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

DIN:20230364SW000000AE48

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1274/2022-APPEAL /9319 - 24

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-175/2022-23**
दिनाँक Date : **28-02-2023** जारी करने की तारीख Date of Issue 10.03.2023

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

ग Arising out of Order-in-Original No. **80/AC/D/2021-22/KMV** दिनाँक: **25.03.2022/31.03.2022**, issued by Assistant Commissioner, Division-IV, CGST, Ahmedabad-North

घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Maheshbhai Jivanbhai Lagdhir,
(Trade name: M. J. Enterprise),
B-207, 2nd Floor, Sukh Shanti Complex,
Opp. Jekson Hrdolic, Sarkhej,
Changodar, Ahmedabad-328213

2. Respondent
The Assistant/ Deputy, CGST,Division-IV, Ahmedabad North , 2nd Floor, Gokuldham Arcade,Sarkhej-Sanand, Ahmedabad - 382210

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 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.

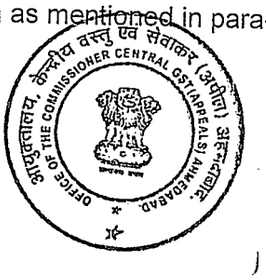
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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

M/s. Maheshbhai Jivanbhai Lagdhir (Trade Name M.J. Enterprise), B-207, 2nd Floor, Sukh Shanti Complex, Opp. Jekson Hydrolic, Sarkhej, Changodar, Ahmedabad-328213 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 80/AC/D/2021-22/KMV dated 25.03.2022/31.03.2022 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-IV, Ahmedabad North, Ahmedabad (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant were registered with the department for rendering 'Courier Service' and were holding Service Tax Registration No.ABSPL0201BST001. On the basis of the data received from the Central Board of Direct Taxes (CBDT) for the F.Y. 2015-16 and 2016-17, it was noticed that the appellant had declared less amount as the 'Gross Value of Services Provided' in their ST-3 Returns, compared to the amount reflected as "Total amount paid / credited under Section 194C, 194I, 194H, 194J (Value from Form 26AS)" and 'Sales of Service' shown in their I.T. Return filed with the Income Tax Department, on which no tax was paid. Letters were, therefore, issued to the appellant to explain the reasons for non-payment of tax and to provide certified documentary evidences for the F.Y. 2015-16 & F.Y. 2016-17. The appellant submitted Balance Sheet, P&L Account, IT Returns, Form-26AS, ST-3 Returns for said period. However, the reasons for such difference were not provided.

2.1 A Show Cause Notice (SCN) No. V/27-86/Maheshbhai/2020-21/TPD/R dated 24.12.2020 was issued to the appellant proposing recovery of service tax demand of Rs.3,88,449/- not paid on the differential value of income received during the F.Y. 2015-16 to F.Y. 2016-17, along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under Sections 77(1), Section 77(2) and Section 78 of the Finance Act, 1994, were also proposed.

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.3,88,449/- was confirmed alongwith interest. Penalty of Rs.10,000/- each was imposed under Section 77 (1) & (2) and equivalent penalty of Rs.3,88,449/- was also imposed under Section 78.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the grounds elaborated below:-

- They are providing courier services and are also providing job-work of delivering articles on behalf of other Courier agencies. They claim that in terms of CBIC Circular dated 31.10.1996, they are not liable to pay service tax on income received from sub-contract with other courier agencies. Both the incomes are shown separately in the P&L Accounts.

F.Y.	Income from Courier	Income from job-work (sub-contractor/co-loader)
2015-16	38,86,611/-	11,79,539/-
2016-17	3,62,055/-	14,49,445/-

- The transaction between the appellant and the other courier agency is on principal to principal basis. It cannot be said that the service has been rendered on behalf of the courier agency. For such activity, they have received consideration from the first courier agency. From the nature of the activity undertaken by the appellant, it cannot be said that they have carried out courier service on behalf of another. The production of goods on behalf of the client as envisaged under BAS has been clarified by C.B.E. & C. in their letter F. No. 127/171/2007-CX4, dated 18-7-2007. Hence this part of the demand is not sustained.
- Further, they relied on the Circular No. 341/43/1996 dated 01.11.1996, wherein it is clarified that in some cases one courier agency, who undertakes to deliver the documents goods or articles received from customers, utilizes the services of another company for in-transit movement of such documents, etc., from one point to another. These are, technically, called co-loaders. The co-loader undertakes to transport the documents, goods or articles on behalf of the courier agency and charges the courier agency for such services. As the co-loaders provide service to the courier agencies, they do not provide directly any service to the customer who gives the documents, goods or articles to the courier agency for their delivery to the consignee. The service tax is charged on the service provided by courier agency to the customer. The courier agency being not a customer as such, the service provided by co-loader to the courier agency is not chargeable to service tax. The charges of the co-loaders to the courier agency for in-transit movement of goods, documents or articles are in any case ultimately recovered by the courier agency from the customer and these charges are included in the gross amount charged by the courier agencies from customers on which the service tax is computed. They placed reliance on following case laws:-
  - 2017 (48) S.T.R. 270 (Tri. - Del.) United Business Xpress India P. Ltd.
  - Concord Express Logistics India: Appeal No.: ST/00146/2010 in CESTAT CHENNAI
- Further, the appellant has already paid service tax on courier service provided by them to customers as per profit & loss account.
- Demand of service tax was raised merely on the basis of reconciliation of ST-3 returns with financial statements is not sustainable. Department has computed demand of service tax for the period of April-15 to March-17 on the basis of reconciliation of ST-3 returns with the financial statements without considering the factual details that the appellant was co-loader to the other courier agency, which is not taxable. The income earned as co-loader from other courier agencies was amounting to Rs.11,79,539/- & Rs.14,49,445/- during the F.Y. 2015-16 & F.Y. 2016-17 respectively which needs to be deducted. After deducting such income there is no difference in the net taxable income shown in the ST-3 returns. They placed reliance on catena of decisions; 2013 (31) STR 673- Tobacco Board, 2010 (20) STR 789-Anvil Capital Management (p) Ltd., 2010 (19) STR 242 (Tri-Ahm) – Purni Ads Pvt. Ltd.
- Demand is time barred as there is no suppression or willful mis-statement of facts on the part of appellant.

Penalty under Section 78 is not imposable as case of suppression or willful mis-statement of facts has not been made out. The appellant was under the bonafide

belief that the activities are not taxable. Reliance placed on the decision passed in the case of Steel Cast Ltd. 2011(21) STR 500 (Guj).

- Penalty under Section 76 is also not liable as there is no short payment. As there was no intent to evade taxes, the penalty cannot be imposed. Reliance placed on the decision passed in the case of Hindustan Steel Ltd- AIR 1970 (SC) 253, Pushpam Pharmaceuticals Co.- 1995 (78) ELT 401 (SC).

4. Personal hearing in the matter was held on 16.02.2023. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum. He also submitted additional written submission during the hearing wherein he reiterated the contentions made in the appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum, the additional written submissions as well as the submissions made at the time of personal hearing. The issue to be decided in the present appeal is whether the service tax demand of Rs.3,88,449/- confirmed in the impugned order passed by the adjudicating authority, in the facts and circumstances of the case, is legal and proper or otherwise?

The demand pertains to the period F.Y. 2015-16 & F.Y.2016-17.

6. It is observed that the appellant is registered with the department and has been filing ST-3 Returns. The entire demand has been raised based on the reconciliation of ITR data provided by Income Tax Department vis-à-vis the figures reflected in the STR-3 Returns filed by the appellant. The adjudicating authority has confirmed the demand on the basis of following observations;

a) the appellant during the personal hearing claimed to have earned some amount of income from bank interest, which due to oversight was shown as income from courier service. Thus, such interest income may be excluded while computing the demand. However, in their written submission, they contradictorily contended that the differential income not reflected in the ST-3 returns was the income earned towards the services provided as co-loaders to other Courier Agencies.

b) the appellant was having franchise of Courier Agencies like Ms/. Midway Express Couriers Service Pvt. Ltd and M/s. Mahavir Courier Agency Service Pvt. Ltd. In the certificate issued by M/s. AIR Express Franchise of M/s. Trackson Couriers, M/s. Ajay Enterprises Franchise of M/s. Shri Ram Courier Service Pvt. Ltd. etc, these agencies showed that they have given courier agency work to the appellant, who acted as agents for delivery of parcels to clients and charged service charges for such activities. However, on verification of Form 26AS for said period, it was noticed that no TDS was deducted by these franchises. Therefore, the claim that the income of Rs.11,79,539/- & Rs.14,49,445/- earned during the F.Y. 2015-16 & F.Y. 2016-17, as co-loader of said franchise of Couriers Agencies, is not correct as was not supported by any documentary evidence. Hence, benefit of exemption claimed by the appellant on the income of co-loader is not admissible.

c) Form-26AS showed that TDS deducted under Section 194A was of income earned as interest amounting to Rs.95,145/- during the F.Y. 2015-16 and Rs.89,195/- earned during the F.Y. 2016-17, which was not included in the differential value arrived in the SCN. The demand was on the total amount paid/credited under Section 194C, 194H, 194I, 194J.

6.1 The appellant in the present appeal are contending that the difference in income noticed in ST-3 Return vis-à-vis income reflected in Form-26AS was on account of the service rendered as co-loaders to other Courier Agencies, which is exempted in terms of Board's Circular No. 341/43/96-TRU, dated 1-1-1996. They have claimed that in terms of CBEC letter No.127/171/2007-CX4 dated 18.07.2007, the transaction between appellant and other courier agencies should be considered on principal to principal basis and such activities are not covered under Courier Service. The adjudicating authority has, however, observed that as no TDS was deducted by the franchises/Courier Agencies for whom the appellant rendered the services of co-loaders and as the same was also not reflected in Form 26AS of the appellant, the income cannot be considered to have earned for said exempted services.

6.2 I have gone through Board's Circular dated 1-1-1996, issued vide F. No. 341/43/96-TRU in respect of Courier Service wherein following clarification was made:-

> *"**15.** It has been pointed out that in some cases one courier agency, who undertakes to deliver the documents, goods or articles received from customers, utilises the services of another company for in-transit movement of such documents etc. from one point to another. These are, technically, called **co-loaders.** The co-loader undertakes to transport the documents, goods or articles on behalf of the courier agency and charges the courier agency for such services. A question has been raised whether under these circumstances the co-loaders are also liable to pay service tax.*
>
> ***16.** In this context, it is clarified that co-loaders provide service to the courier agencies as such. They do not provide directly any service to the customer who gives the documents, goods or articles to the courier agency for their delivery to the consignee. What is chargeable to service tax is the service provided by courier agency to the customer. In this case, the courier agency being not a customer as such, the service provided by co-loader to the courier agency is not chargeable to service tax. **It is significant to point out that the charges of the co-loaders to the courier agency for in-transit movement of goods, documents or articles are in any case ultimately recovered by the courier agency from the customer and these charges are included in the gross amount charged by the courier agencies from customers on which the service tax is computed.***
>
> ***17.** As regards the value of taxable service it is the gross amount charged by the courier agency from the customer for services in relation to door to door transportation for time sensitive documents, goods or articles. The service tax is, therefore, to be computed on the gross amount charged by the courier agency from the customers."*

6.3 From the above clarification of the Board, it is clear that as the Courier Agencies recover the charges of the co-loaders for in-transit movement of goods, documents or articles from their customers, the co-loaders are not liable to pay service tax. In the instant case, the appellant were rendering service as co-loader as they were delivering the parcels on behalf of the franchisee of various Courier Agencies. As per above CBEC clarification, the co-loader services provided by the appellant to other courier agencies is not taxable, because the Service Tax under Courier service had already been discharged by first courier agency and the gross amount charged from the clients includes the

charges of co-loaders and thus the consideration received by the appellant from such first courier agency was on principal to principal basis.

6.4 However, the above clarification was superseded vide Master Circular No.96/7/2007 dated 23.08.2007, which stated that in respect of all taxable service a sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Therefore w.e.f. 16.5.2008, the definition of taxable service was amended to replace the term 'customer' to 'any person'. Thus, the sub-contractor (Co-loader) would also be liable to service tax. Relevant text of the Master Circular is reproduced below;

Circular No. 96/7/2007-S.T., dated 23-8-2007

999.03/ **23-8-07**	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

6.5 After 01.07.2012, service tax regime has shifted from selective taxation to comprehensive taxation. Thereby, in terms of Clause (44) of Section 65B of the Finance Act, 1994, the term *"**service**" means any activity carried out by a person for another for consideration, and includes a declared service.* Considering the period involved, I find that the appellant has rendered a service to a Courier Agency as a co-loader to other Courier Agencies. As the said service is not covered under negative list, they are liable to pay service tax on the income earned as co-loaders. Further, I find that the Board's letter F.No:127/171/2007-CX.4 dated 18.7.2007 is also not applicable to the present case as it deals with the Business Auxiliary Service (BAS), whereas in this case the service provided is Courier Service.

6.6 Further, the adjudicating authority has also observed that the TDS deducted under Section 194A was of income earned as interest amounting to Rs.95,145/- during the F.Y. 2015-16 and Rs.89,195/- earned during the F.Y. 2016-17 and not included in the differential value arrived in the SCN. The appellant are not challenging the said observation but are definitely contending the total amount paid/credited under Section 194C, 194H, 194I, 194J pertaining to the income earned as co-loader, which is not taxable. Since the services provided by the appellant as co-loader are taxable, the income earned for rendering such service attracts service tax. Hence, the demand of Rs.1,88,449/- under Section 73(1) is sustainable.

6.7 The appellant has placed reliance on the decisions passed in the case of United Business Xpress India P. Ltd. -2017 (48) S.T.R. 270 (Tri. - Del.) and Concord Express Logistics India: Appeal No.: ST/00146/2010 in CESTAT CHENNAI. In the case of United Business Xpress India P. Ltd, the service tax demanded in respect of co-loader services provided by the appellant to other courier service companies for delivery of domestic courier packets as well as imported courier packets was made under the category of "Business Auxiliary Service (BAS)" classified under Section 69(19) of the Act. Further, in the case of Concord Express Logistics India, the decision was passed by relying on the above decision passed in case of United Business Xpress India P. Ltd. In both the cases, the facts of the case are distinguishable, hence, not applicable in this case.

7. Another contention of the appellant is that the demand of service tax was raised merely on the basis of reconciliation of ST-3 returns with financial statements, hence not sustainable. Further, the demand is time barred as there is no suppression or willful mis-statement of facts on the part of appellant. I do not find any merit in the above argument. The demand was confirmed after reconciliation of the financial statement and documents submitted by the appellant. The onus to challenge the allegation made in the SCN is on the appellant. They have not produced any documentary evidence alongwith the appeal memorandum to counter the findings of the adjudicating authority. Hence, the argument that the demand was confirmed without any basis is not correct. The appellant has incorrectly assessed the taxable income and, thereby, suppressed the taxable value with intent to evade the tax. The facts of the case was gathered by the department only on receipt of the income data received from I.T Department, hence, the extended period of limitation has been rightly invoked to demand service tax short paid.

7.1 In view of the above, I find that the penalty imposed under Section 78, is also justifiable as it provides penalty for suppressing the value of taxable services. 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. I find that the demand was raised based on the income data provided by the Income Tax department and only after proper reconciliation of data, the demand was confirmed. The appellant have deliberately not reflected the taxable income in their ST-3 Return though there were clear cut circulars classifying such sub-contracting of service as taxable service, which clearly show that though they were aware of their tax liability but chose not to discharge it correctly, which undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. If any of the circumstances referred to in Section 73(1) are established, the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined.

8. As regards the penalty under Section 77, the appellant have claimed that as there is no short payment with intent to evade taxes, the penalty cannot be imposed. Reliance placed on the decision passed in the case of Hindustan Steel Ltd- AIR 1970 (SC) 253, Pushpam Pharmaceuticals Co.- 1995 (78) ELT 401 (SC). It is observed that the SCN proposed imposition of penalty under Section 77(1) & 77(2) on the allegations that the appellant has failed to provide the documents for further verification and has failed to

assess the correct service tax liability and failed to file correct ST-3 returns. The allegation that the appellant has failed to provide the documents for further verification is incorrect as both SCN and impugned order states that the appellant had submitted the requisite documents, as called for. Hence, the penalty under Section 77(1) is not legally sustainable. Further, I find that the penalty under Section 77(2) is imposable when no penalty is separately provided in this Chapter. The purpose of Section 77(2) is to impose penalty on the taxpayer, in case the assessee contravenes any of the provisions and/or rules, if not provided separately. For example, if the assessee does not, maintain statutory records in the manner prescribed, the said assessee shall be liable for penalty under Section 77(2). In the instant case, the appellant has not declared the correct value on their ST-3 returns, I therefore find that the penalty of Rs.10,000/- imposed is sustainable.

8.1 The appellant has relied on few case laws. On careful consideration of the all the judgments relied upon by the appellant, I find that none of the judgment has dealt with the legal issue of interpretation of Section 77(2). Hence, I find that judgments relied upon by the appellant is not directly relevant to the issue in the present case, therefore, I need not discuss those judgments.

9. When the demand sustains there is no escape from interest. Hence, the same is also recoverable under Section 75 of the F.A., 1994. Appellant by failing to pay service tax on the taxable service are liable to pay the tax alongwith applicable rate of interest.

10. In view of the above discussions and findings, the impugned O-I-O is upheld and the appeal filed by the appellant stand rejected in above terms.

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.

28th February, 2023.

(अखिलेश कुमार)
आयुक्त (अपील्स)

Date: 28.2.2023

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

By RPAD/SPEED POST

To,
M/s. Maheshbhai Jivanbhai Lagdhir - **Appellant**
(Trade Name M.J. Enterprise),
B-207, 2nd Floor, Sukh Shanti Complex,
Opp. Jekson Hydrolic,
Sarkhej, Changodar,
Ahmedabad-328213

The Assistant Commissioner,
Central Tax, CGST & Central Excise,
Division-IV, Ahmedabad North
Ahmedabad

- **Respondent**

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.