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: 20221164SW000000A8F6

स्पीड पोस्ट

क फ़ाइल संख्या : File No : GAPPL/COM/STP/31/2022-APPEAL/5433-37

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-69/2022-23**
दिनाँक Date : **25-11-2022** जारी करने की तारीख Date of Issue 29.11.2022

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/41/2021-22** दिनाँक: **31.08.2021**, issued by Deputy/Assistant Commissioner, CGST, Division-VII, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Nippon Express(India) Pvt. Ltd.,
201, 2nd Floor, Citizen Arena,
Opposite Nidhi Hospital,
Navrangpura, Ahmedabad – 380009

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. Nippon Express (India) Pvt. Ltd., 201, 2nd Floor, Citizen Arena, Opposite Nidhi Hospital, Navrangpura, Ahmedabad-380009 (hereinafter referred to as '*the appellant*') against Order–in–Original No. CGST/A'bad North/Div-VII/ ST/DC/41/2021-22 dated 31.08.2021 (for brevity referred to as "*the impugned order*") passed by the Deputy Commissioner, Central Tax, CGST & Central Excise, Division-VII, Ahmedabad North (for short referred to as the "adjudicating authority").

2. The facts of the case, in brief, are that during the course of audit of the records of the appellant, conducted by the officers of CGST Central Tax Audit, Ahmedabad for the period from April 2013 to June, 2017, it was noticed that the appellant, during F.Y. 2016-17 and April, 2017 to June, 2017, had claimed deduction of income as a 'pure agent' in terms of the provisions of Rule 5(2) of the Service tax (Determination of Value) Rules, 2006. The appellant was, therefore, requested to furnish party-wise breakup in respect of the services provided as pure agent. The appellant vide letter dated 18.01.2019 furnished following data.

Sr.No.	Name of the Party	Amount Involved
01	Claris Life Science /Claris Injectables Ltd.	Rs.40,13,639/-
02	SEZ Unit (Meghmani Industries Ltd)	Rs.27765/-
03	Other Units	Rs.4,63,402/-
	Total	Rs.45,04,806/-

2.1 The auditors made following observations against the appellant;-

(i) In the case of M/s. Claris Life Science they raised invoices in which the transportation charges recovered from Claris was more than 'actual amount incurred as transport charges', hence were not eligible for benefit of pure agent;

(ii) In respect of pure agent services rendered to M/s. Meghmani Industries Ltd., it was stated that the said unit was a SEZ unit and are not liable to pay service tax. In terms of Para 3(II)(b) of the Notification No.12/2013 dated 01.07.2013, an authorization shall be issued by JAC/JDC of Central Excise to the SEZ unit or the Developer in Form -A2. However, the appellant could not produce the copy of Form-A2 issued to M/s. Meghmani Industries Ltd, hence the appellant are not eligible for benefit of pure agent;

(iii) In respect of other units, the amount claimed as pure agent by the appellant is the trucking invoice where the service tax has been discharged at the end consignee.

2.2 It, therefore, appeared that the appellant has not fulfilled the criteria for claiming deduction of income from the gross taxable value for payment of service tax as per the provisions of Rule 5(1) of the Valuation Rules. The service tax not paid was worked out to Rs. 5,75,723/- for the period F.Y. 2016-17 and April, 2017 to June, 2017.

2.3 A Show Cause Notice (SCN) No.GTA/04-149/Cir-VII/AP-48/2017-18 dated 08.04.2019 was issued to the appellant proposing to include the amount of Rs.45,04806/- (received by the appellant as consideration but claimed as reimbursable expenses), in the assessable value; proposing recovery of service tax demand of Rs.6,75,723/- alongwith interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under Section 78(1) of the Finance Act, 1994 was also proposed.

2.4 The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.6,75,723/- was confirmed alongwith interest. Penalty of Rs.6,75,723/ under Section 78 was also imposed.

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

- Mere non-payment of tax or duty cannot establish fraud or willful mis-statement, suppression of facts. ST-3 Returns were filed, and service tax was paid hence no facts were suppressed. The amount shown as pure agent in their ST-3 return is clerical error for which they also provided explanation that the services rendered by them are exempted from service tax, which was not considered. They placed reliance on following case laws to support their contention that extended period of limitation is not invokable :- .
  - Cosmic Dye Chemicals-1995(75) ELT 721 (SC)
  - Pushpam Pahrmaceuticals Co.-1995 (78) ELT (SC)
  - Anand Nishikawa Co. Ltd – 2005(188) ELT 149 (SC)

- Para-15 of the SCN mentions that the reimbursement claimed is actually the payment for providing Clearing and Forwarding Agent service, whereas in the impugned order, at para 34.1.10, it is confirmed as reimbursement charges. Secondly, the SCN alleges that condition 'vii' of Rule 5(2) has not been met while the order concludes that the appellant has not fulfilled all the conditions of rule 5(2), which are far exceeding than what has been charged.

- Para 14 of the contract quoted in the SCN was not considered properly, which states that the transportation charges has to be supported by L.R. and any other charges that may have been paid by the transporter. Thus the services rendered were of GTA services for transport of containers from factory to Port which are exempted as was in relation to exports. However, the amount received for said service was wrongly shown as 'Pure Agent' receipts instead of showing them under GTA receipts, which was a clerical error. Such changes/omissions does not attract any tax as the liability in such cases is on the recipient of service hence, penalty also cannot be imposed.

- Exemption is also available in terms of Notification No.31/2012-ST dated 20.06.2012, for providing services to exporter for transport of goods by GTA subject to fulfillment of conditions prescribed therein. Also services rendered to SEZ unit (M/s. Meghmani Industries) for CHA activity is also exempted from payment of service tax as per Notification No.12/2013 dated 01.07.2013.

- M/s. Meghmani Industries has obtained Eligibility Certificate issued by SEZ, Ahmedabad. Non-submission of A-2 from JAC is only procedural lapse based on which exemption cannot be denied. They placed reliance on following case laws;
  - Moser Baer Photovoltaic Ltd.- 2018(1) TMI 113-CESTAT (All.)
  - National Trades & agencies – 2018(2) TMI 1868-CESTAT (Bang.)
  - Jagdamba Industries- 2016(331) ELT 609 (Tri-Del.)

- They have provided various services and indicated the charges separately in the invoices hence the same cannot be brought under a "Composite Contract". They neither directly nor indirectly provided any service of "Clearing & Forwarding operations" in any manner hence classifying the service under said head would be illogical.

4. Personal hearing in the matter was held on 18.11.2022. Ms. J. Ragini, Advocate, appeared on behalf of the appellant. She re-reiterated the submissions 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 by the appellant in the appeal memorandum as well as during personal hearing. The issue to be decided in the present appeal is as to whether the amount of Rs.45,04,806/- claimed as deduction by the appellant as a 'pure agent', is admissible or otherwise. The demand pertains to the period F.Y. 2016-17 to April, 2017 to June, 2017.

6. Before examining the issue on merits, I will first take up the issue of limitation raised by the appellant. The appellant have strongly contended that the demand is hit by limitation and placed reliance on various case laws to support their contention that mere non-payment of tax or duty cannot establish fraud or willful mis-statement /suppression of facts. I do not agree with their above contention. The onus to disclose full and correct information about the value of taxable services lies with the service provider as the tax is paid based on self assessment and transactions reported in the ST-3 returns, which is a basic document. It is the bounden duty of the assessee to disclose all and correct information in the ST-3 returns. Non disclosure of full and correct information in returns would amount to suppression of facts. Non-payment of tax by mis-declaring the taxable income by claiming ineligible deduction clearly establishes the conscious and deliberate intention to evade the payment of service tax. The case laws relied by the appellant are distinguishable of facts hence not applicable to the present case. In those cases, it was held that limitation cannot be invoked just for omission of an assessee unless it is deliberate. In the instant case, the appellant have agreed to have mis-declared the taxable income in the ST-3 returns only when the same was noticed by auditors. Thereafter, they classified the nature of services rendered as transport service to split the taxable income and claim inadmissible exemption. I, therefore, find that all these ingredients are sufficient to invoke the provisions of extended period under proviso of Section 73(1) of the F.A, 1994. In these circumstances, the Tribunal held that the department had no occasion to know the activity of the appellant and there is suppression of fact on the part of the appellant.

6.1 It is observed that Hon'ble Tribunal in the case of ICICI Econet Internet & Technology Fund-2021 (51) G.S.T.L. 36 (Tri. - Bang) at para 46, held that;

"It cannot be argued that suppression cannot be alleged as the information is in the public domain. Information being in the public domain is not of any consequence. The information should be in the knowledge or made available to the authorities concerned who need to take a certain decision depending on such information. It is not the case of the appellants that they have been paying applicable service tax on getting registered and have been submitting regular returns to service tax authorities. It is not the case of the appellants that the material information available in the form of various contracts/agreements and balance sheets/ledgers have been submitted to the Department suo motu by the appellants. It is only after investigation has been initiated, the necessary documents were submitted. Thus, the information available in the public domain is of no avail."

6.2 Also, in the case of *Maruti Udyog Ltd.* v. *CCE, New Delhi,* 2001 (134) E.L.T. 269, Hon'ble Tribunal has upheld the invocation of the extended period of limitation and held that the theory of universal knowledge cannot be attributed to the department in the absence of any declaration.

7. Now, to examine other issue, I will take the services rendered to each service provider separately.

7.1 In respect of the services rendered to M/s. Claris Life Science; the SCN alleges that the appellant has undertaken a composite contract for receiving, storing and dispatch of goods on behalf of M/s. Claris, therefore, the service provided is of Clearing and Forwarding Agent services. Further, the amount received/recovered by the appellant on account of transportation charges is more than the 'actual expenses' incurred by them for procuring such goods or services. As such, the condition no (vii) to Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, is not fulfilled, hence, are not eligible for benefit of pure agent. The appellant on the other hand are contending that the Contract dated 14.03.2016 entered with M/s. Claris was not a 'Composite Contract' and the service rendered cannot be classified under "Clearing & Forwarding operations". Instead, they claim to have rendered GTA service for transport of containers from factory to port in relation to exports of goods, which is exempted from service tax, vide Notification No.31/2012-ST dated 20.06.2012. They, however, admitted that due to clerical error, the amount received was wrongly shown as 'Pure Agent' receipts instead of showing the same under GTA receipts.

7.2 In para-14 of SCN, as per the Agreement dated 14.03.2013, it was observed that the service agreement is for transportation and distribution of goods and other incidental work. The appellant is appointed as a Forwarding Agent and is required to receive and store goods of M/s. Claris and forward their products in various parts of the world; the appellant shall be responsible for uploading the goods and if the goods do not reach the right destination, then all loss, damages, cost and expenses shall be borne by the appellant; the appellant shall be responsible for penalty, product loss or any extra cost due to non-maintenance of requested temperature. Claris will make the payment against the bill raised by the appellant and the bill shall be supported by copy of original LR and any other charges that may have been paid by the transporter on behalf of the Claris.

7.3 From the above wordings, it is clear that the appellant was a Forwarding Agent who was receiving, storing and dispatching goods on behalf of Claris. I have gone through the sample invoice issued to M/s. Claris, wherein the appellant has raised sea freight export charges, Terminal Handling charges, B/L Charges, Handling Charges, Transportation charges, stuffing charges, EDI charges, Service charges OCN exp, Seal Charges etc which clearly prove that the appellant was rendering 'Clearing & Forwarding Agency services' and not 'Goods Transport Agency service' as claimed by them. The contract was to render composite service. The appellant was not rendering GTA service separately as the transportation charges were not collected under a separate contract nor were they authorized to engage a transporter. In fact, the goods were received or dispatched while rendering the Clearing & Forwarding Agent service either by engaging transport on their own or through the authorized transporter of the principal. Since the appellant has not collected transportation charges under a separate contract, the same shall form part of the taxable value. The appellant themselves have claimed that the amount received for transport service was wrongly shown as receipts of 'Pure Agent' which proves that the amount was not reimbursable expenses. I, therefore, find that the amount collected for transport of goods shall form part of the taxable value for the services rendered as Clearing & Forwarding Agent.

7.4 If the income received was towards a taxable services defined under Clause (44) of Section 65(B), I find that the value shall be determined in terms of Section 67 of the Finance Act, 1994 read with Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006, unless the expenditure or costs incurred by the service provider are as a pure agent of the recipient of service. 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.

7.5 I find that the appellant have failed to produce any contract evidencing that they were permitted to make such expenses on behalf of M/s. Claris. 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. I find that the appellant was trying to split the cost which 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.

8. In respect of services rendered to M/s. Meghmani Industries Ltd., the SCN alleges that the appellant failed to produce authorization issued in terms of Para 3(II)(b) of the

Notification No.12/2013 dated 01.07.2013, which is issued by JAC/JDC of Central Excise to the SEZ unit or the Developer in Form -A2, hence, not eligible for benefit of pure agent. The appellant have contended that such failure should be considered procedural in nature. Even otherwise, they claim the services rendered to SEZ units are exempted vide Notification No.12/2013 dated 01.07.2013 and the service of transportation provided for export of goods are also exempted vide Notification No.31/2012-ST dated 20.06.2012.

8.1 Notification No.31/2012-ST dated 20.06.2012, exempts the service provided to an exporter for transport of the said goods by Goods Transport Agency (GTA) in a goods carriage from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or service provided to an exporter in relation to transport of the said goods by goods transport agency in a goods carriage directly from their place of removal, to an inland container depot, a container freight station, a port or airport, from where the goods are exported. This exemption is available to exporters, who are liable to pay service tax under sub-section (2) of Section 68 of said Act, read with item (B) of sub-clause (i) of clause (d) of sub-rule (1) of Rule 2 of the Service Tax Rules, 1994, for the specified service. I find that the transport service provided by the appellant is not as GTA but was in the nature of 'Clearing & Forwarding Agency services', thus, the benefit of above notification cannot be extended to them.

8.2 Similarly, Notification No.12/2013 dated 01.07.2013, exempts the services on which service tax is leviable under Section 66B, received by a SEZ unit and used for the authorised operation. The exemption is provided by way of refund of service tax paid on the specified services received by the SEZ Unit and used for the authorised operations. Provided that where the specified services received by the SEZ Unit are used exclusively for the authorised operations, the person liable to pay service tax has the option not to pay the service tax *ab initio*, subject to the conditions and procedure stated therein. One of the conditions is that the SEZ Unit shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I). On the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, to the SEZ Unit or the Developer, in Form A-2. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit without payment of service tax. The SEZ Unit shall furnish to the jurisdictional Superintendent of Central Excise a quarterly statement, in Form A-3, furnishing the details of specified services received by it without payment of service tax. Where the *ab initio* exemption is admissible but not claimed, conditions prescribed at Para 3(III) shall be followed.

8.3 In the instant case, the appellant has not produced the A-2 Form issued to M/s. Megmani which reflect that the GTA service is the specified services listed in A-1, hence exempted. I find that the refund or exemption is allowed to SEZ unit subject to the procedure and conditions mentioned therein. The appellant, however, have produced an Eligibility Certificate issued to M/s. Meghmani Industries Ltd. by the Office of the Development Commissioner, (SEZ), Dahej, wherein it is specifically mentioned that the said unit is exempted from payment of service tax, levied under Chapter-V of the Finance

Act, 1994, on the taxable services in the designated areas of the SEZ. But in terms of Notification No. 12/2013 dated 01.07.2013, the exemption is provided by way of refund to the SEZ or the SEZ can claim *ab initio* exemption subject to the conditions prescribed at Para 3 (II) & (III) prescribed. The service provider shall provide the specified services to the SEZ Unit without payment of service tax only when an authorisation is issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, to the SEZ Unit. In the instant case, this document was not produced hence the appellant shall remain outside the purview of said notification. The appellant has placed reliance on various decisions passed in the case of Moser Baer Photovoltaic Ltd.- 2018(1) TMI 113-CESTAT (All.), National Trades & agencies – 2018(2) TMI 1868-CESTAT (Bang.) & Jagdamba Industries- 2016(331) ELT 609 (Tri-Del.), which I find are distinguishable on facts. It is settled law that the person availing the exemption notification shall satisfy all the conditions prescribed in the notification and failure to do so would disentitle him from the exemption as held in the case of *Harichand Shri Gopal* - 2010 (260) E.L.T. 3 (S.C.), Larger Bench of Hon'ble Supreme Court.

9. Similarly, in respect of other units, the SCN alleges that no specific agreements were entered by the appellant to prove that they were acting as pure agent. I have gone through the sample invoice produce by the appellant issued in the name of Nitto Denko India Pvt. Ltd. wherein the payment made is towards taxable services rendered in the nature of 'Clearing & Forwarding Agency services'. As long as they have failed to establish the fact that the expenses incurred were on behalf of their clients who have authorized them to make payment to the third party, the expenditure or costs incurred by the appellant in the course of providing service shall be included in the value for the purpose of charging Service Tax on said service, in terms of Section 67 of the Finance Act, 1994 read with Rule 5(1) of Service Tax (Determination of Value) Rules, 2006,

10. Thus, in view of above discussion and finding, I find that the amount of Rs.45,04,806/- claimed as deduction of income by the appellant claiming the same as receipts of rendering GTA service and reimbursable in nature is not sustainable. The impugned order confirming the demand of Rs.6,75,723/-, therefore, sustains on merits.

11. 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 audit para and only after the demand was raised they contended to have wrongly classified their service which 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-declaring the correct taxable income and showed it under pure agent receipt, which undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. Thus, 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.

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.

13. 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.

25th November 2022

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 25.11.2022

Attested

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

By RPAD/SPEED POST

To,
M/s. Nippon Express (India) Pvt. Ltd., - **Appellant**
201, 2nd Floor, Citizen Arena,
Opposite Nidhi Hospital, Navrangpura,
Ahmedabad-380009

The Deputy Commissioner, - **Respondent**
Central Tax, CGST & Central Excise,
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.