आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
: 079-26305065 **टेलेफैक्स** : 079 - 26305136

By speed Post

क फाइल संख्या :File No : **V2(ST)86/North/Appeals/2019-20** /1H562 TO 1H567

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-002-APP-004-2020-21**

दिनाँक Date :22.04.2020 जारी करने की तारीख Date of Issue: 05/06/2020

श्री अखिलेश कुमार, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Akhilesh Kumar,** Commissioner (Appeals) Ahmedabad

ग _____आयुक्त, केन्द्रीय GST, अहमदाबाद North आयुक्तालय द्वारा जारी मूल आदेश : दिनाँक : से सृजित

Arising out of Order-in-Original:**06/ADC/2019-20/MSC,** Date: **10/07/2019** Issued by: **Additional** Commissioner ,CGST, Div: III, Ahmedabad North.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. M/s Emtelle India Ltd

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर 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.

(ख) 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।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध 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।

(d) 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 दिनॉक 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– ण0बी/35–इ के अंतर्गतः–

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

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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय 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 beer a court fee stamp of Rs.6.50 paisa 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.

(6) **सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) **धारा 11 डी के अंतर्गत निर्धारित रकम**

(ii) **सेनवैट जमा की ली गई गलत राशि**

(iii) **सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम**

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
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.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) **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।**

(6)(i) 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER-IN-APPEAL

This appeal has been filed by M/s Emtelle India Ltd (presently known as M/s Parixit Industries Ltd), Survey No.214/1 and 214/2, Virpur Bus Stop, P O Iyavaya, Ta-Sanand, Dist. Ahmedabad [hereinafter referred to as "appellant"] against Order-in-Original No.06/ADC/2019-20/MSC dated 10.07.2019 [hereinafter referred to as "impugned order"] passed by the Additional Commissioner of CGST & Central Excise, Ahmedabad North Commissionerate [hereinafter referred to as "adjudicating authority"].

2. The facts of case, in brief, are that the appellant are engaged in manufacture of Drip and Sprinkler Irrigation Systems and HDPE and PVC Pipes and Fitting falling under Chapter Heading No.84.24 and 39.17 respectively of the Central Excise Tariff Act, 1985. The audit of the records of the appellant, pertaining to the period from January 2015 to Marc h 2017, was conducted by the Ahmedabad Audit Commissionerate and Final Audit Report No.1449/2017-18 dated 26.03.2018 was issued. The details of observations relevant to this case raised in the said Audit Report are as under:

[a] Short payment/reversal of Cenvat credit taken on common input services and attributable to exempted goods/exempted services under Rule 6(3A) of Cenvat Credit Rules, 2004 (for short-CCR).

- It was noticed that the appellant is engaged in manufacturing of dutiable goods; exempted goods; taxable services; and exempted services and availing Cenvat credit on Manpower Services, Security, and Inward transportation etc which were used in their factory for the manufacture of dutiable as well as exempted category of goods and services. The appellant were proportionately reversing Cenvat credit attributable to exempted goods and services at the end of the each month, under Rule 6 of the CCR. It was observed that as per Rule 6 (3A) of the CCR, the appellant was liable to pay/reverse an amount equal to Cenvat credit proportionate to the input services used for manufacture of dutiable and exempted goods as well as used for providing dutiable and exempted service, as determined as per formula prescribed under Rule 6(3A) (b), on provisional basis and on final basis under Rule 6(3A) (c) of the CCR. During audit, it was observed that on calculation of the amount liable for reversal under Rule 6(3A) (c) ibid and the appellant had short paid/reversed amounting to Rs.11,73,310/- from 2012-13 to 2016-17. This amount was liable to be recovered under Rule 14 of the CCR read with Section 11A of the Central Excise Act, 1944 along with interest and penalty.

[b] Service Tax collected on agronomy service and not deposited into the Government Account.

- It was noticed that the appellant had entered into Memorandum of Undertaking with M/s Gujarat Green Revolution Company Ltd [for short-M/s GGRC], Vadodara for implementing Micro Irrigation Scheme to farmers.

Accordingly, work orders were issued to the appellant on the basis of all relevant reports submitted by the appellant. It was further noticed that the quotation summary sheet issued by them for the cost of Micro Irrigation Scheme includes 'Agronomy charges" and installation charges, apart from other cost viz. Head unit cost, transportation, inspection and insurance charges etc; that out of all charges, the amount mentioned against Agronomy and installation charges were inclusive of Service Tax. During audit, it was noticed that the appellant had only discharged Service Tax against Installation charges and not discharged Service Tax towards Agronomy charges. Though the Agronomy charges falls under Agriculture extension service, as defined under Section 65B (4) of the Finance Act, 1994 and covered under Negative List, it was noticed from the quotation summary sheet that the appellant had collected Service Tax on Agronomy charges from M/s GGRC and not deposited into the Government Account. Service Tax Amounting to Rs.19,26,857/- was collected by the appellant from M/s GGRC during 2012-13 to 2016-17 but was not deposited to the Government Account. It was liable to be recovered under provisions to Section 73 A (3) of the Finance Act, 1994 along with interest under Section 73 B of the Act. They were also liable for consequential penalties.

[c] Non-payment of Service Tax on Professional service received from Director under Reverse Charge Mechanism.

➢ It was noticed that the appellant had received Professional service from one of its Director Shri Rajiv Sarin, who was Managing Director of the Company till 31.12.2014 and Director from 01.01.2015. Though the said service is taxable under Reverse Charge Mechanism, as per provision of Rule 2(d)(ee) of the Service Tax Rules, 1994 read with Notification No.30/2012-ST dated 20.06.2012 (Sr.No.5A), Service Tax amounting to Rs.12,08,254/- on taxable value of Rs.87,48,000/- paid to Shri Rajiv during 2015-16 was not paid by the appellant under Reverse Charge Mechanism. This was liable to be recovered under Section 73 of the Finance Act, 1994 along with interest and with consequential penalties.

[d] Non-payment of Service Tax on Works Contract Service provided to SEZ Unit.

It was noticed that the appellant has provided Work Contract service viz. supply, laying and commissioning of HDPE Pipeline Conveyor System inside sea to Mangalore SEZ Ltd, as per agreement dated 03.12.2010. Since the work undertaken by the appellant involves Earthwork excavation or pipeline trenches, providing bedding for pipe, refilling pipeline trenches, providing and laying HDPE pipes in land portion, sea shore portion and other related work, the amount received towards the said work contract is taxable. However, the appellant has claimed to have availed exemption under Notification No.25/2012-ST dated 01.07.2012 [E.No.13(d)] and Notification No.40/2012-

ST/12/2013-ST. It was further noticed that the appellant has quoted price for the work in question including Service Tax from M/s Mangalore SEZ Ltd vide bill No.PIL/MSEZ/09/2014-15 dated 25.06.2014. It was observed by the audit that their document clearly indicates that the amount received by the appellant included Service Tax and they were required to deposit Service Tax amount of Rs.65,81,700/- collected by them to the Goovernment Account. However, they had paid amount of only Rs.7,68,993/- charged in RA Bill No.4 dated 12.02.2011 and the remaining amount of Service Tax of Rs.58,12,707/- was not deposited in Government Account. Non-payment of Service Tax amounting to Rs.58,12,707/- was calculated for the period from 2010 to 2014 and demanded under Section 73A of the Finance Act along with interest under Section 73B of the Act and with consequential penalties.

2.1 In terms of instruction F No.1080/90/DLA Misc/15 dated 21.122015 and Master Circular No.1053/02/2017 –CX dated 10.03.2017 of CBEC, a pre-Show Cause Notice Consultation was granted to the appellant on 01.06.2018. Since, the reply submitted by the appellant was not acceptable to the Department and the appellant has not paid the payment of Central Excise Duty/Service Tax, a Show Cause Notice dated 20.06.2018 was issued to them for recovery of:

[i] Rs.11,73,316/- equal to Cenvat credit attributable to input services used in manufacture of exempted goods/providing exempted services short paid under Section 11A(d) of the Central Excise Act, 1944 along with interest under Section 75of the Act and imposition of penalty under Rule 15 of CCR read with Section 11 AC of the Central Excise Act.

[ii] Service Tax amounting to Rs.19,26,857/- collected on Agronomy services but not deposited into the Government Account, under Section 73(A) of the Finance Act, 1994 along with interest under Section 73 B of the Finance Act and penalty under Section 76 and 78 of the Finance Act.

[iii] Service Tax amounting to Rs.12,08,254/- under Reverse Charge Mechanism in respect of Professional services received from their Director, under Section 73(1) of the Finance Act, 1944 along with interest under Section 75 of the Finance Act and Penalty under Section 76 and 78 of the Finance Act.

[iv] Service Tax amounting to Rs.59,58,219/- collected on Work Contract services provided to Mangalore SEZ and not deposited into Government Account, under Section 73A(3) of the Finance Act, 1944 along with interest under Section 73B of the Finance Act and penalty under Section 76 and 78 of the Finance Act.

2.2 The adjudicating authority has confirmed all the allegations raised in the Show Cause Notice and confirmed the short payment/non-payment of Central Excise duty/Service Tax along with interest. He also imposed penalty under Section 11A C of the Central Excise Act, 1994 in respect of [i] above and imposed penalty under Section 76 and 78 of the Finance Act, 1994 in respect of [ii] to [iv] above. A penalty amounting to Rs.10,000/- was also imposed under Section 77 of the Finance Act, 1994 for non disclosure of correct taxable value in their ST-3 returns.

3. Aggrieved with the impugned order, the appellant has filed the instant appeal on the grounds that:-

Recovery of Cenvat Credit amounting to Rs.11,73,316/-

- No doubt that they had adopted the wrong method of calculation of paying/reversing the Cenvat credit but the same has happened primarily because the value of the traded items was wrongly taken in taxable category whereas it was required to be taken in non-taxable category as per fiction introduced in Rule 6 of the CCR w.e.f 01.04.2011; that they also took actual sales including exports in taxable sales whereas all dispatches excluding exports was required to taken in taxable sales for working out the quantum of reversal of Cenvat credit. Further, changes in the Rule 6 of CCR were being made from 2011-12 to 2016-17 which not only lost sight of but could not be interpreted in the correct manner.
- They had shown reversal of Cenvat credit under Rule 6 of the CCR in their monthly return regularly filed for last so many years; that no documents other than monthly return prescribed under the law to show such reversal of Cenvat credit; thus the allegation in the Show Cause Notice that the appellant did not submit any document from which non-payment of appropriate amount of Cenvat credit and the trading activity could be known, is not sustainable.
- Audit of the records pertaining to the year September 2009 to December 2014 were conducted by the Departmental officer in three occasions i.e April 2012, December 2013 and February 2015; that no objections on the subject issue was ever taken by the departmental officers, it made them to believe the reversal of Cenvat credit has been correctly made. Further, the adjudicating authority has not given any reason of either fraud or collusion or wilful misstatement or suppression of facts etc with intent to evade payment of duty/tax. Therefore, applicability of extended period invoked in the matter is not sustainable. They relied on catena of Apex Court's/Tribunal's decisions and in this regard.
- Thus demand of Rs.6,17,113/- pertaining to the year 2012-13 to 2014-15 hits by limitation and be set aside. Accordingly, penalty imposed under Section 11 AC of the Central Excise Act, 1944 is also not sustainable.

Recovery of Rs.19,26,857/- towards agronomy charges.

- The adjudicating authority has accepted that the Agronomy service is in the Negative List and hence chargeable to Nil rate of duty; that in spite of such fact, it has been deemed by him that the expression "Agronomy charges' inclusive of Service Tax used by the appellant in the quotation summary sheet would mean inclusive of Service tax @10.3% and collected from the appellant. The correct interpretation of the said expression used by the appellant in the quotation would mean that they had given quotation for

Agronomy charges along with the Nil rate of Service Tax applicable on the said service and no amount of Service Tax was collected. This interpretation is supported by the judgment of Hon'ble Tribunal in M/s Subah Engineers Pvt Ltd reported in 2005 (183) ELT 362 (Tri-Chennai).

- When no amount is collected in the invoice from the customers representing as duty/tax, the same is not payable under Section 11D of the Central Excise Act 1944, as held by the Hon'ble Tribunal, Kolkatta [2013 (158) ELT 473]; Tribunal Mumbai [2005 (186) ELT 107].
- M/s GGRCL, the recipient of Agronomy service has clarified that they were not paying any Service Tax to the appellant on the said service; that the word 'inclusive o Service Tax' is used for future purpose, if the said service become chargeable to Service Tax.
- Issuing demand within normal period/extended period as the case may be is also applicable in the instant issue, though no time limit for raising demand has been prescribed under Section 73A of the Finance Act, 1994. They relied on decision of Apex Court [1989 (42) ELT 515] ; 2007 (217) ELT 325 and Hon'ble Gujarat High Court's decision reported at 2012 (283) ELT 359.
- In this regards also, the audit of the records pertaining to the year September 2009 to December 2014 were conducted by the Departmental officer in three occasions i.e April 2012, December 2013 and February 2015; Therefore, no suppression of facts or omission and commission committed by the appellant. Under the circumstances, applicability of extended period invoked in the matter is also not sustainable. They relied on catena of Apex Court's/Tribunal's decisions in this regard. Accordingly, penalty under Section 78 of the Finance Act, 1994 is not correct.
- No penalty under Section 76 ibid is imposable as the said Section existed prior to 15.05.2015; that the same applies to only those person who are liable to pay Service Tax in accordance with the provisions of Section 68 of the Finance Act.

<u>Recovery of Rs.12,08,254/- on Professional service received from Director under Reverse Charge Mechanism</u>.

- Shri Rajiv Sarin was appointed Managing Director of their company from 12.06.2012 as per terms and condition of his appointment and Resolution passed by the Board and continued till 31.12.2014; that Form 16 was issued to him like any other employee and TDS were also deducted; that necessary deduction on account of EPF were also made to his account by the appellant. No sitting fee was paid to him.
- From 01.01.2015, he was made Non-Executive Director of the company; that on request of the appellant, the management consultancy service was rendered by him to the company. The adjudicating authority demanded Service Tax on the Professional Service rendered by Shri Rajiv Sarin as per

Notification No.30/2012-ST dated 20.06.2012 (Sr.No.5A of table) under Reverse Charge Mechanism which is not correct; that the service provided by the Director of the company alone is liable to service tax under reverse charge mechanism and other services i.e professional services rendered by him beyond the capacity of Non-Executive Director for which he separately raised the invoice on the appellant, would not fall under the category of reverse charge mechanism as per the said Notification.

- Since the service provided by the Director in the personal capacity to the company, which is beyond the function of Director, would be liable to Service Tax at the hands of the Director himself and not by the company; that Board Circular No.115/9/2009-ST dated 31.07.2009 clarifies this issue.
- Although a provision was made in the financial statement for the year 2014-15, the date of actual payment made to Shri Rajiv Sarin during the year 2015-16 is Rs.79,82,000/- , thus the demand is not correct. Further, as per Point of Taxation, the demand of Service Tax of Rs.8,70,242/- is beyond the normal period of 30 months and hence hits by limitation.
- Penalty under Section 78 of the Finance Act is not imposable as the appellant has not committed any fraud, wilful mis-statement, suppression of facts etc.; that penalty under Section 76 ibid is also not imposable as the Section ibid only applies where there is demand of Service Tax for the period prior to 14.05.2015.

<u>Recovery of Rs.58,59,219/- on Works Contract Service provided to Mangalore SEZ.</u>

- As per Scope of Work, the appellant has supplied, laid, tested and commissioned a pipeline which made effluent treatment plant operational as the pipeline carries the effluent from the effluent treatment plant and dispose into the sea; hence the service rendered fulfil the nature of activity mentioned in the Notification No.25/2012-ST and therefore, benefit thereof has been rightly availed.
- The demand was raised under Section 73A of the Finance Act, 1994 which is not correct; that the demand was required to be raised under Section 73 ibid. Provisions of Section 73A is not attracted to their case as they have not collected any Service Tax from Mangalore SEZ after they started availing full exemption under Notification 25/2012-ST dated 20.06.2012.
- The adjudicating authority's finding that the appellant have agreed on the work execution price inclusive of Service Tax, it means that they had charged Service Tax which is not correct as judgement of Hon'ble Tribunal Mumbai [2005 (186) ELT 107] and Kolkatta [2003 (158) ELT 473] has held that even if the contract is inclusive of service tax, even then Service Tax cannot be demanded unless it is separately shown and charged in the invoice.
- The demand of Service Tax ought to have been made within 30 months from the last date of filing of Service Tax return for the relevant period which

expired on 25.04.2017; thus, the entire demand is time barred as the Show Cause Notice was issued on 20.06.2018.

- Audit of the records pertaining to the year September 2009 to December 2014 were conducted by the Departmental officer in three occasions i.e April 2012, December 2013 and February 2015; Therefore, no suppression of facts or omission and commission committed by the appellant.
- Penalty under Section 78 of the Finance Act is not imposable as the appellant has not committed any fraud, wilful mis-statement, suppression of facts etc.; that penalty under Section 76 ibid is also not imposable as the Section ibid only applies where there is demand of Service Tax for the period prior to 14.05.2015.
- They relied on various case laws in support of above arguments.

4. Personal Hearing in the matter was held on 27.02.2020. Shri Deepak Kumar, Consultant, appeared for the hearing and reiterated the submissions made in Grounds of Appeals. He also submitted copies of case laws relied by him and requested to allow the appeal.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Grounds of Appeal and oral submissions made during Personal Hearing. The issues to be decided in the instant case are short payment / non-payment of Central Excise duty/Service Tax as discussed at [i] to [iv] of Para 2.1 above. Therefore, I take the issue one by one for decision.

6. As regards issue mentioned at [i] of Para 2.1 above, relating to short payment/reversal of Cenvat credit amounting to Rs.11,73,310/- for the period pertaining from 2012-13 to 2016-17, I find that the adjudicating authority has confirmed the demand on the grounds that as per Rule 6 (3A) of the CCR, the appellant is liable to pay/reverse an amount equal to Cenvat credit proportionate to the input services used for manufacture of dutiable and exempted goods as well as used for providing dutiable and exempted service, as determined as per formula prescribed under Rule 6(3A) (b), on provisional basis and on final basis under Rule 6(3A) (c) of the CCR; that the appellant has wrongly calculated the amount liable for reversal under Rule 6(3A) (c) ibid and accordingly they are requested to reverse reverse an amount of Rs.11,73,310/- for the period in question. In this context, I find that the appellant has not disputed the audit observation relating to the wrong calculation and short payment/reversal thereof. They disputed that the demand of Rs.6,17,113/- pertaining to the year 2012-13 to 2014-15 is time barred as they had shown the reversal of Cenvat credit in this context in their monthly return regularly; that audit of the records were also conducted by the department in December 2013 and February 2015 for the said period of 2012-13 to 2014-15 and no objections on the subject issue were ever taken which made them to believe the reversal of Cenvat credit has been correctly made.

6.1 I find force in the contention of the appellant. I find from the records that the Department has conducted audit of the records of the appellant pertaining to period from January 2015 to March 2017, vide Final Audit Report No.1449/2017-18 dated 26.03.2018. It is an admitted fact on records that the appellant was proportionately reversing Cenvat credit attributable to exempted goods and services at the end of the each month under Rule 6 of the CCR on provisional basis and on final basis under Rule 6(3A) (c) of the CCR at the end of the year. This was reflected in the relevant returns filed by them. Further, audit of the records pertaining to the earlier period from January 2012 to November 2013, December 2013 to December 2014 were conducted by the Departmental officer on two earlier occasions i.e in December 2013 and February 2015 respectively. However, the issue in question relating to wrong calculation of Cenvat reversal under Rule 6(3A)(c) ibid was not raised at any point of time. In other words, the appellant had made available all the records including periodical returns before the Departmental officer at the time audit. Therefore, there was no fraud, suppression, or wilful-misstatement etc at the end of the appellant. Under the circumstances, invoking extended period of demand under Section 73(1) of the Finance Act, 1944, by reason of fraud, collusion, mis-statement or suppression of fact with intent to evade payment of tax/duty is not correct and not sustainable.

6.2 The appellant, in support of their above contention, has relied on case laws wherein judgments were delivered by the Hon'ble Supreme Court viz. M/s Uniworth Textile -2013 (288) ELT 13; M/s Chemphar Drugs & Liniment -1989 (40) ELT 276; M/s Cosmic Dye Chemicals-1995 (75) ELT 721; M/s Pushpam Pharmaceuticals Company Ltd -1995 (78) ELT 401; M/s Tamilnadu Housing Board-1994 (74) ELT 9. The Hon'ble Supreme Court, in the decisions referred to above, has held that the Department has to establish with independent finding that there has been wilful suppression of fact on part of the assessee; that suppression of facts does not mean any omission. It must be deliberate. The assessee must be deliberately avoiding payment of duty which is payable in accordance with law. They have also cited judgment of Hon'ble Supreme Court in M/s Pragathi Concrete Product (P) Ltd reported at 2015 (322) ELT 819 (SC) wherein the Hon'ble Apex Court has held that there cannot be any case of suppression if the unit has been audited by the Departmental officers several times.

6.3 In view of the fact discussed at para 6.1 above and the decisions of Hon'ble Supreme Court relied by the appellant, the demand by invoking extended period is not sustainable and only the demand pertaining to the normal period prescribed under the Section 11A ibid is sustainable. Accordingly, as contended by the appellant, the amount of Rs.6,17,113/- pertaining to the year 2012-13 to 2014-15 is hit by limitation and required to be set aside. Under the circumstances, the remaining amount of Cenvat credit amounting to Rs.5,56,203/- pertaining to the year 2015-16 to 2016-17 is required to be paid/reversed along with interest as prescribed under Rule 6(3A)(e) of the CCR.

6.4 I find that the adjudicating authority has imposed penalty of 100% duty involved under Section 11 AC of the Central Excise Act, 1944. Since the demand under 11 A by invoking extending period is not sustainable, the penalty imposed under Section ibid is also not sustainable and required to be set aside.

7. As regards Service Tax amounting to Rs.19,26,857/-collected on Agronomy service and not deposited into the Government Account from 2012-13 to 2016-17, as mentioned Para 2.1 [ii] above, I find that the adjudicating authority has demanded/confirmed Service Tax under Section 73(A) of the Finance Act, 1994 along with interest under Section 73 B of the Finance Act. He also imposed penalty under Section 76 and 78 of the Finance Act. It is an admitted fact by the adjudicating authority that the Agronomy Service in question falls under the category of 'Agriculture extension service' as defined under Section 65B (4) of the Finance Act, 1944 and it is covered under 'Negative List' under Section 66 (d) (vi) of the Act ibid. However, the demand was raised and confirmed on the grounds that as per quotation summary submitted by the appellant to M/s GGRC, they had quoted price towards Agronomy charges as inclusive of Service Tax. Accordingly, the adjudicating authority has come to the conclusion that the amount received towards the Agronomy charges is cum tax value i.e inclusive of Service Tax, therefore, it is obvious that the appellant had collected Service Tax amounting to Rs. 19,26,857/- during the relevant period from M/s GGRC but failed to deposit into Government account. On other hand the appellant has contended that in the quotation, the Agronomy charges inclusive of Service Tax used by them would mean that whatever Service Tax leviable at the relevant time will be applicable; that when the said service is under Negative List, attracting Nil rate of Service Tax, no amount was collected from the customers representing as tax. Accordingly, the question payment does not arise under Section 73A ibid. In support of their above contention, I find that they submitted declaration of M/s GGRCL, the recipient of Agronomy service, which clarifies that no Service Tax was paid to the appellant towards Agronomy charges.

7.1 Further, from the records, I find that the adjudicating authority has demanded and confirmed the Service Tax in question on Agronomy charges collected by the appellant only on the basis of quotation summary which shows as "inclusive of Service Tax". No other evidence has been brought on records to conclude that the appellant has received Service Tax in fact from M/s GGRC at least by way of recording statement from the authorized person of M/s GGRC etc or invoice raised by them indicating collection of Service Tax. On going through the quotation, I find that the appellant has expressed the word 'inclusive of service' in other category of service viz. Installation charges, MIS inspection charges and according to the adjudicating authority's contention applicable rate of Service Tax was paid by the appellant in these category. This facts further show that the appellant has collected tax or M/s GGRC has paid the tax only wherever it is chargeable and paid to Government account. It is fact that the quotation shows the

consideration including Service Tax but it does not prove that Service Tax is actually charged and collected. The provisions of Section 73 A of the Act states that the amounts which an assessee collects from his customers representing Service Tax is required to be deposited by him to the credit of Central Government. In the instant case, evidence has not been brought on record to show that there was a collection of certain amount representing tax.

7.2 The appellant has relied on decision of Hon'ble Tribunal in the case of [i] M/s Subah Engineers Pvt Ltd [2005 (183) ELT 362- Chennai]; M/s Poddar Industrial Corporation [2003 (158) ELT 473-Kolkatta]; M/s Tapi RCC [2005 (186) ELT 107-Mum]. In all these decision, The Hon'ble Tribunal has held that the price inclusive duty does not mean that price include duty element when no evidence brought on records to the effect of collection of duty. Therefore, Section 11 D of the Central Excise Act, 1944 is not applicable. Section 11D of CEA is para material to Section 73 A of the Finance Act, 1944. Thus, the case is applicable to Service Tax matter also. I Find that the Hon'ble Tribunl Chennai's decision in case of M/s Everest Industries Ltd [2019 (369) ELT 1569], wherein, identical case has been decided under Section 11 D of Central Excise. The relevant portion is as under:

> "*They have collected a consolidated amount stating it as inclusive of Excise duties. No specific amount was shown as representing excise duty. On this ground also, the demand does not sustain. We have carefully considered the arguments of Ld. D.R. that they should have reduced the price and passed on the benefit of exemption notification to customers which they have not. It is true, from a plain perusal of the records that the appellant has resorted to profiteering by not passing on the benefit of the exemption notification to the customers. While they enjoyed the exemption notification, they have not reduced the prices to customers thereby enhancing their own profits. However, non-profiteering is not what is contemplated in Section 11D of the Central Excise Act. Therefore no demand can be raised or sustained on this ground. Unless any amount is specifically collected representing as excise duty, Section 11D cannot be invoked. Whenever duties are reduced or exempted, a shrewd businessman can pocket the windfall by not reducing his prices and such profiteering is not covered by Section 11D*".

Further, I find that the Hon'ble Tribunal in the case of M/s B L Mehta Construction Pve Ltd [2018 (8) G.S.T.L. 92], has held as under:

> *"Applicability of provisions of Section 73A of Finance Act, 1994 - Confirmation of demand merely on ground of contract inclusive of Service Tax - HELD : Amount of Service Tax not collected and retained by assessee hence no Service Tax payable under impugned Section 73A ibid - Section 73A ibid not invocable and impugned order set aside - Section 73A of Finance Act, 1994".*

7.3 In view of above discussion and decisions of higher judicial authorities supra, I do not find any merit in the impugned order with regard to demand of Service Tax amounting to Rs. 19,26,857/- on Agronomy charges received by the appellant. Under the circumstances, the demand along with interest is not sustainable. Further, since the demand is not sustainable, the penalty imposed is also not sustainable.

7.4 Further, I find that in this issue also, the appellant has raised limitation issue and penalty imposed thereof in respect of demand. As discussed at para 6.1 to 6.3

consideration including Service Tax but it does not prove that Service Tax is actually charged and collected. The provisions of Section 73 A of the Act states that the amounts which an assessee collects from his customers representing Service Tax is required to be deposited by him to the credit of Central Government. In the instant case, evidence has not been brought on record to show that there was a collection of certain amount representing tax.

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> *"They have collected a consolidated amount stating it as inclusive of Excise duties. No specific amount was shown as representing excise duty. On this ground also, the demand does not sustain. We have carefully considered the arguments of Ld. D.R. that they should have reduced the price and passed on the benefit of exemption notification to customers which they have not. It is true, from a plain perusal of the records that the appellant has resorted to profiteering by not passing on the benefit of the exemption notification to the customers. While they enjoyed the exemption notification, they have not reduced the prices to customers thereby enhancing their own profits. However, non-profiteering is not what is contemplated in Section 11D of the Central Excise Act. Therefore no demand can be raised or sustained on this ground. Unless any amount is specifically collected representing as excise duty, Section 11D cannot be invoked. Whenever duties are reduced or exempted, a shrewd businessman can pocket the windfall by not reducing his prices and such profiteering is not covered by Section 11D".*

Further, I find that the Hon'ble Tribunal in the case of M/s B L Mehta Construction Pve Ltd [2018 (8) G.S.T.L. 92], has held as under:

> *"Applicability of provisions of Section 73A of Finance Act, 1994 - Confirmation of demand merely on ground of contract inclusive of Service Tax - HELD : Amount of Service Tax not collected and retained by assessee hence no Service Tax payable under impugned Section 73A ibid - Section 73A ibid not invocable and impugned order set aside - Section 73A of Finance Act, 1994".*

7.3 In view of above discussion and decisions of higher judicial authorities supra, I do not find any merit in the impugned order with regard to demand of Service Tax amounting to Rs. 19,26,857/- on Agronomy charges received by the appellant. Under the circumstances, the demand along with interest is not sustainable. Further, since the demand is not sustainable, the penalty imposed is also not sustainable.

7.4 Further, I find that in this issue also, the appellant has raised limitation issue and penalty imposed thereof in respect of demand. As discussed at para 6.1 to 6.3

above, the demand by invoking extended period is not sustainable on this issue also. Accordingly, demand of Rs.13,92,270/- pertaining to the period from 2012-13 to 2014-15 is hit by limitation. However, in view of above discussion, no Service Tax is payable in the instant issue on merit itself, therefore, the entire demand is set is aside along with interest. The penalty imposed is also not sustainable in absence of any demand. Accordingly, the penalty is also set aside.

8. As regards third issued in respect of recovery of Service Tax amounting to Rs.12,08,254/- under Reverse Charge Mechanism in respect of Professional services received from their Director, as mentioned at par 2.1[iii] above, I find that Shri Rajiv Sarin was appointed as Managing Director of the appellant's company from 12.06.2012 and from 01.01.2015, he was made Non-Executive Director of the company; that on request of the appellant, management consultancy service was rendered by him to the company (no sitting fee). The adjudicating authority has demanded Service Tax on Professional Service rendered by Shri Rajiv Sarin, as per Notification No.30/2012-ST dated 20.06.2012 (Sr.No.5A of table). The appellant has contended that when Shri Rajiv Sarin was appointed as Managing Director of their company, they issued Form 16 was issued to him like any other employee and TDS were also deducted; that since 01.01.2015, as a non-Executive Director, he provided Management Consultancy service in the personal capacity to the company, which is beyond the function of Director and such service is liable to Service Tax at the hands of Shri Rajiv himself and not by the company.

8.1 I find that in terms of Rule 2(1)(d)(EE) of Service Tax Rules, 1994, the person liable for paying tax in relation to service provided or agreed to be provided by a Director of a company to the said company is the recipient of such service. Further, in terms of Notification No.30/2012-ST dated 20/06/2002, as amended vide Notification No. 45/2012-S.T. dated 07/08/2012, in respect of services provided or agreed to be provided by a Director of a company to the said company, 100% of the tax is payable by the person receiving the service.

8.2. It is a fact on records that Shri Rajiv Sarin was appointed as a Managing Director of the company's firm 12.06.2012 as per terms and conditions of the Board of Company and accordingly remuneration was being paid. Like other employees of the company, Shri Rajiv was also issued Form-16 after deducting TDS. From 01.01.2015, he was made Non-Executive Director of the company and he rendered Management Consultancy service to the appellant. The appellant has vehemently contended that no sitting fee was paid to him. Till 01.01.2015, Shri Rajiv Sarin had acted as Managing Director of the appellant and the relation between the appellant and the Director is in the nature of employer and employee, no Service Tax is payable by the appellant on the remuneration paid to the director which is nothing but 'salary' being paid to an employee. Similar issue has been decided by the Hon'ble Tribunal, Mumbai in the case of M/s Allied Blenders and Distillers Pvt Ltd [2019 (24) G.S.T.L. 207 (Tri. - Mumbai)], wherein, it has been held that:

"15.....Answering the question No. 3. Mr. Dalal informed that there were four directors in the company and they were appointed in accordance with the provisions of Companies Act and Regulation of Article of Association of Company for managing day-to-day affairs of the company. Further answering to question No. 4, he has stated that the company are paying them remuneration which is nothing but salary. All the necessaiy deductions on account of Provident Fund, Professional Tax and TDS under Section 192 of the Income Tax Act are made as applicable; also they were issuing Form-16 like it is issued to all other employees. Even in the salary return filed by the appellant company before the Income Tax authorities, the director's names have been included. The company does not pay the director's sitting fee to any of the directors. To discredit the said statement, no contrary evidence was produced by the Revenue to establish that the directors are not involved in the day-to-day function of the Company, but participate only in Board Meetings and consequently paid remuneration".

8.3 From 01.01.2015, Shri Rajiv Sarin had acted as Non-Executive Director of the appellant's company and provided Management Consultancy service to the appellant after raising invoices. The service rent received by the appellant from Shri Rajiv was in his personal capacity and not in the capacity as Director of the appellant company. Under the circumstances, Service Tax was payable by the individual person who was rendering the service and there was no scope of recovering Service Tax from the appellant under the Reverse Charge Mechanism. The charge made by the department that the impugned activity attracted Service Tax under the reverse charge mechanism in terms of Rule 2(d)(EE) of Service Tax Rules, 1994 and Notification No.30/2012-ST as amended is based on the incorrect surmise that the service provided by Shri Rajiv was in his capacity as Director. Further, I find that the CBEC has issued a clarification on independent Directors/Managing Directors under Management Consultancy Service, vide Circular No.115/9/2009-ST dated 31.07.2009. As per the clarification issued by the Board in the said Circular, "the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax". In other words, the service provided by the Director in the personal capacity to the Company, would be payable by the person who rendered such service and not by the company under Reverse Charge Mechanism. I also find that in a similar issue in case of M/s Advance Addmine Pvt Ltd, the Commissioner (Appeals), Ahmedabad vide OIA No.AHM-CXCUS-003-APP-003-18-18 dated 27.04.2018 has also taken a view that the Director himself is liable to pay the Service Tax as an individual service provider. Therefore, the demand for Service Tax and interest as confirmed in the impugned order is not sustainable and is liable to be set aside. Since the demand is set aside, the question of demanding interest under Section 75 of FA and imposition of penalty under Section 76 and 78 of the Act is also no legally sustainable and is set aside.

8.4 In this issue also, the appellant has raised limitation issue and penalty imposed thereof. I find that the period of Service rendered is from April 2015 to December 2015 and the period of audit of records undertaken was from January 2015 to March 2017. Therefore, in the instant issue there is suppression of facts as the facts relating to non-payment under Reverse Charge Mechanism was unearthed

by the Department only at the time of last audit. However, in view of discussion at above para, when the demand is not sustainable on merit, any penalty imposed on the subject issue is also not sustainable.

9. Finally, I take the issue mentioned at para 2.1 [iv] in respect of recovery of Service Tax amounting to Rs.59,58,219/- collected on Work Contract services provided to Mangalore SEZ and not deposited into Government Account. It is the allegation of the Department that the appellant has provided service of supply, laying and commissioning of HDPE Pipeline Conveyor System inside sea to Mangalore SEZ Ltd, as per agreement dated 03.12.2010; that since the work is not exempted under Notification No.25/2012-ST dated 01.07.2012 [E.No.13 (d)], as claimed by the appellant, Service Tax is required to be discharged. It was also noticed that since the appellant has quoted price for the work in question including Service Tax, they collected the Service Tax in question but failed to deposit in Government account, therefore, recovery of Service Tax collected by them to be done under Section 73A of the Finance Act. On other hand, the appellant has contended that as per scope of work, the activity is exempted from payment of Service Tax under Notification 25/2012-ST supra; that accordingly, no Service Tax was collected.

9.1 I find that Entry No.13 (d) of the Notification No.25/2012-ST exempts from payment of Service Tax in respect of Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a pollution control or effluent treatment plant, except located as a part of a factory. As per Scope of Work furnished by the appellant, the work contract involved supply, laying, testing & commissioning of HDPE pipeline conveyance system from landfill point to different point located inside the sea. The work involves Earthwork excavation for pipeline trenches, providing bedding for pipe, refilling pipeline trenches and laying HDPE pipes in land portion, sea shore portion and sea. . From the Scope of Work narrated, it appears the activity in question carried out by the appellant is not related to any pollution control or effluent treatment plant Therefore, their above contention is not acceptable and does not fall under exemption Notification supra.

9.2 Now the issue comes as to whether the appellant has collected Service Tax or otherwise. They contended that till 2012, they were paying Service Tax and discontinued from 01.07.2012 as they have not collected any Service Tax as the Notification No.25/2012-ST supra exempts their activity from payment of Service Tax. As discussed at para 9.1 above, their activities are not exempted from payment of Service Tax. However, on perusal of certain invoices raised by the appellant to M/s Mangalore SEZ, it is clearly mentioned that "No Service Tax is charged in this office due to Notification 25/2012-ST". When no Service Tax was collected from the customs, the question of depositing the amount under Section

73A of the Finance Act, 1994 does not arise, as held by the Hon'ble Tribunal in case of M/s B.L.Mehta Construction Pvt Ltd supra. However, since the activities carried out by the appellant to M/s Mangalore SEZ is taxable and no exemption under Notification supra is eligible to them, Service Tax is to be paid by them on "cum-tax value". However, the Department has wrongly demanded the Service Tax under Section 73A of the Act instead of Section 73(1) of the Act. The appellant has argued that in such circumstances, the demand is not sustainable. I do not find any merit in the said contention of the appellant, looking into various judicial pronouncement where it has been held that assessee is not absolved of liability of duty/tax when demand is not made in show cause notice or incorrect reference to statutory provision or wrong section/Rule is quoted. I rely on some of the case laws viz. [i] Principal Bench of Hon'ble CESTAT's decision in case of Pahwa Chemicals Pvt Ltd [2009 (244) 467-Tri Del]; [ii] Ajmer Aauthomobile [2012(26)STR 19-Del]; [iii] Goyal Sythetics [2009 (233) ELT 65-Tri. Ahm] and [iv] Hon'ble High Court, Calcutta's decision in case of M/s Indus Integrated Information MGMT Ltd [2018 (14) GSTL 24]. In view of above, Service Tax is payable by the appellant in respect of taxable amount received from Mangalore SEZ in respect of Work Contract Service.

9.3 The appellant further contended that the demand beyond normal period prescribed under Section 73 is time barred as their records from September 2009 to December 2014 of the appellant were audited in three occasions, lastly on February 2015 and the Department was well aware of the said activities in question undertaken with Mangalore SEZ; therefore, the entire demand confirmed for the period from 2010 to 2014 is time barred. I find force in the said contention of the appellant. I find that all the facts referred to above are placed before the Department at the time of previous audits undertaken and the Department is supposed to verify the facts at the relevant time of audit. In other words, it is deemed that all the facts were known to the Department by auditing their records including periodical returns. Under the circumstances, the demand by invoking extended period is not sustainable by law, as discussed by me at para 6.1 to 6.3 above. In the instant issue, I find that the period involved is 2010 to 2014 and the Show Cause Notice was issued on 20.06.2018. Therefore, applying provisions of Section 73 of the Finance Act, 1944, for issuing Show cause Notice within normal period 30 months, all the demand confirmed hits by limitation.

9.4 In view of above, the entire demand on the subject issue is not sustainable and required to be set aside. Accordingly, the interest confirmed and penalty imposed is also not sustainable.

10. In view of above discussion, I decide the matter and pass orders as under:

[i] Out of demand amounting to Rs.11,73,316/-confirmed in respect of reversal of Cenvat credit, as mentioned at para 2.1 [i] above, I set aside the demand of Rs. Rs.6,17,113/- for the period pertaining to 2012-13 to 2014-15. The remaining amount of Rs.5,56,203/-

pertaining to 2015-16 to 2016-17 is upheld along with interest. I also set aside the penalty imposed.

[ii] I set aside the demand of Service Tax amounting to Rs.19,26,857/- confirmed along with interest and penalty imposed, in respect of Agronomy services as mentioned at para 2.1[ii] above.

[iii] I set aside the demand amounting to Rs.12,08,254/- confirmed along with interest and penalty imposed in respect of Professional services, as discussed at para 2.1[iii] above.

[iv] I set aside the demand amounting to Rs.59,58,219/- confirmed along with interest and penalty imposed, in respect of Work Contract Service provided to Mangalore SEZ, as discussed at para 2.1 [iv].

11. The appeal filed by the appellant stands disposed of accordingly.

22nd April, 2020

(Akhilesh Kumar)
Commissioner (Appeals)
/04/2020

Attested

(Mohanan V.V)
Superintendent (Appeals),
CGST, Ahmedabad.

To,

M/s Emtelle India Ltd
(presently known as M/s Perixit Industries Ltd),
Survey No.214/1 and 214/2, Virpur Bus Stop,
P O Iyavaya, Ta-Sanand, Dist. Ahmedabad

Copy To:-

1. The Principal Chief Commissioner, CGST, Ahmedabad Zone .
2. The Commissioner, CGST, Ahmedabad-North
3. The Additional Commissioner, CGST, Ahmedabad-North.
4. The Dy./Assistant Commissioner, Sanand Divisin, Ahmedabad North
5. The Assistant Commissioner, System-Ahmedabad North
6. Guard File.
7. P.A.

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