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
☎ 26305065-079 : **टेलेफैक्स** 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211164SW0000222F28

स्पीड पोस्ट

H274 TO H279

क फाइल संख्या : File No : GAPPL/COM/CEXP/375/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-23/2021-22**
दिनाँक Date : **29.09.2021** जारी करने की तारीख Date of Issue : **01.11.2021**

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

ग Arising out of Order-in-Original Nos. **07/Ref/DC/D/2020-21/AKJ dated 14.10.2020**, passed by the Deputy Commissioner, Central GST & Central Excise, Div-IV, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Leamak healthcare Pvt. Ltd., Sarkhej-Bavla Highway, Matoda, Ahmedabad.

Respondent- Deputy Commissioner, Central GST & Central Excise, Div-IV, Ahmedabad-North.

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 पूर्वोक्त 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 मे 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 आदेश 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 है।

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 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.

(6) 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** 11) **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 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

This appeal has been filed by M/s Leamak Healthcare Pvt. Ltd, Near Intas Pharmaceuticals Ltd., Village-Matoda, Taluka-Sanand, District-Ahmedabad [hereinafter referred to as the 'appellant'] against Order-In-Original No. 07/Ref/DC/D/2020-21/AKJ dated 14.10.2020 (hereinafter referred as "impugned order") passed by the Deputy Commissioner, CGST, Division-IV, Ahmedabad North Commissionerate (hereinafter referred to as the "adjudicating authority").

2. The facts of the case, in brief, are that the appellant is engaged in manufacture of Sugar Boiled Confectionary falling under CTH 1704.90 of the Central Excise Tariff Act, 1985 and having Central Excise Registration No. AACCL6538EXM001. Theyhad manufactured sugar confectionary for ITC Ltd., on a principal to principal basis, under the brand name 'Candyman' and cleared the said goods on payment of duty under Section 4A of the Central Excise Act, 1944 in accordance with the changes made in the Union Budget-2002.

2.1 Since the wholesale packages were containing 'Candy man' pieces having weight ranging from 3 to 4 grams each, the appellant was of the view that the products would be subjected to valuation under the provision of Section 4 instead of Section 4A of the CEA,1944. Accordingly, they filed refund claims amounting to Rs. 17,23,325/- for the period from November-2003 to March-2004, Rs. 17,58,379/- for the period from April-2004 to August-2004, Rs. 51,71,580/- for the period from September-2004 to January-2005 and Rs. 54,54,515/- for the period from February-2005 to May-2005.

2.2 The jurisdictional Assistant Commissioner issued SCNs as per details given belowand proposed for rejection of the abovementioned refund claims on the ground that the sub-rule (b) of Rule 34 of the Standard of Weights & Measures(Packaged Commodity) Rules,1977 provided that the MRP provisions do not apply to a package containing individual pieces of less than 10 gms, if sold by weight or measure. Also in view of Board's Circular No. 492/58/99-VCX dated 02.11.1999, it could be said that 'candy man' was assessable under Section 4A of CEA, 1944.

Sl. No	SCN No.& Date	Refund Amount (Rs.)	Period	OIO No.& date
1	2	3	4	5
1.	V17/18-251/R/04 dated 02.06.2004(111/AHD-II/04)	17,23,325/-	Nov '03 to Mar '04	24/R/2004 dated 25.08.2004
2.	V17/18-802/R/04 dated 07.12.2004(60/AHD-II/05)	17,58,379/-	Apr '04 to Aug '04	536/R/2004-05 dated 25.01.2005
3.	V17/18-09/R/05 dated 03.06.2005(246/AHD-II/05)	51,71,580/-	Sept '04 to Jan '05	530/R/2005 dated 15.09.2005
4.	V17/18-18/R/05 dated 14.10.2005	54,54,515/-	Feb '05 to May '05	
	Total Amount	**1,41,07,799/-**		

2.3 All the show cause notices, except Show Cause Notice No. V17/18-18/R/05 dated 14.10.2005 shown at Sr. No. 4 in the table above, have been adjudicated by the jurisdictional Assistant Commissioner of erstwhile Central Excise, Division IV, Ahmedabad-II, vide the respective Order-in-Original as mentioned in column no. 5 of the table at para-2.2 above, wherein the refund claims have been rejected on the ground that the goods were liable for assessment under Section 4A of Central Excise Act, 1944 and at the relevant time, the duty was correctly paid by Appellant.

2.4 Being aggrieved with the above orders [as mentioned in column no. 5 of the table at para-2.2 above], the appellant preferred appeals before the Commissioner (Appeals). The Commissioner(Appeals), vide OIA Nos. 90 to 97/2006(Ahd-II)CE/DK/Commr(A) dated 29.3.2006, set aside the abovementioned OIOs and allowed the appeals by holding that goods were correctly liable for assessment under Section 4 of Act in view of the Hon'ble Tribunal's Order No. A/218-227/WZB/06-C-3 dated 25.01.2006 in case of M/s Swan Sweets (P) Ltd. v. CCE, Rajkot [2006 (198) ELT 565 (Tri. Mum)]. He allowed the appeals with consequential relief of refund of excess duty paid by the appellant, subject to fulfillment of other conditions of Section 11B of Central Excise Act, 1944.

3. In pursuance of the order passed by the Commissioner(Appeals) vide OIA Nos. 90 to 97/2006(Ahd-II)CE/DK/Commr(A) dated 29.3.2006, the Jurisdictional Assistant Commissioner decided the refund claims [as mentioned in table at para-2.2 above] vide OIO Nos. 136/R/2007, 137/R/2007, 138/R/2007 and 139/R/2007 all dated 22.03.2007 wherein he sanctioned the refund claims, but credited the amount to Consumer

Welfare Fund under Section 12C of the CEA, 1944 on the grounds of unjust enrichment.

Sl. No	OIO No. & Date	Refund Amount (Rs.)
1.	139/R/2007 dated 22.3.2007	17,23,325/-
2.	136/R/2007 dated 22.3.2007	17,58,379/-
3.	137/R/2007 dated 22.3.2007	51,71,580/-
4.	138/R/2007 dated 22.3.2007	54,54,515/-
	Total Amount	**1,41,07,799/-**

3.1 Being aggrieved with the above orders dated 22.03.2007, the appellant preferred an appeal before the Commissioner (Appeals) on the ground that the orders were passed on the basis of assumptions, conjectures and without evidence. Department also preferred an appeal before the Commissioner (Appeals) on the ground that the refund orders were issued in pursuance of OIA Nos. 90 to 97/2006(Ahd-II)CE/DK/Commr(A) dated 29.3.2006 wherein several decisions were cited and stated that since there was a difference of opinion between the two benches on identical issue, the matter was referred to Hon'ble President for constituting a Larger Bench to answer the issue involved and hence orders of the Jurisdictional Assistant Commissionerdeserved to be set aside. The Commissioner (Appeals) decided both the appeals vide OIA Nos. 127 to 134/2007(Ahd-II)CE/RAJU/Commr(A) dated 17.10.2007 wherein the review application filed by the revenue was rejected andfor appeal filed by the appellant, it was held that the orders passed by the jurisdictional Assistant Commissioner were non-speaking and remanded it back to the Original Adjudicating Authority for fresh adjudication after giving due regard to the judgements cited by the appellant and facts presented.

3.2. As per the Commissioner(Appeals) order dated 17.10.2007, the Jurisdictional Assistant Commissioner decided the refund claims afresh vide OIO Nos. 1393 to 1396/REFUND/08 dated 29.08.2008 wherein he again held that the appellant could not produce any evidence to prove that incidence of duty paid was not passed onto any other person directly or indirectly and hence the said refund claims filed by the appellant merit sanction but not payable to them and deserved to be credited to Consumer Welfare Fund under Section 12C of the CEA,1944.

3.3 Being aggrieved with the above orders dated 29.08.2008, the appellant preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide OIA Nos. 374/2009(Ahd-II)CE/CMC/ Commr(A)/Ahd dated 29.10.2009 rejected the appeal filed by the appellant.

3.4 Being aggrieved with the OIA dated 29.10.2009, the appellant preferred an appeal before the Hon'ble CESTAT. The Hon'ble Tribunal decided the appeal vide Final Order No. A/12990-12991/2018 dated 18.12.2018 wherein the Tribunal set aside the order dated 29.10.2009 and allow the appeal by way of remand to the adjudicating authority for passing afresh order after verifying all the documents which were submitted before the Hon'ble CESTAT.

4. As per the order and direction of Hon'ble CESTAT vide order dated 18.12.2018, the adjudicating authority vide impugned order dated 14.10.2020 decided the refund claim afresh and ordered to pay the refund amounting to Rs. 26,86,610/- in cash to the appellant, which was earlier sanctioned but ordered to be credited to the Consumer Welfare Fund. Further, the adjudicating authority had not interfered with the balance amount of refund of Rs. 1,14,21,189/- pertaining to the period F.Y. 2003-04 and 2004-05, which was earlier ordered to be credited to the Consumer Welfare Fund. The summary of the findings of the adjudicating authority, in brief, are reproduced below:

- The appellant were not considering the said amount as receivable in their statutory records and therefore the same was not reflected in their balance sheet of 2003-04 and 2004-05. However, it appears that on accounts of after-thought to comply the provisions of unjust enrichment, all of sudden, the claimant shown the entire amount of all the refund claims in the balance sheet of 2005-06. Therefore, the appellant is not entitled for the refunds for the period from November, 2003 to March, 2005 as they failed to prove that burden of tax has not been passed on to the buyer and to have fulfilled and substantiate the provision of unjust enrichment.

- The appellant is found eligible for the cash refund for the period from April, 2005 to May, 2005 amounting to Rs. 26,86,610/- (against Invoice Nos. 6 to 202 of 2005) as the amount belongs to the refund for the relevant period is also appearing in the balance sheet of 2005-06.

5. Being aggrieved with the impugned order dated 14.10.2020, the appellant have filed the present appeal on the grounds that:

- The adjudicating authority has erred in not releasing the amount of interest under Section 11BB of CEA,1944 in respect of refund amounting to Rs. 26,86,610/- sanctioned in cash and relied upon CBEC Circular No. 670/61/2002-CX dated 01.10.2002 and judgements of Hon'ble Supreme Court in case of Ranbaxy Laboratories Ltd Vs UOI [2011 (272) ELT 3 (SC)] and UOI V/s Hamdard (WAQF) Laboratories [2016 (333) ELT 193 (SC)];
- The receivable is one of the element and by mention of it may add to some clarity but no mention of it in balance sheet would not change the financial facts in a balance sheet and it does not mean that the amount is already received or incidence thereof is passed on to buyer or any other person. Therefore, the adjudicating authority has come to incorrect conclusion that because refund claimed amount of Rs. 1,14,21,189/- was not reflected as "Receivable" in Balance Sheets for Financial Years 2003-04 and 2004-05, appellant is not eligible for cash refund, which was earlier sanctioned and credited in Consumer Welfare Fund;
- The adjudicating authority has not correctly appreciated that doctrine of unjust enrichment, is a legal fiction devised under section 12B of Central Excises Act 1944 and relied upon judgement in case of M/s Mafatlal Industries Ltd Versus Union of India, reported in [1997 (89) ELT 247(SC)] as well as Union of India Versus A K Spintex Ltd, reported in [2009 (234) ELT 41(Raj)];
- The presumption as regards passing of duty burden on to the buyers or any other person has been judicially interpreted as being a rebuttable one and the appellant has rebutted such burden cast upon them and relied upon judgements in case of (i) CCE Vs Manisha Pharmoplast Pvt. Ltd [2008 (222) ELT 511 (Guj)], (ii) CCE,

Delhi-III Vs BHP Engineers Ltd [2009 (234) ELT 250(P&H)], (iii) CCE Vs Dabur India Ltd [2014 (304) ELT 321 (All)] and (iv) Bhilwara Processors Ltd Vs CCE, Jaipur [2012 (282)ELT (Tri. Del)];

- The impugned order dated 14.10.2020 has not correctly interpreted or appreciated that verification of passing of the burden of excess duty paid to any other person is a finding of fact, which is required to be asserted based on the evidence, documentary or otherwise, on record;
- The annexure 2 to the agreement, provides the methodology of costing for price fixation from time to time, the price of the impugned goods were worked out and accordingly purchase orders were raised by the buyer ITC Ltd;
- The cost sheets and the relevant purchase orders would reveal that the prices fixed in the purchase orders are determined taking into account the duty liability on the impugned goods as per the provisions of Section 4 of CEA,1944;
- The invoices for clearance/sale of the impugned goods to the buyer ITC Ltd were prepared calculating the duty liability in terms of Section 4A of the CEA,1944, however, the payment against the said invoices were received as per the agreed price under purchase order based on Section 4 assessment and submitted following documents in support of their defense;
    - Extract of the ledger account of the buyer in the books of account, certificate issued by auditors M/s H Jamnadas & Co, CA, Rajkot certifying that the appellant neither received nor collected the additional duty liability arising on account of difference between Section 4 and Section 4A assessment, copies of bank account statement for the period from March-2003 to May-2005;
- The documentary evidences on records clearly establish that the duty incidence for which refund claims have been filed, has not been passed on by the assessee to their buyer ITC Ltd and to any other person by the appellant. Thus the presumption of unjust enrichment in terms of Section 12B of the Central Excise Act, 1944 has been successfully rebutted by the appellant in the facts of this

case, which makes appellant eligible for release of cash Refund of Rs. 1,14,21,189/-,as claimed by the appellant in the facts of this case;

- They relied upon various judgements in support of their defence and stated that if the proof is produced that the incidence of duty has not been passed on to the buyers by producing the CA's certificate, in such cases, doctrine of the unjust enrichment would not be applicable.
- The adjudicating authority has not correctly appreciated or disputed the following submissions made by the appellant:-

  a) *The correct factual position is that the Agreement between the appellant with their Buyer was on a Buy-Sell Model, on a principal-to-principal basis. This factual position is verifiable from the copy of Agreement dated 24.1.2003 enclosed to the Appeal.*

  b) *The marketing pattern of the impugned goods by ITC Ltd. clearly indicate that neither the appellant nor the Buyer were in contact with the ultimate consumer. The goods in question were sold by ITC Ltd to their customers on their own price considering prevailing markets prices.*

  c) *The documentary evidence produced in form of (monthly cost sheets) to show that the price of the goods was always determined in terms of assessment under Section 4 of the Central Excise Act, 1944.*

- When the appellant produced all required documentary evidences to prove that incidence of excess duty paid which is claimed as refund was born by Appellant and such incidence of duty was not passed on to buyer M/s ITC Ltd or any other person. The burden to prove contrary has been shifted to Revenue and impugned order has not discharged such heavy burden case upon them to prove that unjust enrichment is applicable. Even if refund claimed amount is not reflected as receivable in the Balance Sheet, it does not prove that revenue has discharged its burden to prove that unjust enrichment is applicable. Balance Sheet or any such receivable account ledgers are not mandatory documents for claiming any refund of duty.
- When claimed amount is not reflected in Balance Sheet as receivable, statutory implication thereof would be that cash refund, when allowed will be added as Income in Balance Sheet for that year. However, when the amount is not shown as receivable, it will not prove that the incidence of such duty was passed on to buyer or any other person.

6. Personal hearing in the matter was held on 18.06.2021 through virtual mode. Shri P.P.Jadeja, Consultant, attended the hearing on behalf of the appellant. He re-iterated submissions made in the appeal memorandum.

7. I have carefully gone through the facts of the case available on records, grounds of appeal in the Appeal Memorandum as well as oral submissions made at the time of personal hearing. I find that the issues to be decided in the present case are as under:

(i) Whether the appellant is entitled for grant and release of Refund amounting to Rs.1,14,21,189/- in their favour, which is credited to Consumer Welfare Fund by the adjudicating authority vide the impugned order on the ground of unjust enrichment or otherwise?

(ii) Whether the appellant is entitled for interest under Section 11BB of the Central Excise Act, 1944, in respect of the refund amounting to Rs. 26,86,610/- granted to them by the adjudicating authority vide the impugned order?

8. It is observedfrom the records that the appeal filed by the appellant before the Hon'ble CESTAT, Ahmedabad was decided vide its Final Order No. A/12990-12991/2018 dated 18.12.2018, wherein the case was remanded back to the adjudicating authority with following remarks:

> *"4. Considering the submissions made by both the sides and on perusal of the records, we find that on inviting our attention to all the documents such as balance sheet, wherein the amount of refund was shown as receivable in the balance sheet for the year of 2006. In the ledger they have shown the debit amount as shown in the invoice value but the amount collected from the buyers is lesser by the amount of differential duty. They have also produced CA Certificate wherein it was certified that the amount of differential duty was not collected from the buyer and the same was not passed on any other person. We find that all these documents are very vital documents to prove that whether the incidence of refund amount was passed on any other person or not, however on going through the findings of both the lower authorities, they have discarded all the documents by giving no other reason. They have not commented anything on the factual position of the accounting as regard the treatment given to this differential duty. The authorities have also not considered the judgment cited before them by the appellant. Since the verification of the entire books of account and other documents referred before us has to be made which has not yet verified by the lower authorities. It is also observed that in the first proceeding of the refund before adjudicating authority, all the documents were verified and refund was sanctioned.*

5. In the interest of justice we set aside the impugned order and allow the appeal by way of remand to the adjudicating authority for passing afresh order after verifying all the documents which were submitted before us."

9. As per the Hon'ble CESTAT, Ahmedabad's Order dated 18.12.2018, the adjudicating authority has examined the matter afresh and decided the refund claim vide impugned order dated 14.10.2020 and sanctioned refund claim amounting of Rs. 26,86,610/- in cash to the appellant from the total Refund claim and did not interfere for the balance amount of Rs. 1,14,21,189/-, pertaining to the refund for the period of Financial Year 2003-04 and 2004-05, which is ordered to be credited to the Consumer Welfare Fund on the grounds that the said amount were not shown as 'Receivables' in the balance sheets for respective period and appellant failed to prove that burden of tax has not been passed on to buyer and to have fulfilled and substantiated the provision of unjust enrichment.

10. It is observed that there is no dispute regarding appellant having paid excess amount of duty and consequently they were eligible for refund. The only dispute remains that the appellant has failed to establish that they had not passed on the burden of duty to buyers and hence, the refund sanctioned was credited to Consumer Welfare Fund for failing to cross the bar of unjust enrichment. Therefore, in the present case, I find that the issue of "Unjust enrichment" is required to be examined.Accordingly, it would be proper to first examine the relevant provision of Section 12B of the Central Excise Act, 1944 which is reproduced below:

> ***"Section 12B. Presumption that the incidence of duty has been passed on to the buyer.*** *- Every person who has paid the duty of Excise on any goods under this Act shall,* ***unless the contrary is proved by him,*** *be deemed to have passed on the full incidence of such duty to the buyer of such goods."*

10.1 Accordingly, the abovementioned provision of Section 12B ibid has made it mandatory for every assesse seeking refund of duty to prove that they had not passed on the burden of the duty to the buyer or to any other person. In the present case, the appellant contended that merely not reflecting the refund claimed amount as "Receivable" in their Balance Sheet, does not establish or prove that the amount for which refund is claimed has been recovered from their buyer i.e. M/s. ITC Ltd or

any other person. The appellant has further contended that in terms of the agreement dated 24.01.2003 between the appellant and their buyer ITC Ltd., the said buyer has paid amount of duty as per the agreed price on value in terms of Section 4 of the Central Excise Act, 1944 whereupon the appellant has claimed refund of the difference of duty paid under Section 4A of the said act.

10.2 On going through the impugned order and particularly, facts mentioned at para-14 of the same, I find it undisputed that the sales made to the buyer have been recorded in the Ledger Account maintained by the appellant for the buyer i.e. M/s. ITC Ltd. for the period for F.Y. 2003-04 and F.Y. 2004-05 as per the sale invoices raised on the buyer, which are on the basis of Section 4A assessment only and the said practice was continued throughout the said period. However, the appellant contended that the payments received from the said buyer are in terms of prices agreed as per purchase orders, which are based on Section 4 assessment only.

10.3 Further, it is observed as per the appellant's contention that on 1st June 2005, based on Auditors recommendation, an amount of Rs. 1,41,07,799/- being the differential duty (difference between the duty paid under Section 4A and payable under Section 4) paid under protest and claimed from the department by way of refund, has been transferred to a separate account viz. "Refund Claim with the Excise Department". As regards the said contention, I find that the appellant has not produced any details whether the same amount was being reflected as due amount in the ledger account for the said buyer in the books of accounts of the appellant at that point of time and if so, what kind of accounting treatment was givento the said amount to finally conclude the account with the buyer to that extent.Further, as per the facts mentioned at para-14 of the impugned order, it is also observed that the said appellant as submitted in para-4.5 of their written submission dated 14.08.2020 also stated that "*they had received certain advances to meet working capital requirements from their buyer, viz. M/s. ITC Limited, which were incorrectly accounted in Debtor's Ledger. This accounting treatment was again objected to by the Auditors and they were advised to account the same as a liability and not set off the same in the Debtor's Ledger. Accordingly, the amount was rightly transferred to the Creditor's*

Ledger. Consequently, the said advances received from the buyer, viz. M/s. ITC Limited were shown in the Balance Sheet for the financial year ended on 31st March, 2006 as a liability."

Accordingly, I find that the above mentioned acts of the appellant by simultaneously (i) making entry of an amount of Rs. 1,41,07,903/- as "Receivable (Refund claim with Excise Department)" and (ii) making entry of certain amounts received from the buyer, viz. M/s. ITC Limited as a liability showing it as 'advances' in the year 2005-06, also substantiate the view of the adjudicating authority as mentioned in para-19 (e) of the impugned order that "to cover up the provisions of unjust enrichment in the documents in particular in balance sheet of 2005-06 entries were made on the part of the claimant.", particularly in absence of any clear documentary evidences produced by the appellant in support of their contention.

10.4 Further, I find that the appellant has relied upon the judgment of Hon'ble High Court of Rajasthan in case of Union of India Versus A. K. Spintex Ltd [2009 (234) ELT 41 (Raj)], relevant part of which is reproduced as below:

> *"**10.** So far as Section 12B is concerned, it only places burden of proof on the assessee, by enacting the presumption, against him, and does not do anything beyond it. The burden placed on the assessee, by Sec. 12B, obviously, is a rebuttable one, and the assessee may lead evidence in rebuttal, by proving issuance of debit note and credit note, likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note, like Cheque, or Draft, for refund of the amount, or there may be case, where goods are sold on credit, and **while making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller, and if all those facts are shown and proved, the burden placed on the assessee,** by Sec. 12B, would shift on the revenue, then, it is required for revenue, to prove, either that the theory projected by the assessee, is fake and false, or that the burden has actually been passed on. Once the assessee leads reliable evidence, about his having not passed burden on the purchaser, and revenue fails to rebut that evidence, the presumption enacted by Sec. 12B, stands sufficiently rebutted, and cannot survive ad infinitum.*

In the present case, the appellant has not submitted at any point of time either before the adjudicating authority or during the appeal proceedings that any kind of debit note or credit note have been issued subsequent to the sale taken place by them to the buyer i.e. ITC Limited. Further, the appellant has not been able to produce any substantial documentary evidences to prove their contention that they have not

received payment of the amounts for which refund is claimed by them from the buyer i.e. ITC Limited has not made the payment of the amounts for which the appellant has claimed refund. Accordingly, I find that the ratio of the above mentioned judgment would not be applicable in the present case, as facts of the present case are different. I have also gone through the other judicial pronouncements relied upon by the appellant. I find that the facts of the said cases are not similar to the present case and hence, ratio of the said judgments cannot be made applicable to the present case.

10.5 In a nutshell, I find that the Appellant has claimed that there is no unjust enrichment by them, whereas the adjudicating authority has held that the Appellant is not eligible for the cash Refund which was credited to Consumer Welfare Fund since the difference between duty payable u/s 4 and paid u/s 4A ibid has not been reflected in the Balance Sheet as "Receivable" for the FY 2003-04 and 2004-05. On going through the facts of the present case, it is observed that transaction between Appellant and M/s ITC Ltd have been continued for a long period of over three years andaccordingly, all expenses and receipts for such manufacture etc should have been reflected in the Balance Sheets. Therefore, when the amount of amount is not reflected in the Balance Sheets for FY 2003-04 and 2004-05, as they have been reflected for 2005-06, it can be inferred that the said amount has otherwise been included in the value of the goods manufactured and cleared to the said M/s ITC Ltd and has been recovered from them in any other manner or else the same should have been reflected as amount "Receivable" as refund amount claimed. Merely by producing CA Certificate or letters from M/s ITC Ltd, Appellant has not discharged the burden cast on them to prove that the incidence of duty has not recovered from M/s ITC Ltd or any other person, as required under Section 12B of the Central Excise Act 1944, particularly when the duty paid under Section 4A of CEA, 1944 was being reflected in the relevant Invoices. Further, I also find that the adjudicating authority, as discussed in para-19 of the impugned order, has also examined theinvoices produced by the appellant pertains to the F.Y of 2005-06 alongwith the details of the payment received to verify the contention of the appellant that they have not passed the burden of tax onto any other person and accordingly, he accepted the contention of the appellant as

regards the eligibility for the refund claim to the extent of the month ofApril & May, 2005 for which entries were available in the respective year balance sheet i.e. 2005-06.

In view of the above, I find that the Adjudicating Authority has examined all these aspects in its totality and the findings that "*the claim for Refund amounting to Rs.1,14,21,189/- of the Appellant is hit by the bar of Unjust Enrichment as they have not discharged the burden to prove that the incidence of duty paid by them has not been recovered from any other person in terms of section 12B of Central Excise Act 1944*" are just and fair and,hence, need no further interference in the impugned order to that extent.

11. Further, I also find that the appellant has made contention that the adjudicating authority has erred in not releasing the amount of interest under Section 11BB of CEA,1944 in respect of refund amounting to Rs. 26,86,610/- sanctioned in cash. They also relied upon the following Circular/Judgment in support of their contention:

- CBEC Circular No. 670/61/2002-CX dated 01.10.2002;
- Judgements of Hon'ble Supreme Court in case of Ranbaxy Laboratories Ltd Versus UOI [2011 (272) ELT 3 (SC)];
- Judgment in case of Union of India VersusHamdard (WAQF) Laboratories [2016 (333) ELT 193 (SC)]

11.1 On going through the impugned order, I find that the adjudicating authority has ordered to pay the refund amount of Rs. 26,86,610/- in cash to the appellant which was earlier sanctioned but credited to the Consumer Welfare Fund, on the grounds of 'Unjust Enrichment'. Further, it is observed that the adjudicating authority has neither paid any amount to the appellant towards 'interest' in terms of Section 11BB of CEA,1944 nor mentioned any findings whether the appellant is entitled for interest on the said amount of refund under the provisions of Section 11BB of CEA,1944 or otherwise.

11.2 As regards the issue of interest on refund amount granted to the appellant, I find it proper to go through the provisions of Section 11BB of the Central Excise Act, 1944 which is reproduced as below:

"***SECTION 11BB. Interest on delayed refunds.*** — *If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not*

refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the Official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :"

11.3 I have also gone through CBEC Circular No. 670/61/2002-CX dated 01.10.2002 and find that the board has clarified at para-2 of the same as below:

"2. In this connection, Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest."

11.4 Further, the appellant has relied upon the judgment Hon'ble Supreme Court in case of Ranbaxy Laboratories Ltd Versus UOI [2011 (272) ELT 3 (SC)] wherein I find that the Hon'ble Supreme Court held as below:

*"The challenge in this batch of appeals is to the final judgments and orders delivered by the High Court of Delhi in W.P. No. 13940/2009 and the High Court of Judicature at Bombay in Central Excise Appeal Nos. 163/2007 [2008 (229) E.L.T. 498 (Bom.)] and 124 of 2008. The core issue which confronts us in all these appeals relates to the question of commencement of the period for the purpose of payment of interest, on delayed refunds, in terms of Section 11BB of the Central Excise Act, 1944 (for short "the Act"). **In short, the question is whether the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made?***

15. In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made."

11.5 Further, the appellant has also relied upon the judgment of Hon'ble Supreme Court in case of Union of India Versus Hamdard (WAQF) Laboratories [2016 (333) ELT 193 (SC)] wherein I find that the Hon'ble Supreme Court held as under:

"21. As far the said principles are concerned, they are binding on us. But the facts in the case at hand are quite different. It is not a case where the

assessee is claiming automatic refund. It is a case that pertains to grant of interest where the refund has been granted. The grievance pertains to delineation by the competent authority in a procrastinated manner. In our considered opinion, the principle laid down in Ranbaxy Laboratories Limited (supra) would apply on all fours to the case at hand. It is obligatory on the part of the Revenue to intimate the assessee to remove the deficiencies in the application within two days and, in any event, if there are still deficiencies, it can proceed with adjudication and reject the application for refund. The adjudicatory process by no stretch of imagination can be carried on beyond three months. It is required to be concluded within three months. The decision in Ranbaxy Laboratories Limited (supra) commends us and we respectfully concur with the same."

11.6 I also find that Hon'ble CESTAT, New Delhi in a similar case of National Engineering Industries Limited Versus Commissioner of Central Excise & Customs, Jaipur [reported as 2019 (028) GSTL 0264 (Tri. Del)] also held that *"in view of the law explained by the Hon'ble Supreme Court, it appeared that even where the refund is granted by the appellate authority, interest under Section 11BB shall be payable with effect from the expiry of three months from the date of original application. Accordingly, this ground is allowed in favour of the appellant. The adjudicating Authority is directed to pay interest w.e.f. three months from the date of expiry of the date of original refund application, being 29-1-2007".*

11.7 In view of the provisions of Section 11BB of the Central Excise Act, 1944 and the judgments of the Hon'ble Supreme Court as well as Hon'ble Tribunal as discussed above, I find it clear that "any applicant is entitled for interest [at the rate time being fixed by the Central Government for the relevant period] on the amount of duty which has been refunded under sub-section (2) of Section 11B of the act, after expiry of three months from the date of receipt of application under sub-section (1) of the said Section". Further, I also find that the Board also clarified vide the Circular dated 1.10.2002 that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyonda period of three months.

11.8 Accordingly, I find in the present case that the appellant is entitled for interest [at such rate fixed by the Central Government, by the notification in the official gazette] on the amount of Rs. 26,86,610/- granted and refunded to them by the adjudicating authority vide the impugned order,from the date immediately after the expiry of three months from the date of receipt of application of refund submitted by the

appellant to the proper officer [in terms of the provisions of Section 11B (1) of the Central Excise Act, 1944] till the date of refund of such duty to them. Hence, I find that the contention of the appellant to that extent is legally correct.

12. Accordingly, as discussed in para-10.5 above, I find that the contention of the appellant for refund of Rs. 1,14,21,189/- which has been held by the adjudicating authority as hit by bar of 'Unjust Enrichment' and credited to the Consumer Welfare Fund, is not sustainable. Hence, the impugned order is upheld and the appeal filed by the appellant to that extent is accordingly rejected.

13. Further, as discussed in para-11.8 above, the contention of the appellant for interest on the refund amount of Rs. 26,86,610/- is found legally correct and hence, the appeal filed by the appellant to that extent is allowed. The adjudicating authority is also directed to determine the amount of interest payable to the appellant, under Section 11BB of the Central Excise Act, 1944 on the basis of the legal position, as discussed above andthe amount, if any, so worked out, shall be paid to the appellant.

14. The appeals filed by the appellant stands disposed of in above terms.

29th September, 2021

(Akhilesh Kumar)
Commissioner (Appeals)
Ahmedabad
/09/2021

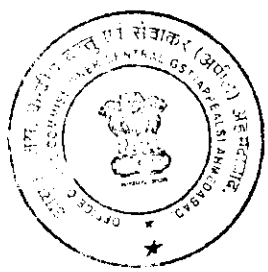
Attested

(M.P.Sisodiya)
Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D
To
M/s Leamak Healthcare Pvt. Ltd,
Near Intas Pharmaceuticals Ltd. Vill -Matoda,
Tal-Sanand, Dist-Ahmedabad

Copy to:

1. The Principal Chief Commissioner, Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Asstt/Dy Commissioner, CGST, Division-IV, Ahmedabad-North.
4. The Assistant Commissioner, System-CGST, Ahmedabad-North.
5. Guard File.
6. P.A. File.



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
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211064SW000000CE02

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1082, 1084,1087/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad 3622 To 3633

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-20 to 22/2021-22**
दिनाँक Date : **23.09.2021** जारी करने की तारीख Date of Issue : **01.10.2021**

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

ग Arising out of Order-in-Original Nos. **15/ADC/2020-21/MSC dated 14.09.2020**, passed by Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Sl. No. 01. - M/s. Wagad Infraprojects Pvt. Ltd., Block No. 765, Sarkhej to Sanand Road, In lane of Hotel Sarvottam, Nr. Bharat Farm House Gibpura, TA: Sanand, Ahmedabad.

Sl. No. 02. – Shri Ankush Jain, Director of M/s. Wagad Infraprojects Pvt. Ltd.,

Sl. No. 03. – Shri Brijendra Pravinsinh Vaghela, Accounts Manager of M/s. Wagad Infraprojects Pvt. Ltd.

Respondent- Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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 :

(i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले 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 ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित की 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) रिवेजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

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

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

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

(क) उपरोलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों 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 आदेश 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 है।

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 a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इस 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 (कार्यविधि) 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 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 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 appeals have been filed by M/s. Wagad Infraprojects Pvt Ltd, Block No. 765, Sarkhej to Sanand Road, In lane of Hotel Sarvottam, Nr. Bharat Farm House, Gibpura, Tal: Sanand, Ahmedabad, Shri Ankush Jain, Director of M/s. Wagad Infraprojects Pvt Ltd, and Shri Brijendra P. Vaghela, Accounts Manager of M/s. Wagad Infraprojects Pvt Ltd (hereinafter referred to as the appellants) against Order in Original No. 15/ADC/20-21/MSC dated 14-09-2020 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST, Ahmedabad North [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant firm, having Central Excise Registration No. AABCW1489KEM003, is engaged in the manufacturing of Ready Mix Concrete (hereinafter also referred to as RMC). They are having manufacturing plants at Gandhinagar, Sanand and Vadodara. They were also providing taxable services viz. Works Contract Service but were not registered with the Service Tax Department. Intelligence was gathered by the Directorate General of Goods and Service Tax Intelligence, Surat Zonal Unit (hereinafter also referred to as DGGI) that the appellant firm is engaged in the manufacture of RMC falling under CH 38245010 and is not registered with Central Excise and not paying Central Excise duty. Investigation was carried out against all three units of the appellant firm. The investigation against the appellant firm located at Sanand was carried out by DGGI, Vadodara and the firm paid differential Central Excise duty alongwith applicable interest and penalty. The evasion of Service Tax for the period from April, 2014 to June, 2017 was also investigated.

3. The appellant firm were receiving work orders for providing and laying of RMC involving both supply of RMC as well as service. They were receiving composite contracts for supplying and laying RMC. The service part includes laying of RMC using a concrete pump, finishing the concrete with machineries/tools, labour etc. and in the contracts it was clearly mentioned that the rates are under the conditions of Works Contract. The service provided by the appellant firm appeared to be classifiable under the taxable service viz. Works Contract Services. The appellant firm was showing the details of works contract sales separately in their ledger under the column Works Contracts where they have also paid works contract tax instead of VAT. The appellant suppresses the above facts regarding providing of Work Contract

services from the Service Tax department. They had neither obtained Service Tax registration from the department nor paid Service Tax. The total Service Tax so evaded by the appellant firm was computed at Rs.1,94,47,481/-.

4. The documents submitted by the appellant firm to DGGI in the course of the investigation indicated that Work Order issued to them is for supply of RMC under Work Contract and the responsibility of the appellant firm includes supply of RMC, transporting, laying using concrete pump, finishing the concrete with their machineries, supply of all material, labour, tools, plant etc. It is also clearly mentioned in the Terms & Conditions that the rates are under the conditions of Works Contact.

5. In his statement, the Authorised Signatory of the appellant firm, Shri Brijendra Pravinsinh Vaghela, confirmed that wherever VAT paid is shown as Nil in sales invoices, the supplies are under Works Contract and for such supplies the contract entered into with the buyers is for concrete providing and laying and finishing at site of the buyers. In his statement, the Director of the appellant firm, Shri Ankush Jain, stated that Works Contract Sales related to the contract entered into with the party which are covered under Works Contract i.e. in such type of contract along with supply some service portions is also involved and as it was not possible for them to bifurcate the supply and service portion they were paying Central Excise duty on full amount and they were not paying Service Tax under Works Contract. He further clarified that in cases of contracts covered under Works Contract they were paying Works Contract Tax and no VAT was payable on such contract; wherever VAT paid has been shown as Nil in their sales invoices, such suppliers are under Works Contract and for such supplies the contract entered into by them with the buyer was for providing of concrete and laying and finishing at the site of the buyer.

6. A notice bearing F.No. DGGI/SZU/36-32/2019-20 dated 22.07.2019 was issued to the appellant firm calling upon them to show cause as to why : i) The service provided by them viz. transportation, laying, finishing and mixing should not be classified as Works Contract Services under the category of Declared Services under Section 66(E)(h) of the Finance Act, 1994 and the value received on account of sale of RMC should not be treated as taxable value for computing Service Tax liable thereon. ii) Service Tax amounting to Rs.1,94,47,481/- should not be demanded and recovered from them by invoking the extended period as per proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. iii) Interest should not be demanded from them

under Section 75 of the Finance Act, 1994 and iv) Penalty under Section 77 and 78 of the Finance Act, 1994 should not be imposed upon them.

6.1 The Director and the Authorised Signatory of the Appellant firm were also issued notice bearing F.No. DGGI/SZU/36-32/2019-20 dated 22.07.2019 calling upon them to show cause as to why Penalty should not be imposed upon them under Section 78A of the Finance Act, 1994.

7. The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has :

A) ordered classification of the service provided by the appellant firm viz. transporting, laying, finishing and mixing be classified as Works Contract Services under the category of Declared Services under Section 66(E)(h) of the Finance Act, 1994 and the value received on account of sale of RMC to be treated as taxable value for computing Service Tax;

B) Confirmed the demand of Service Tax amounting to Rs.1,94,47,481/- as per the proviso to sub-section (1) of Section 73 of the Finance Act, 1994;

C) Ordered charging of interest under Section 75 of the Finance Act, 1994;

D) Imposed penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994;

E) Imposed penalty of Rs.1,94,47,481/- under Section 78 of the Finance Act, 1994;

F) Imposed penalty of Rs.1,00,000/- on Shri Ankush Jain, Director of the appellant firm Under Section 78 of the Finance Act, 1994;

G) imposed penalty of Rs.50,000/- on Shri Brijendra Pravinsinh Vaghela, Accounts Manager and Authorised Signatory of the Appellant firm under Section 78 of the Finance Act, 1994.

8. Aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

i) That the adjudicating authority has failed to appreciate that the entire basis for treating the transaction as Works Contract is the purchase orders vide Purchase Order dated 13.09.2016 from M/s.Virasat Buildcon and Purchase

Order dated 30.11.2015 of M/s.A.D.Corporation. These contracts apart from supply of RMC stipulate other additional requirements of transporting, laying, using concrete pump and finishing concrete with machineries. When the RMC is to be placed at the Rooftop or first floor then only the appellant is required to discharge the delivery by using a pump. The pumped out RMC is also required to be equally distributed on the given floor as it cannot be discharged for technical reasons on a single spot in the form of a heap. The appellant have not used any plant or machinery or tools to carry out any process of construction etc. other than the aforesaid process of laying of RMC by concrete pump.

ii) They have not deployed any manpower like mason, concrete punner, plasterer or similar such tradesman/artisans or skilled workers except six pure labourers who handled the aforesaid work of laying RMC by pumping.

iii) The Purchase Order shows a Works Contract for concrete providing and laying because under the Sales Tax/VAT laws the terms 'Works Contract' is very loosely defined. As per the Sales Tax Act, Works Contract is defined as : " Work Contract" means a contract for carrying out any work which includes assembling, construction, building, altering, **manufacturing, processing**, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property".

iv) In the Gujarat VAT Act, 2003 there is no definition of Works Contract but it is covered under Composition Tax:" The lump sum tax reduced under Section 14A for Works Contract is notified vide Notification No. (GHN-88) dated 17.08.2006.

v) The definition of Works Contract in the VAT law is very wide which includes among others even manufacturing and processing work. On the other hand, the definition of Works Contract in the Service Tax law is poles apart and does not include or apply to a case of manufacturing or processing. As per the Service Tax law, the dominant activity has to be a service simplicitor. Consequently, the mere fact that an activity is classified as Works Contract under the VAT law cannot *per se* be a conclusive factor to treat the contract as Works Contract Service.

vi) The impugned process of laying out the RMC by pumping and placing it at the given floor area is only an integral part of delivery that is required solely due to the peculiar nature of the product and its shelf life. The dominant activity in the whole transaction is that of manufacture and sale of RMC on

FOR destination basis. Therefore, such a predominant activity of manufacture cannot cease to be so, just because the manufacturer performs some extra work for due discharge of the goods in the extant peculiar situation.

vii) There are direct judgements on the issue rendered by the Hon'ble Tribunal and upheld by the Hon'ble Supreme Court :

a) 2012 (25) STR 357 (T) in the case of GMK Concrete Mixing Pvt Ltd Vs. CST

b) 2016 (44) STR 274 (Tri.-Del) in the case of M/s.Ultratech Concrete Vs. CST :

c) 2016 (42) STR 866 (T) in the case of M/s.Vikram Ready Mix Concrete (P) Ltd Vs. CST and 2017 (8) TMI 1308 – CESTAT, Chennai in the case of CST Vs. RMC Readymix (I) Pvt Ltd

d) 2018 (11) TMI 1470 – CESTAT, Chennai in the case of CCE Vs. Larsen & Toubro Ltd

e) 2011 (8) TMI 1037 – Karnataka HC in the case of ACC Ltd Vs. State of Karnataka.

viii) The activity of manufacture is covered by the negative list of services vide clause (f) of Section 66D of the Finance Act, 1994. According to the charging Section 66D, levy of service tax is mandated on all services, other than services specified in the negative list.

ix) The Revenue proposes to treat the entire transaction as falling under Works Contract Service, such an attempt would go diametrically repugnant with the provisions of Section 2 (f) and Section 3 of the Central Excise Act, 1944 read with CET Heading 38.24 which together mandate levy of excise duty on RMC, being an excisable goods.

x) When the appellant have already paid full Central Excise duty on the full value of RMC including the pumping and laying charges, the demand of service tax on the very same value and very same activity will amount to double taxation.

xi) The impugned activity of manufacture and supply of RMC by pumping and laying cannot be categorized and taxed to Service Tax under Works Contract for the following reasons :

1) The definition of Works Contract Service as provided in Section 65 (105) (zzzza) very categorically specifies 5 types of services which can be classified as Works Contract Services. The appellant is not constructing i.e. not creating or raising or building any civil structure or a building or a part thereof..

2) The aforesaid definition clearly indicates that a Works Contract Service should basically be a service contract simplicitor and must fall under the 5 taxable services specified in clause (zzzza). The impugned services of pouring, pumping and laying of concrete do not fall in any of the 5 taxable services.

3) Neither the Show cause Notice nor the impugned order indicates the specific sub-clause of 65 (105) (zzzza) under which the disputed activity would fall, according to the Revenue.

4) Mere payment of Sales Tax/VAT under Works Contract cannot bring the activity under the Works Contract Service, since for the purpose of Service Tax the definition given in the Finance Act, 1994 alone would be applicable.

5) The impugned activity as a whole involves as a predominant object, manufacture of RMC with condition of door delivery by pumping. The alleged service portion forms far less than 5% of the contract value.

6) Valuation of Works Contract is provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. Valuation has been adopted by the department under sub-clause (A) of clause (ii) of Rule 2A. According to this provision, in the case of works contract entered into for execution of "original works", service tax shall be payable on 40% of the total amount charged for the works contract.

7) However, there is no case of any construction in the present case because by mere supply of RMC at the place of construction, the appellant cannot be said to have erected or built a construction. In other words, there is no original work and even if mere pumping and laying of RMC is considered as construction, then also the exclusive value of RMC cannot be considered as attributable to the whole original construction.

xii) The adjudicating authority has failed to appreciated that according to Section 67 read with Rule 2A (i) of the Service Tax (Determination of Value) Rules, 2006 the value of the service portion in execution of Works

Contract shall be the value of the service portion less the property in goods transferred. The value of RMC is already available on record and they are charging the additional delivery cost of Rs.200 to Rs.300 per M^3. Therefore, even assuming that the impugned activity of the works contract service, the service tax recoverable is wrongly calculated which should be re-determined by taking value of the service portion only.

xiii) The adjudicating authority has failed to appreciate that the appellants are only supplying Ready Mix Concrete at their customers construction site in their vehicles. Even if there are some ancillary and incidental activities of pouring, pumping of concrete from transit mixtures and laying of concrete, such activities cannot be treated as service as the primary and dominant object of the contract with the buyers was to manufacture and supply RMC on FOR delivery basis. There was no taxable service involved in the supply of RMC.

xiv) The quantity and value of RMC cleared during the relevant period without pumping & laying is approximately 40 to 50% of the total turnover whereas the remaining 50 to 60% is for the quantity of RMC cleared with the extended delivery steps as aforesaid.

xv) The purchase order dated 13.9.2016 of M/s.Virasat Buildcon is wrongly taken as the order dated 14.09.2016 mentioned in Invoice No. RPS/EX/0705 dated 27.09.2016. The said invoice is against Purchase Order dated 14.09.2016 and not against Purchase Order dated 13.09.2016 which is scanned and printed on page 3 of para 4.2.2 of the SCN. Therefore, the contention and allegation based on such comparision is inapt and factually distorted. They submit copy of purchase order dated 13.09.2016 which is RMC with pumping while the purchase order dated 14.09.2016 is for RMC without pumping.

xvi) The adjudicating authority has failed to appreciate that the Show Cause Notice covering the period from April, 2014 to June, 2017 is time barred.

xvii) The entire issue is of interpretational nature and as per the prevailing practice in the RMC industry, the appellant had cleared RMC on payment of excise duty on full value including the extended delivery cost. Their bonafide belief is also well supported by the judgements including that of the Hon'ble Tribunal, High Courts and Supreme Court. Therefore, just because the appellant considered the activity as manufacture and exigible to Central Excise duty whereas the department considered it a works contract

service does not ipso facto lead to a conclusion of malafide on the part of the appellant justifying invocation of longer period of limitation. For the same reason also, penalty is not imposable as none of the ingredients of the penal provisions invoked in the impugned order stands satisfied in the facts and circumstances of the case.

9. Aggrieved with the impugned order, the Director and the Accounts Manager of the appellant firm have filed the instant appeal on the following grounds:

I) They refer and rely upon all the grounds contained in the Appeal Memorandum filed by the main appellant.

II) The impugned order has been passed in violation of the principles of Natural Justice.

III) The adjudicating authority has erred by imposing penalty inasmuch as there is no material or evidence or proof in the Show Cause Notice or in the impugned order to indicate any specific role played by, or to establish any guild on their part.

IV) The adjudicating authority has failed to appreciated that the '*mens rea*' is a prerequisite under the relevant provisions. There is no allegation or findings in the impugned order about the presence of any '*mens rea*', consequently it is liable to be quashed.

V) They are merely the employee/Director and are carrying out the orders given by the employer/Board of Directors, therefore, they cannot be considered as a person in charge/responsible for conduct of the employer company's business. Consequently, the appellants cannot be held liable to penalty under Section 78A.

VI) They rely upon various judgements of the Hon'ble Tribunal that penalty cannot be imposable.

10. Personal Hearing in the case was held on 18.06.2021 through virtual mode. Shri Willingdon Christian, Advocate, appeared on behalf of all three appellants for the hearing. He reiterated the submissions made in their appeal memorandum and in the synopsis of case submitted by him. He relied upon various case laws on subject which was submitted along with synopsis.

11. I have gone through the facts of the case, the grounds of appeal made by the appellants in Appeal Memorandum and their written submissions. It is the department's case that the appellant firm is supplying RMC under work orders for providing and laying of RMC involving both supply of RMC as well as service. They were receiving composite contracts for supplying and laying RMC. The service part includes laying of RMC using a concrete pump, finishing the concrete with machineries/tools, labour etc. and in the contracts it was clearly mentioned that the rates are under the conditions of Works Contract. Therefore, the department contended that the service provided by the appellant firm is classifiable under the taxable service viz. Works Contract Services.

12. Before examining the merits of the case, I find it necessary to deal with the appellant's contention that about 40 to 50% of the total turnover of RMC is cleared without pumping and laying. What this implies is that these clearances of RMC are purely sales and cannot be a subject matter of dispute. I have perused the copies of some of the invoices submitted by the appellant and find that the appellant have sold RMC to some of their customers with Pumping clearly mentioned in the invoices. I also find that they have sold RMC to other customers with Non-Pumping clearly mentioned in the invoices. However, this aspect has apparently been overlooked and the demand against appellant has been determined by extrapolating some instances of RMC sold with pumping and laying to their entire turnover. I further find that this aspect has also not been considered by the adjudicating authority while passing the impugned order, which is vital for quantification of demand made in SCN.

13. I find that the dispute in the instant case pertains to the period from April, 2014 to June, 2017. From 01.07.2012 the definition of Works Contract is as per Section 65B(54) of the Finance Act, 1994, which reads as :

> "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods **and such contract is for the purpose** of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property". [Emphasis supplied]

13.1 From a reading of the definition of Works Contract as per Section 65B(54) of the Finance Act, 1994 it emerges that there are two primary ingredients which are required to be satisfied so as to fall within the scope of Works Contract :

1) The contract should involve transfer of property in goods, involved in the execution of such contract, which is leviable to tax as sale of goods; and

2) Such contract is for the purpose of carrying out construction, erection, ...

Applying the above to the case on hand, I find that the appellant are manufacturing RMC and selling it to their buyers and are paying Composition Tax under the Gujarat Vat Act, 2003. Therefore, they are satisfying the first ingredient of the definition of Works Contract under Section 65B(54).

13.2 I have perused the work orders which form part of the show cause notice issued to the appellant and I find that the work order referred to in para 4.2.2 is an order for RMC under the condition of Works Contract. Similarly, the work order referred to in para 4.2.3 of the show cause notice is also an order for RMC under condition of Works Contract. From these orders, it is clear that the **orders are for supply of RMC**. These orders are for supply of RMC under Works Contract and I find the scope of the work mentioned in the terms and conditions of these work orders. As per terms and condition 9 and 10 of the order referred to in para 4.2.2, the appellant is liable for providing and placing of concrete from their plant to the buyer's site and Material, Labour, Tools, are to be provided by the appellant. As per terms and condition 8 and 9 of the order, the appellant is liable for providing and placing of concrete from their plant to the buyer's site and laying and finishing. The Material, Labour, Tools, are to be provided by the appellant. Simply stated, the appellant is selling the RMC and he is also required to carry out the laying and finishing of the concrete at the site designated by the buyer. Therefore, I find that the scope of the work covered by these work orders do not fall under any of the activity i.e. carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property referred to in the definition of Work Contract as per Section 65B (54) of the Finance Act, 1994.

13.3 There is also merit in the contention of the appellant that RMC has a very short shelf life and that the same cannot be discharged at a single spot in the form of a heap. Considering the nature of the product, I am of the view that the activity of pumping, laying and finishing of the RMC at the buyer's site can at best be associated with the sale and delivery of the RMC to the buyer.

13.4 I also find support for the above in the decision of the Hon'ble High Court of Karnataka in the case of ACC Ltd Vs. State of Karnataka reported at 2012 (52) VST 129 (Kar.) The said decision was in the context of the VAT Act of the state of Karnataka, however, the ratio is applicable to the facts of the present case. At para 12 of the said judgement the Hon'ble High Court had observed that :

> " As is clear from the materials on record, the assessee transports the RMC from the manufacturing place to the customer's site. Therefore, in the case of RMC, transportation charges invariable forms part of the sale consideration. After it reaches the site of the customer, the RMC is to be delivered to the customer. The choice of taking the delivery is given to the customer. He has the option of getting the entire RMC dumped at the site from the lorry or he has also been provided the option to get the RMC dumped to a particular place such as roof top or any floor. **Therefore, the RMC is delivered by pumping the RMC from the lorry to the specified place by the customer. All expenses incurred till the delivery constitutes sale price.** In order to deliver the RMC at the specified place, if the assessee uses pump, then the charges collected by the assessee from the customer as pumping charges for mart of the sale price. If the RMC is not delivered through pumping, then the charges is not collected from the customer and it will not form part of the sale price. **Therefore, the sale transaction of the RMC gets completed only when it is delivered at the point where it is finally put to use.** All expenses incurred till such stage, if such delivery includes service of pumping then the pumping charges are also included in the pre-sale expenses and hence, form part of the taxable turnover.". [Emphasis supplied]

13.5 In view of the above judgement of the Hon'ble High Court, the charges collected by the appellant from their buyers, where the order for RMC is with the condition of pumping, laying and finishing, would have to necessarily be associated with the sale of the RMC. The delivery of RMC at the buyer's designated site by pumping and laying cannot be considered to be a taxable service.

14. I further find that the judgements relied upon by the appellant squarely cover the issue involved in the present appeals. In the case of M/s.GMK Concrete Mixing Pvt Ltd Vs. Commissioner of Service Tax, Delhi reported at 2012 (250) STR 357 (Tri.-Del) the Hon'ble Tribunal had vide Final Order dtd.4.11.2011 held that:

> *" Record does not reveal involvement of any taxable service aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service contract. In absence of cogent evidence to the effect of providing taxable service, primary and dominant object of contract throws light that contract between parties was to supply ready mix concrete (RMC) but not to provide any taxable service. Finance Act, 1994 not being a law relating to commodity taxation but services are declared to be taxable under this law. "*

14.1 This decision of the Hon'ble Tribunal was appealed by the department before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide Order dated. 06.01.2015 in Civil Appeal Dairy No.37837 of 2014 dismissed the appeal holding that:

> *" Having gone through the records of the case, we are of considered opinion that the appeal, being devoid of any merit, is liable to be dismissed and, is dismissed accordingly".*

15. The decision in the case of M/s.Vikram Ready Mix Concrete (P) Ltd Vs. Commissioner of Service Tax, Delhi reported at 2016 (42) STR 866 (Tri.Del) is also squarely applicable to the facts of the present appeal. In the said case the Hon'ble Tribunal observed that *" Both sides agreed that the short issue involved in the present appeal is as to whether the supply of ready mix concrete and carrying out the ancillary and incidental activities of pouring, pumping and laying of concrete would*

call for service liability of not". The Hon'ble Tribunal by following the decision in the case of M/s.GMK Concrete Mixing Pvt Ltd Vs. Commissioner of Service Tax, Delhi reported at 2012 (250) STR 357 (Tri.-Del) allowed the appeal with consequential relief to the appellant. This decision too was appealed by the department before the Hon'ble Supreme Court by way of Civil Appeal No.8544 of 2015. The Hon'ble Supreme Court vide order dated 09.10.2015 dismissed the appeal filed by the department.

16. In view of the above judgements of the Hon'ble Tribunal the issue involved in the present appeal i.e. the activities of pumping, pouring, laying and finishing in respect of the RMC sold and delivered at the site stand settled in favour of the appellant. It is very pertinent to refer to the observation of the Hon'ble Tribunal in the GMK Concrete judgement :

> *"Record does* ***not reveal involvement of any taxable service*** *aspect in the entire supply of RMC. Rather the contract appears to be a sales contract instead of a service contract".* [Emphasis supplied]

16.1 The Hon'ble Tribunal had in very clear terms held that there was no Taxable Service involved. The department had appealed these orders of the Hon'ble Tribunal before the Hon'ble Supreme Court without any success as the Hon'ble Supreme Court had upheld the judgements of the Hon'ble Tribunal. The judicial pronouncements are against the department and do not support the contentions of the department. Further, these decisions of the higher appellate authority as well as of the Hon'ble Supreme Court are binding upon me in terms of the principles of judicial discipline. Applying the ratio of the judgements referred to hereinabove, I am of the considered view that there is no merit in the contention of the department in the present case. Therefore, I find that the impugned Order passed by the adjudicating authority confirming the demand of Service Tax under Works Contract Services is not legally sustainable. Since the demand has been set aside, the question of interest on demand and imposition of penalty does not arise

17. In view of facts discussed above, I set aside the impugned order and allow the appeal filed by all three appellants.

18. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by all three the appellants stand disposed off in above terms.

23rd September, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

Date: .09.2021.

BY RPAD / SPEED POST

To

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The Additional Commissioner,
Ahmedabad North. — Respondent

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