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: 20221164SW000000D44C

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2675 & 2679/2021-APPEAL /5118- 23

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-62 & 63/2022-23**
दिनाँक Date : **18-11-2022** जारी करने की तारीख Date of Issue 24.11.2022

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

ग Arising out of Order-in-Original No. **46/JC/MT/2020-21** दिनाँक: **19.02.2021**, issued by Joint Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s. Markcom Solutions Pvt. Ltd. **204-205, Benkesha Complex, Near Navrangpura Bus Stand,** **Navrangpura, Ahmedabad**	**Shri Dipesh seth** **Director of M/s. Markcom Solutions Pvt. Ltd.** **204-205, Benkesha Complex, Near Navrangpura Bus Stand,** **Navrangpura, Ahmedabad**

2. Respondent
The Joint Commissioner,CGST, Ahmedabad North , Custom House, 1st Floor, Navrangpura, Ahmedabad - 380009

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 प्रक्रिया 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 अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,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

Following appeals, as per the details given below, have been filed against the OIO No. 46/JC/MT/2020-2021 dated 19.02.2021 (in short '*impugned order*') passed by the Joint Commissioner, Central GST & Central Excise, Ahmedabad North (in short '*the adjudicating authority*').

Sr.No.	Appeal No.	Appellant	Referred to as
01	GAPPL/COM/STP/ 2679/2021	**M/s. Markcom Solutions Pvt. Ltd.,** 204-205, Benkesha Complex, Near Navrangpura Bus Stand, Navrangpura, Ahmedabad-380009	**Appellant firm**
02	GAPPL/COM/STP/ 2675/2021	**Shri Dipesh Shah,** Director of M/s. Markcom Solutions Pvt. Ltd., 204-205, Benkesha Complex, Near Navrangpura Bus Stand, Navrangpura, Ahmedabad-380009	**Appellant -1**

2. On the basis of intelligence developed by Preventive Officers of Ahmedabad North Commissionerate, it came to notice that the Appellant firm, having Service Tax Registration No.AAECM6140NST001 engaged in providing 'Event Management Service', have not discharged their service tax liability in full. They were required to pay service tax on the actual amount received for rendering their services, as reflected in the Profit & Loss account instead they claimed abatement on reimbursable expenses without disclosing the details in their ST-3 Returns, which was not admissible. Thus, short payment of service tax on the gross amount reflected in the Profit & Loss account vis a vis the ST-3 Return was noticed.

2.1 A search was, therefore, carried out at their premises on 23.12.2015. During the search, Trial Balance, Balance sheet, Income Tax Return and sample invoices issued for the F.Y. 2012-13 (Jan – March) to F.Y. 2015-16 (up to Nov-2015) were withdrawn under Panchnama, which revealed that though the Appellant firm was providing 'Event Management Service', they took registration under 'Business Auxiliary Service'; they claimed inadmissible reimbursement and suppressed the gross value to evade tax; they availed Cenvat Credit of the services received from Decorators, Caterers, Publicity, Sound Service etc, which are not eligible if the service provider claims to be Pure Agent. Reconciliation of ST-3 Return with Profit & Loss Account showed short payment of service tax as there was difference in the value shown in these documents. Therefore, statement of Shri Dipesh Sheth, Director of the Appellant firm (Appellant-1), was recorded on 23.12.2015, wherein he admitted that they were required to pay service tax on the gross amount. He stated that for the period 2015-16 onwards, they were not claiming reimbursement and were charging on full gross amount. To support his contention, documents like ST-3 Return, P&L Account were sought, but were not provided. These documents were, therefore, downloaded from respective website and accordingly, their outstanding service tax liability for the F.Y. 2012-13 (Jan – March) to F.Y. 2017-18 (upto June 2017) was worked out to amounting to Rs.1,69,47,904/-.

2.2 Based on the above facts, a Show Cause Notice (SCN) No. STC/04-180/Prev/Gr.III/Markcom/15-16 dated 16.05.2019 was, therefore, issued proposing as to

why the taxable income received by the Appellant firm during the period F.Y. 2012-13 (Jan – March) to F.Y. 2017-18 (up to Jun-2017) under the head 'Event Management Service' should not be treated as gross income in terms of Section 65B(44) read with Section 66D of the F.A, 1994; proposing Service tax demand of Rs.1,69,47,904/- under u/s 73(1) alongwith interest u/s 75; appropriation of Rs.21,93,249/- already paid against their service tax liabilities. The SCN also proposed imposition of penalties u/s 77(2) and penalty u/s 78 and Late fess u/s 70(1). Imposition of personal Penalty u/s 78A of the F.A. on Appellant-1 was also proposed in the SCN.

3. The said SCN was adjudicated vide the impugned order wherein the demand alongwith interest was confirmed. Penalty of Rs.10,000/- u/s 77(2), late fees u/s 10(1) and penalty equivalent to duty was also ordered against the Appellant firm. On the Director (Appellant-1), penalty of Rs.1,00,000/- was imposed.

4. Aggrieved by the impugned order, both the appellants preferred the present appeal contesting the demand, interest, penalties and late fees, principally on following grounds:-

- The Appellant firm claims that the benefit of Pure Agent was denied without any explanation by the adjudicating authority. They are rendering Event Management Services to State Govt. or various other private parties and offered fixed agency charges plus actual expenses as reimbursement which will qualify as Pure Agent and where such reimbursement is not claimed, the service tax is paid on full value of the invoices. They claim to have hired various other service providers on behalf of the service recipient and the payment made to them are routed through the appellant firm. Thus the deduction claimed was admissible in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. They placed reliance on judgment passed in the case of Intercontinental Consultants & Technocrats Pvt. Ltd- 2013 (29) STR 9 (Del) and Apex Court's judgment reported at 2014 (35) STR 0J99 (SC).
- The cum-duty benefit was denied to them merely on the argument that certain documents sought by the department were not submitted.
- No findings on following decisions:-
  - Adhikrut Jabti Evam Vasuli- 2017 (6) GSTL 529 (Tri-Del)
  - Bee Am Industries-2017 (4) GSTL 185 (Tri-Del)
  - Reliance Life Insurance -2018 (363) ELT 1050 (Tri-Del)
- No Cenvat credit is availed on the expenditure claimed as deduction. They claim to have provided three separate invoices where full reimbursement is claimed but no cenvat credit availed.
- The deduction of Rs.2,69,01,638/- & Rs.3,19,69,490/- claimed in the ST-3 returns for 2014-15 & 2016-17 is hit by limitation
- The total turnover was simply divided by 4 quarters assuming the turnover is equally spread throughout the year and certificate of Chartered Accountant was ignored which clearly stated that turnover shown in the ST-3 returns is correct.
- Mere confession of the Director cannot be sufficient to fasten the service tax liability, when the veracity is not tested with the business transaction vis-à-vis the law and procedure with regard to taxability. The Circular No.B.111/2002-TRU dated 01.08.2002 pertains to the period prior to introduction of Service Tax

(Determination of Value) Rules, 2006 whereas Rule 5 of the said Rules clearly provides deduction of expenses incurred by the service provider in capacity of Pure Agent.

- The short payment was detected by comparing the financial records with the ST-3 Returns, thus the facts were never suppressed as the deductions were reflected in ST-3 Returns for F.Y. 2014-15 which was accepted by the department hence inclusion of said amount in the SCN is not sustainable. When the allegation of suppression is not proved and the department could not detect anything which is not reported in the ST-3 returns, demand is hit by limitation.
- When demand is not sustainable interest and penalties are also not sustainable. They placed reliance in the decision passed in the case of Tamil Nadu Housing Board Vs CCE-1194 (74) ELT 9 (SC).
- They have sought refund of service tax wrongly confirmed and paid by them alongwith interest.
- Appellant-1 contended that the impugned order fails to establish his role in evading the tax. As the issue relates to interpretation of availability of reimbursement expenses, penalties cannot be imposed on him for performing the normal duties of the Appellant firm. He placed reliance on following case laws:-
  - Vikram Cement (P) Ltd- 2014 (303) ELT A82 (Tri-Del)
  - T.R.Venkatadari -2018(10) GSTL 483 (Tri-Mum)
  - Shri Jai Hanuman-2017(349) ELT 322 (Tri-Del)
  - Fun Foods Pvt. Ltd -2017 (348) ELT 357 (Tri-Del)
  - V.S.Bobba – 2021 (52) GSTL 67 (Tri-Bang)

5. Personal hearing in the matter was held on 20.10.2022. Shri Pravin Dhandharia, Chartered Accountant, appeared on behalf of both the appellants. He reiterated the submissions made in appeal memorandums in respect of both the appellants.

6. The Appellant firm vide letter 07.11.2022, also made additional submissions wherein they submitted the copies of contracts (sample basis) for income generated during F.Y. 2012-13 (Q4) till F.Y. 2017-18 (Q1).

7. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in both the appeal memorandum, submissions made at the time of personal hearing as well as additional submissions made on 07.11.2022. The issues before me for decision are **(i)** whether exclusion of reimbursable expenses incurred by the Appellant firm from the gross amount is admissible in the case of 'Event Management Service'; **(ii)** whether the Appellant firm qualifies as pure agent and **(iii)** whether personal penalty of Rs.1,00,000/- imposed on the Director of the Appellant firm is legal and proper or otherwise? Period of dispute involved covers F.Y. 2012-13 (Jan – March) to F.Y. 2017-18 (up to Jun-2017).

7.1 On going through the facts of the case, it is observed that the appellant were rendering 'Event Management Service' and after 01.7.2012, they were providing taxable services defined under Section 65B (44) of the Finance Act, 1994. They had raised bills for the agency charges plus the reimbursable charges /expenses. However, for arriving at the tax liability, they deducted such reimbursable expenses from the gross amount. Revenue's contention is that exclusion of such reimbursable expenses from the gross value charged

by the Appellant firm in respect of service provided is not admissible and was done to evade the taxes. It is argued that in terms of Section 67, service tax is payable on the value which shall be the gross amount charged for providing the taxable service and as no abatement is respect of the nature of 'Event Management Service' is provided in Notification No.26/2012-ST dated 20.06.2012, therefore, the abatement claimed is inadmissible. The appellants, however, have argued that the reimbursable charges collected from their clients was in capacity of 'pure agent' and hence, in terms of Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, such expenses are excludible from value of taxable service.

8. To examine the first issue, I find that the Appellant firm has produced copy of invoices/vouchers raised by various other service providers as well as the invoices raised by them to their clients. On going through one such invoice bearing No.MSPL-DMFT-08-1826 dated 17.08.2016 raised by the Appellant firm to client (M/s. Dewang Mehta Foundation Trust), it is noticed that the Appellant have charged gross amount of Rs.15,27,747/- towards "Charges towards event management for Dewang Mehta IT Awards 2016 ". They have shown Agency Charges/Fees as 10% of the above charges i.e. Rs.1,52,775/- and discharged Service tax liability only on such amount. No reimbursable expense is shown in the invoice. Further, the Work Order dated 12.05.2016 for the above event mentions the description of the work and specifies that Agency has to take the permission before incurring any expense on behalf of the trust. 10% Agency Fees & 15 % Service tax on Agency fees will be paid separately, and all actual bills will be reimbursed. I find that the Appellant firm has paid service tax on the 10% of the gross amount charged. They also provided the bifurcation of the amount of Rs.15,27,788/- which they claim was made on behalf of their client as were reimbursed to them subsequently. In the given case, it is observed that the entire bill raised by the Appellant firm was towards reimbursable expenses and no service element is charged, which is not logically acceptable. The entire gross amount charged cannot be attributed to the reimbursable expenses with no service element. On going through various other contracts produced before me, I find that the contracts entered with various clients were for Conceptualizing, Designing, Execution and Supervision of various event management activities and the bill raised is for the above work. The contract value is inclusive of all expenses. As per Section 67 of the Finance Act, 1994, value of a taxable service shall be the gross amount charged by the service provider for the service provided and includes any amount received towards the taxable service before, during or after provision of such service. The expenses incurred while rendering the taxable service cannot be claimed as reimbursable expenses unless these actual expenses were incurred by the service provider on behalf of the service recipient. Hence, I find that the charges collected by the appellant firm are therefore integral part of the consideration received for the services provided by them. Method of vivisecting may not be of any relevance as long as the amount is in the nature of the consideration paid for the service provided.

9. On the second issue, the Appellant firm claims that they have hired various other service providers on behalf of their clients and the payment made to these service providers was routed through them. Thus, such deduction was admissible in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. I find that the provisions relating to determination of the value of taxable services contained in Service Tax

(Determination of Value) Rules, 2006 are clear and unambiguous. Relevant text of Rule 5 of Service Tax (Determination of Value) Rules, 2006 is reproduced below:

> ***RULE 5. Inclusion in or exclusion from value of certain expenditure or costs.*** *— (1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*
>
> *[**Explanation.**- For the removal of doubts, it is hereby clarified that for the [the value of the telecommunication service shall be the gross amount paid by the person to whom telecommunication service is actually provided].]*
>
> *(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-*
>
> *(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
>
> *(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
>
> *(iii) the recipient of service is liable to make payment to the third party;*
>
> *(iv) the recipient of service authorises the service provider to make payment on his behalf;*
>
> *(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
>
> *(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*
>
> *(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*
>
> *(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*
>
> ***Explanation 1.*** *- For the purposes of sub-rule (2), "pure agent" means a person who -*
>
> *(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
>
> *(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
>
> *(c) does not use such goods or services so procured; and*
>
> *(d) receives only the actual amount incurred to procure such goods or services.*
>
> ***Explanation 2.*** *- For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.*

As per Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006, where any expenditure or costs are incurred by the service provider in the course of providing service, all such expenditure or costs shall be included in the value for the purpose of charging Service Tax on said service. However, Rule 5(2) ibid, *inter alia,* envisages that the expenditure or costs incurred by the service provider as a pure agent of recipient of

service shall be excluded from the value of taxable service, if all the conditions mentioned therein are satisfied.

10. I find that the Appellant firm has failed to produce any contract evidencing that they were permitted to make such expenses on behalf of the clients. They also could not produce any contracts or agreement to establish the fact that their clients are liable to make payment to the third party/service providers or the clients have authorized the appellants to make payment to the third party; or that the clients knows that the goods / services for which payment has been made by the Appellant firm was provided by the third party or that the services were hired on behalf of the clients after having entered into a contract with the recipient of service to act as their pure agent to incur expenditure or costs in the course of providing taxable service. If the expenses incurred on various other service providers were actually reimbursed, then the Appellant firm should have produced the invoices raised by them, in the name of the clients, to establish that all such expenses were subsequently reimbursed to them by their clients. Thus, I find that the Appellant firm was trying to treat the cost of inputs / input services as reimbursable expenses. As such artificial splitting of cost is not admissible thus, in terms of Section 67 of the Finance Act, 1994 read with Rule 5(1) of Service Tax (Determination of Value) Rules, 2006, the expenditure or costs incurred by the Appellant firm in the course of providing service, shall be included in the value for the purpose of charging Service Tax on said service.

12. Further, it was also admitted by the Appellant firm that they use to add agency fees when the invoice amount went above Rs.1,50,000/- and charged service tax on such fees but when the invoice amount went below Rs.1,50,000/-, they charged service tax on full amount. It is also a fact that the Appellant firm took Cenvat credit of services received from Decorators, Caterers, Publicity, Sound Service, etc. On going through the documents submitted by the appellant firm, it is observed that they have incurred various expenses including Advertisements, Security Services, Transportation, Housekeeping, Manpower, Courier etc, which I find are used for rendering Event Management service. Explanation 1 to sub-rule (2) of Rule 5 clarifies that pure agent does not use such goods or services so procured. In the instant case, the Appellant firm have utilized the above services for rendering Event Management services and also availed the cenvat credit, which clearly imply that they were not acting as a Pure Agent of the service recipient, as envisaged under Rule 5 of the Service tax (Determination of Value) Rules, 2006, but were splitting the gross amount to evade taxes, hence abatement claimed from the gross value claiming such expenses as reimbursable expenses is not admissible.

12.1 It is observed that Hon'ble CESTAT, South Zonal Bench, Bangalore [Larger Bench] In the case of Sri Bhagavathy Traders-***2011 (24) S.T.R. 290 (Tri. - LB)*** held that;

> *6.2 Similar is the situation in the transaction between a service provider and the service recipient.* ***Only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise.*** *For example, when rent for premises is sought to be claimed as reimbursement, it has to be seen whether there is an agreement between the landlord of the premises and the service recipient and, therefore, the service recipient is under obligation for paying the rent to the landlord and that the service provider has paid the said amount on behalf*

of the recipient. The claim for reimbursement of salary to staff, similarly has to be considered as to whether the staff were actually employed by the service recipient at agreed wages and the service recipient was under obligation to pay the salary and it was out of expediency; the provider paid the same and sought reimbursement from the service recipient.

6.3** The various Circulars of the Board relied upon by the learned Advocate for the assessee clearly referred to amounts payable on behalf of the service recipient. For example, the Customs House Agent paying the Customs duty to the Customs Department, paying the charges levied by the Port Trust to the Prot Trust, paying the fee for testing to the Testing Organization are clearly on behalf of the importer/exporter and the same are recoverable by the CHA as reimbursement, that too on actual basis. These Circulars cannot be held to be in support of the claim of the **assessee that they can split part of the amount as reimbursable expenses and the rest as towards service charges.

6.4 The claim for reimbursement towards rent for premises, telephone charges, stationery charges, etc. amounts to a claim by the service provider that they can render such services in vacuum. What are costs for inputs services and inputs used in rendering services cannot be treated as reimbursable costs. There is no justification or legal authority to artificially split the cost towards providing services partly as cost of services and the rest as reimbursable expenses.

(*Emphasis supplied*)

In the instant case, the expenditure made by the Appellant firm towards Decorators, Caterers, Publicity, Sound Services, Flex Printing charges, Food & Travel charges, Advertisement, Security, Housekeeping, Manpower, Courier etc are not reimbursable expenses but are cost of providing service. All these expenses cannot be converted into reimbursable expenses as these expenses are so integral to the activities of the Appellant firm that they cannot perform or organize Event Management without incurring these expenses. Thus, I also do not find merit in the argument of the Appellant firm that where full reimbursement is claimed, no cenvat credit has been availed as these arguments are not supported by any documentary evidence hence, the same are not sustainable, legally.

12.2 The Appellant firm has further relied on the judgment passed in the case of Intercontinental Consultants & Technocrats Pvt. Ltd- 2013 (29) STR 9 (Del) and Apex Court's judgment reported at 2014 (35) STR 0J99 (SC), which I find are not squarely applicable as in the instant case as the Appellant firm was claiming abatement of reimbursable expenses from gross value but simultaneously they were also availing cenvat credit of these services. As, the payment/amount claimed in the name of reimbursements was not of the actual expenses but towards cost of service, hence, the demand confirmed on this amount, claimed as reimbursable expenses, shall sustain on merits.

13. It is further observed that the adjudicating authority has denied cum tax benefit to the Appellant firm on the grounds that certain documents sought were not provided. The issue of granting cum tax benefit is settled in the case of *Idea Cellular Ltd.* v. *Union of India* - ***2017 (4) G.S.T.L. 4 (P&H)*** wherein appeal of the revenue which was filed against order of Tribunal was dismissed. It was held that party has not collected any service tax from the Sim Card subscribers, thus value of sim cards sold to the subscribers shall be deemed to be cum tax price. Further, Hon'ble Tribunal in the case of *Commissioner v.*

Advantage Media Consultant ***[2008 (10) S.T.R. 449 (Tri.-Kol.)]*** held that Service tax being an indirect tax, was borne by consumer of goods/services and the same was collected by assessee and remitted to government and total receipts for rendering services should be treated as inclusive of Service tax due to be paid by ultimate customer unless Service tax was paid separately by customer. This decision has been maintained by the Apex Court as reported in **2009 (14) S.T.R. J49 (S.C.).** Further, the issue was also settled by the Apex Court in the case of *Maruti Udyog Ltd.* - ***2002 (141) E.L.T. 3 (S.C.)*** wherein it was held that the sale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which are included in the wholesale price are to be excluded in arriving at the assessable value. That means, that the cum-tax price when charged, then in arriving at the taxable value, the element of tax which is payable has to be excluded. Since there is nothing on record to show that after the demand was raised by the Department, the appellant has collected the service tax from their customers, therefore, the amount which they have collected needs to be taken as cum-tax value and correspondingly, the amount of service tax needs to be re-computed. There are various quasi judicial and judicial decisions on this issue and hence, I find that this benefit is required to be extended to the Appellant firm and service tax demand is required to be re-worked out accordingly.

14. As regards the issue of limitations, the Appellant firm claim that the demand for the period F.Y. 2014-15 & F.Y. 2016-17 is hit by limitation as the deduction of Rs.2,69,01,638/- & Rs.3,19,69,490/- claimed from gross amount were reflected in the ST-3 returns. In the impugned order, at Para-90, the actual date of ST-3 return filed on half yearly basis by the Appellant firm for the F.Y. 2014-15 is mentioned as 11.06.2015. So, considering the date of return filed and the fact that the Appellant firm had not declared the gross amount received in the returns filed by them, I find that SCN has been issued well within the relevant date i.e. five year prescribed for the cases of suppression. Similarly, for the period 2016-17, the Appellant firm has declared the gross amount in the ST-3 returns which was not same as that of the total amount charged by them from their clients. All these arguments made by the Appellant firm are based on assumptions and not supported by any documentary evidence as a copy of ST-3 returns filed for the relevant period was not produced to substantiate their above claim. This proves that by the act of mis-declaring the taxable amount in the ST-3 returns by claiming inadmissible deduction towards expenses incurred by them while rendering the taxable service, the Appellant firm has shown their malafide intention. In the present system of self-assessment, documents like invoices and other transaction, details are not supplied to the Department. Non-furnishing of proper taxable value to the Department, the intention will have to be believed as that of intention for evasion of duty. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression, which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with intent to evade payment of Service Tax is conspicuous by the facts and circumstances of the present case as discussed above. In view of the above discussion and findings, the ratio of cases relied by the said service provider cannot be applied in the case before me. The ST-3 form prescribes disclosure of all amounts received in respect of service even if not part of Assessable value. Failure to disclose the same amounts to mis-declaration. Thus, the appellant's argument on limitation is dismissed. Even if they believed that the said amount claimed as reimbursed were not includible in taxable value, they were required to declare the same in ST-3 return, in the column prescribed for it. 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.

15. 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, are *'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 in this case was raised based on the audit objection and it is the responsibility of the appellant to correctly assess and discharge their tax liability. The suppression of taxable value in ST-3 Returns and resultant non-payment and short payment of tax, clearly show that they were aware of their tax liability but chose not to discharge it correctly instead tried to mislead the department by not discharging proper tax liability on the gross amount received and by intentionally excluding them claiming to be the reimbursable charges, which undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. Thus, imposition of penalty would follow in view of the decisions rendered in the case of *Rajasthan Spinning and Weaving Mills* [2009 (238) E.L.T. 3 (S.C.)] and *Dharamendra Textile Proceesors* [2008 (231) E.L.T. 3 (S.C.)], if any of the ingredients of proviso to Section 73(1) of the Finance Act, 1994 are established then the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined. As the adjudicating authority is directed to quantify the demand of tax after extending the cum-tax benefit, the penalty under Section 78 shall be modified to that extent.

16. 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 are liable to pay the tax alongwith applicable rate of interest on the tax re-determined.

17. In Section 77(2) of Finance Act, 1994, the term 'any person' means a person who is liable to comply with the provision(s) of the Act and/or Rules made there under. The Appellant firm is bound to follow certain legal provisions of the Act and/or rules made there under. Non-compliance of Section 70 and Rule 7 of the Service tax Rules, 1994 by the Appellant firm has made them liable for penalty under Section 77(2) of the Finance Act, 1994. I, therefore, do not interfere in the amount of penalty imposed by the adjudicating authority under section 77(2) of Financial Act, 1994.

18. Further, the SCN alleges that the Appellant firm failed to assess the service tax on the taxable value for the period from F.Y. 2012-2013 (Jan-March) to F.Y. 2017-18 (upto June 2017) within the stipulated time limit which has resulted in non-payment of taxes. However, in the impugned order neither the adjudicating authority has quantified the delay in filing the ST-3 returns for respective period nor did the Appellant firm could produce any evidence justifying timely filing of returns, before me. As the Appellant firm has not furnished any cause for the late filing of returns, I therefore, find that the late fees is imposable but needs to be quantified in consonance with the delay noticed for the

disputed period for which the matter needs to be remanded back to the adjudicating authority.

19. On the imposition of personal penalty, Appellant-1 has contended that as the issue relates to interpretation of availability of reimbursement expenses, penalties cannot be imposed on him as he was performing the normal duties of the Appellant firm. I do not find any merit in such contention. As a Director, Appellant-1 is responsible for functioning of a Company and acts on behalf of the firm, hence, cannot claim that he was not aware of the developments of their firm. Hence, I agree with the findings of the adjudicating authority. In the present case, when the incriminating documents were recovered and seized under the cover of panchnama, Shri Dipesh Sheth, Director, in his statement agreed with the same and also appended his signature in the panchnama. He further did not co-operate in giving the documents pertaining to F.Y. 2015-16 onwards. He also agreed with the contents of the panchnama and accepted that he looks after all the issues of the Company. Considering his role as Director in the under-valuation of the taxable services provided by the Appellant firm and the legal proposition, I find that there is no bar for imposition of separate penalty on the Director.

19.1 Appellant-1 has relied on various case laws, which I find are distinguishable on facts. In the case of **Vikram Cement (P) Ltd- 2014 (303) ELT A82 (Tri-Del)** the Appellate Tribunal, in its impugned order had held that *"in absence of any other corroborative evidence, the sole statement of Director is not conclusive to established the guilt of the assessee. Burden of proof is on the Revenue and is required to be discharged effectively. Clandestine removal cannot be presumed merely because there were shortages of the stock or on the recovery of some loose papers."* In the present case, I find that sufficient proof has been brought on record to establish that the Appellant firm has intentionally undervalued the taxable service and failed to pay service tax on monthly basis in spite of the knowledge of being a Private Ltd Company and registered with the department, which was in the knowledge of Appellant-1. He, being Director, was aware of the affairs of the Appellant Firm and had never retracted the admissions made in the statement which point toward his role in the above contraventions. He was aware of the fact that the Appellant firm for the F.Y. 2012-13 and F.Y. 2013-14 has not shown reimbursement amount in their ST-3 returns and thereafter they paid service tax after deducting reimbursement charges. They used to add agency fees when invoice value was above Rs.1,50,000/- and paid service tax on agency fees but when the invoice value was below Rs.1,50,000/- they charged service tax on full amount. All this clearly establish his role in the alleged offence as he was aware of the developments in the company.

19.2 Further, he also relied on catena of other decisions in support of his argument, which I find are not applicable to the present case. The case of ***T.R.Venkatadari-2018(10) GSTL 483 (Tri-Mum)*** wherein Hon'ble CESTAT Mumbai has set-aside the penalties imposed upon Directors under Section 77(2) of the Finance Act, 1994; in ***Shri Jai Hanuman-2017(349) ELT 322 (Tri-Del)***, penalty under Rule 26 of Central Excise Rules, 2002 was held not imposable if issue involved of availability of exemption under Notification and not of assessee dealing with excisable goods liable for confiscation - Rule 26 of Central Excise Rules, 2002. Similarly, in ***Fun Foods Pvt. Ltd-2017 (348) ELT 357 (Tri-Del)***, penalties imposed under section 11AC were dropped as there was no "wilful suppression or misstatement with intention to evade payment of duty of excise" by the

appellants and in the case of V.S.Bobba – 2021 (52) GSTL 67 (Tri-Bang), the only ground on which both the authorities have imposed penalties is that these officers were negligent as no material to substantiate that allegation against these officers was placed. I find that in all these case laws the facts are different in as much as the issue there was related to claim of exemption and there was willful suppression etc which was in the knowledge of the appellant. Hence, they are not applicable to the present facts.

19.3. Appellant-1 has clearly admitted to his role in evasion of service tax and, therefore, the penalty imposed is justified. Reliance is placed on the decision of the Hon'ble Bombay High Court in the case of ***Hansa Gosalia*** **[2013 (289) E.L.T. 266 (Bom.)] and *Shivang Ispat Pvt. Ltd.* v. *Commissioner of Customs, Mumbai* [2009 (246) E.L.T. 506 (Tri.-Mum.)],** wherein it was held that penalties are leviable on the co-noticee even if they did not deal physically with the goods but they acted in fraud and collusion with the main appellant to deprive the Government of the legitimate duty. As such, I find no justification for setting aside the penalty imposed upon Appellant-1 and accordingly reject his appeal.

20. In view of the above discussions and findings, I uphold the issue on merits however, the service tax demand needs to be re-quantified by treating the value as cum tax value in terms of the discussions in Para-13. The penalty imposed under Section 78(1) and late fees under Section 70 also needs to be quantified in terms of discussion in Para 15 & 18. I also uphold the penalty imposed under Section 77(2). Accordingly, the appeal filed by the Appellant firm is partially allowed by way of remand and partially rejected. Further, the penalty imposed under Section 78A on Appellant-1 in the impugned order, is upheld. Therefore, the appeal filed by him stands rejected.

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.

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 11.2022

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

By RPAD/SPEED POST

To,
M/s. Markcom Solutions Pvt. Ltd., - **Appellant Firm**
204-205, Benkesha Complex,
Near Navrangpura Bus Stand,
Navrangpura,
Ahmedabad-380009

Shri Dipesh Shah, - **Appellant-1**

Director of M/s. Markcom Solutions Pvt. Ltd.,
204-205, Benkesha Complex,
Near Navrangpura Bus Stand,
Navrangpura,
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The Joint Commissioner - **Respondent**
CGST, 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.