 2015 vide Notification No.06/2015-ST dated 01.03.2015, as clause (a), (c) and (f) of Entry 12 were omitted. Subsequently, vide introduction of new Sr.No.12A by Notification No.09/2016-ST dated 1st March, 2016, this exemption was re-introduced with effect from 01.03.2016, provided a contract had been entered into prior to 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date. Thus, in terms of above changes and the discussion held above, I find that the exemption is not available to the appellant. Further, I find that the case laws relied by the appellant on the issue are not applicable to the present case as in all those cases the demand pertained to the period prior to negative list regime where eligibility of above notification was not in dispute. Further, in these cases the activities provided by the assessee pertained to construction of hospitals etc which is not in this case. I, therefore, uphold the service tax demand of Rs.5,09,564/- alongwith interest.

7. On the **second issue**, it is observed that during the F.Y. 2016-17, the appellant had provided Works Contract Service valued at Rs.1,51,14,113/- to M/s. Industrial Extension Bureau (iNDEXTb) under Work Order No.1EB/MD/GM(MM)/MM/Civil-Maintenance/2016-17 dated 29.11.2016. They had provided civil repairs and maintenance services to iNDEXTb at Mahatma Mandir, Gandhinagar and have availed 60% abatement on the value of the works contract on the behalf that the said activity are covered under 'original works' as provided under Explanation-1(a) to Rule 2A of the Service Tax (Determination of Value) Rules, 2006. The adjudicating authority, however, held that the civil repairs and maintenance services rendered by the appellant does not fall under 'original works' as per the Explanation-1 to Rule 2A, but are covered under Rule 2A(ii)(B). Hence, they were required to discharge the service tax on 70% of the gross amount charged for the works contract.

7.1 On going through the Letter dated 29.11.2016 issued by iNDEXTb granting Work Order No.1EB/MD/GM(MM)/MM/Civil-Maintenance/2016-17 to the appellant, it is observed that the appellant has been entrusted with various Civil Maintenance work to be executed at Mahatma Mandir, Gandhinagar. To examine the service tax liability on the taxable income, I would refer to the Rule 2A of the Service Tax (Determination of Value) Rules, 2006, relevant text of which is reproduced below:-

*"2A. **Determination of value of service portion in the execution of a works contract.-** Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-*

***Sub-rule (ii)** Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-*

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent of the total amount charged for the works contract;

In terms of Explanation-1 (a) to Rule 2A of the Service Tax (Determination of Value) Rules, 2006, 'Original Work' is defined as under;

*(a) "**original works**" means-*
(i) all new constructions;
(ii) all types of additions and alterations to abandoned or damaged structures on
Land that are required to make them workable;
(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

7.2 In terms of above Rule 2A (ii) (A) of Service Tax (Determination of Value) Rules, 2006, where the works contract is entered into for execution of original works, service tax shall be payable on 40% of the total amount of charged and in terms of Rule 2A (ii) (B) where works contract entered is for repair and maintenance of goods, the service

tax shall be payable on 70% of the total amount charged for the works contract. And where the work contract is not covered under (A) & (B) above and includes maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, service tax shall be payable on sixty per cent of the total amount charged for the works contract.

7.3 In the instant case, the appellant has provided civil maintenance work at Mahatma Mandir. I find that the civil maintenance of immovable property carried out by the appellant is neither covered within the scope of 'original works' under clause (A) nor covered under clause (B). Hence, the valuation of the services provided by the appellant shall be done under Rule 2(A)(ii)(C) of Service Tax (Determination of Value) Rules, 2006. The appellant were, therefore, required to discharge service tax liability on 60% of the abated value. However, the appellant have availed abatement of 60% and have paid service tax on 40% of the gross amount by classifying their service under clause (A), which in my considered view is not correct as per the legal provisions contained under Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Further, it is observed that the demand has been confirmed under clause (B), which is also incorrect, as the same pertains to repair and maintenance of goods. I, therefore, find that to that extent the impugned order is not legally sustainable and needs to be set-aside. I, therefore, find it proper to remand the matter back to the adjudicating authority, who shall decide the case afresh on merits in light of above discussion and pass a reasoned order.

8. On the **third issue**, the adjudicating authority has observed that the appellant, for the period F.Y. 2015-16, has availed and utilized CENVAT credit amount of Rs.48,803/- on input service, without cover of the proper duty paying documents prescribed under Rule 9 (1) and also could not produce any documents justifying the admissibility of credit availed in terms of Rule 9(6) of the CCR, 2004. The adjudicating authority had accordingly held the credit as inadmissible. It is observed that the appellant alongwith the appeal memorandum also could not produce any documents justifying the credit availed. Instead, they have relied on various case laws: Madhava Laxmi Mills Ltd-2006(3) STR 147; Nexus Computers- 2005 (190) ELT 55 CESTAT; System India- 2008 (232) ELT 459 etc.

8.1 The relevant portion of the Rule 9 of the 2004 Rules is as follow:

RULE 9. Documents and accounts. *— (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service*

distributor, as the case may be, on the basis of any of the following documents, namely :-

(a) an invoice issued by -

(i) [a manufacturer or a service provider for clearance of -]

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made thereunder with intent to evade payment of duty.

Explanation. *- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or*

[(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax; or]

(c) a bill of entry; or

(d)a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; [or, as the case may be, an Authorized Courier, registered with the Principal Commissioner of Customs or the Commissioner of Customs in-charge of the Customs airport,]

[(e) a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax; or]

(f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or

[(fa) a Service Tax Certificate for Transportation of goods by Rail issued by the Indian Railways; or]

(g)an invoice, bill or challan issued by an input service distributor under Rule 4A of the Service Tax Rules, 1994 :

*[**Provided** that the credit of additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible.]*

[(2) No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document :

***Provided** that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, [assessable value, Central Excise or Service tax registration number of the person issuing the invoice, as the case may be,] name and address of the factory or warehouse or premises of first or second stage dealers or [provider of output service], and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit.]*

8.2 I find that as per sub-rule (1) of Rule 9 of CCR, 2004, the prescribed document for Cenvat credit is an invoice of the manufacturer or service provider, and sub-rule (2) of Rule 9 provides that no Cenvat Credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Rules, as the case may be, are contained in the said

documents. Further, in terms of Rule 9(6) of CCR, 2004, the manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit. As the onus to prove the admissibility of the CENVAT credit lies upon the manufacturer or provider of output service taking such credit, I find the appellant was duty bound to submit and maintain the documents on the strength of which CENVAT credit was availed, which I find was not fulfilled by the appellant, as they have failed to produce any tax paid documents. I, therefore, hold that the appellant is not entitled to the CENVAT credit of Rs.48,803/- on input service as the same was taken without the proper duty paid documents. Further, it is also observed that the case laws relied by the appellant are not applicable to the present case and distinguishable on facts as the issue covered therein was regarding CENVAT credit availed on basis of photo copy or certified copy of invoices or the invoices containing improper address etc, which is not the case here.

9. Further, the argument of demand being time barred is also not maintainable. In the ST-3 return, the assessee is required to disclose the total value of service which includes the exemption/abated value of services and also the exempted/abated value of services before computing the service tax. The demand in the instant case was raised during audit, based on reconciliation of income shown in ST-3 return vis-a-vis the income shown in their financial records and ledgers. Non-disclosure of income in the ST-3 returns or availing in admissible exemption/abatement also results in suppression. Wrongly availing the exemption and taking inadmissible credit came to the notice of the department only during audit. As the onus to fulfill the correct exemption and prove the admissibility of the CENVAT credit lies upon the appellant, the non disclosure of full and correct information in returns would amount to suppression of facts. Non-payment of tax, by classifying the service under wrong head, and thereby claiming ineligible exemption clearly establishes the conscious and deliberate intention to evade the payment of service tax. I, therefore, find that all these ingredients are sufficient to invoke the extended period of limitation provided under proviso to Section 73(1) of the F.A, 1994.

10. Further, I find that the penalty imposed on the appellant under Section 78 of the Finance Act, 1994, is also justifiable as it provides for penalty for suppressing the value of taxable services. The crucial words in Section 78(1) of the Finance Act, 1994, *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'*

should be read in conjunction with '*the intent to evade payment of service tax*'. Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. The demand was raised based on the audit objection. It is the responsibility of the appellant to correctly assess and discharge their tax liability on the taxable services rendered and to avail and utilize admissible credit based on the documents prescribed under Rule 9(1) of the CCR, 2004, and non-discharging of the above obligation undoubtedly bring out the willful mis-statement and suppression of facts with an intent to evade payment of service tax. If any of the ingredients of proviso to Section 73(1) of the Finance Act, 1994 are established, the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined.

11. When the demand sustains there is no escape from interest, hence, the same is therefore also recoverable under Section 75 of the F.A., 1994. Appellant by failing to pay service tax on the taxable service and availing inadmissible credit are liable to pay the tax alongwith applicable rate of interest on the demand upheld on first and third issue.

12. In view of the above discussions and findings, I uphold the service tax demand of Rs.5,09,564/- and Rs.48,803/- alongwith interest and penalty imposed under Section 78(1) in the impugned order. I remand the matter relating to the demand of Rs.6,80,135/- to the adjudicating authority to pass a reasoned order after following principles of natural justice.

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.

9th February, 2023

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 09.2.2023

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. K.B.Builders, - **Appellant**
B-434, Supath-II Complex,
Nr. Juna Vadaj Bus Stand, Usmanpura,
Ahmedabad–380 013

The Deputy Commissioner - **Respondent**
CGST, Division-VII,
Ahmedabad North,
Ahmedabad.

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. The Superintendent (System), CGST, Appeals, Ahmedabad, for uploading the OIA on the website.
5. Guard File.