आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
कंद्रीय 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-20211164SW0000318628

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/433 & 313/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad / 4357 TO 4362

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-30 & 31/2021-22**
दिनाँक Date : **29.10.2021** जारी करने की तारीख Date of Issue : **24.11.2021**

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

ग Arising out of Order-in-Original Nos. **06/ADC/2020-21/MLM dated 06.07.2020**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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

Appellant- M/s. Impretion System Pvt. Ltd., & Shri Yogesh J. Dave, Director of M/s. Impretion System Pvt. Ltd., 6th Floor, Jay Tower, Ankur Complex, Ankur Cross Road, Naranpura, Ahmedabad.

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 :

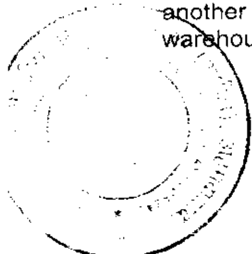
Revision application to Government of India :

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

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

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

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



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश मे 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 केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

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

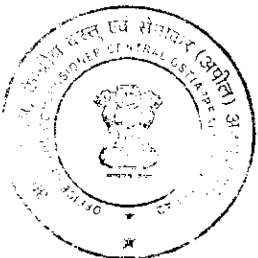
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

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

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner 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 रु.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** 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।

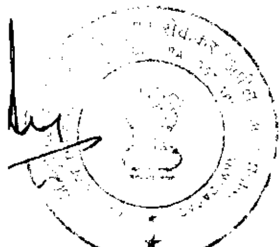
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

1. This order arises out of an appeal (hereinafter referred to as '**appeal-1**') filed by **M/s. Impretion System Pvt. Limited, 6th Floor, Jay Tower, Ankur Complex, Ankur Cross Road, Naranpura, Ahmedabad** holding Service Tax Registration No. AABCI0230LST001 (hereinafter referred to as ***'appellant-1'***) against Order in Original No. 06/ADC/2020-21/MLM dated 06.07.2020 (hereinafter referred to as '*the impugned order*') passed by the Additional Commissioner, CGST, Ahmedabad-North (hereinafter referred to as '*the adjudicating authority*')and a separate appeal (hereinafter referred to as '**appeal-2**') filed by **Shri Yagnesh J. Dave, Director** of M/s. Impretion System Pvt. Limited, 6th Floor, Jay Tower, Ankur Complex, Ankur Cross Road, Naranpura, Ahmedabad (hereinafter referred to as ***'appellant-2'***) against the penalty imposed on him by the adjudicating authority vide impugned order.

1.1 It is observed that 'appeal-1' is filed by the '**appellant-1**' against the impugned order in respect of the demand confirmed against them towards Service Tax short paid/not paid and also against the penalty imposed on them vide the impugned order. The 'appeal-2' has been filed by the 'appellant-2' against the penalty imposed on him by the adjudicating authority vide impugned order in relation to the demand confirmed against the main appellant i.e. 'appellant-1'. Accordingly, both the said appeals have been taken up for consideration under common appeal proceedings.

2. Facts of the case, in brief, are that the main appellant i.e. '**appellant-1**' was holding Service Tax Registration No. AABCI0230LST001 under the category of "Business Auxiliary Service" and engaged in providing Manpower Supply Services to various Government Departments/Offices and Government Educational Institutes etc. Subsequent to an investigation carried out by the Officers of DGGSTI, Ahmedabad Zonal Unit, Ahmedabad, a Show Cause Notice No. DGCEI/AZU/36-57/2017-18 dated 15.11.2017 was issued to the appellants by the Additional Director, DGGSTI, Zonal Unit, Ahmedabad.



2.1 The Show Cause Notice dated 15.11.2017issued to the appellants has been adjudicated by the adjudicating authority vide the impugned order and he ordered, as per details mentioned below:

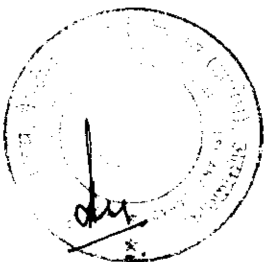
(1) The service provided by the **'appellant-1'** be treated as taxable service under the correct category of "Manpower Recruitment or Supply Agency Service" under Section 65(105)(K) of the Finance Act, 1994, till 30.06.2012 and thereafter under the category of Taxable Services in terms of provision of Section 65(B)(51) of Finance Act, 1994.

(2) He confirmed the demand of Service Tax amounting to Rs. 1,95,09,380/- from the **'appellant-1'**, for the period from April, 2012 to September, 2016 by invoking the extended period of five years under proviso to Section 73(1) of Chapter V of the Finance Act, 1994 read with Section 68 of the Finance Act, 1994 and also ordered to recover the interest thereon at the applicable rate under Section 75 of the Finance Act, 1994.

(3) He imposed a penalty of Rs. 10,000/- upon the **'appellant-1'**, under Section 77 of the Finance Act, 1994 for not furnishing the correct, true, complete information in all respect of taxable services viz. "manpower supply service" and correct taxable value thereof in prescribed periodical ST-3 returns and for contravention of the provisions of Section 68 & Section 70 of Chapter V of the Finance Act, 1994 read with Rules 2(1)(g), Rule 6 and Rule 7 of the Service Tax Rules, 1994.

(4) He also imposed a penalty of Rs. 1,95,09,380/- upon the **'appellant-1'**, under Section 78 of Chapter V of the Finance Act, 1994 for wilful mis-declaration, mis-statement, suppression of facts regarding correct classification of taxable service, correct taxable value of service and contravention of the provisions of Finance Act, 1994 & rules made there under with an intent to evade the payment of Service Tax.

(5) He also imposed a penalty of Rs. 50,000/- upon the **'appellant-2'**, under Section 78 of Chapter V of the Finance Act, 1994.



3. Being aggrieved with the impugned order, the main appellant i.e. 'appellant-1' has preferred an appeal viz. 'appeal-1' as mentioned in above para-1 on the grounds reproduced in subsequent para.

3.1 The issue of the categorization of service provided is irrelevant w.e.f 01.07.2012 and in such a case it can be concluded that service provided by them was the taxable service for getting done different activities of E-dhara cell in pursuance of computerization of land records of State Government and Payroll Management Services.

In Payroll Management Services, the Appellant help to manage the computation, disbursement and reporting of employees' salaries efficiently and accurately. This includes work like gathering of timekeeping information, computation of wages, disbursement of salaries and payslip. In view of the fact supported by evidences in the form of sample letters from various government offices addressed to the appellant, specifying the particular person, as decided or appointed or re-appointed by such offices, who are to perform work in such offices and directing the appellant to issue order for such person for the purpose of carrying out work necessary for payroll of such persons, it transpires that the appellant has rendered Payroll Management Services. The sample letters, as aforesaid, illustrate that the appellant neither has any authority to appointment/recruit any person for service at recipient end nor has any power to sack the person so appointed/recruited. Accordingly, it is established that the appellant renders Payroll Management Services.

3.2 In view of the submission in Para-3.1 above, it transpires that the issue for decision in adjudication, in respect of the period from 01.07.2012 was valuation of services, in terms of Section 67 of the Finance Act, 1994 readwith Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. The services provided by the appellant, as contended, was regarding getting done different activities of E-dhara Cell in pursuance of computerization of land records of State Government and Payroll Management Services. In such an event, reimbursement of expenses of wages/salary of deployed Data Entry Operators etc. had no nexus with E-dhara Computerization by various government offices and thus such reimbursement is not for providing such service. Accordingly, the same is not includible as consideration for such service.

In support of their contention, the appellant has relied upon the decision of the Apex Court in the case of Union of India Versus Intercontinental Consultants & Technocrats Pvt. Ltd. [2018 (10) GSTL 401(SC)] having an issue of inclusion of reimbursable expenses in the valuation of services, wherein Revenue appeal was dismissed. The adjudicating authority while issuing the impugned order, has not considered the same stating that "the issue therein was related to reimbursement of additional expenses such as Hotel, Travel expenses etc. whereas in the present case, the appellant has collected the entire amount from the customer". It is submitted that the manner of recovery either by way of charging entire amount in the invoice or charging reimbursable expenses separately has no bearing on the issue of valuation. The aspect which has relevancy to the valuation is whether reimbursement is of such expenses which were incurred for providing service. There has to be a nexus between the reimbursable expenses and the service in the connection of which such expenses are incurred and if so, the recovery of such reimbursable expenses becomes part of consideration paid as *quid pro qua* for rendering such service. In the present case, the reimbursable expenses towards wages/salaries of persons deployed has not got any nexus with the service provided which is in the nature of getting done different activities of E-Dhara Cell in pursuance of computerization of land records of State Government. It is for this reason that the order of the Apex Court in case of Union of India Versus Intercontinental Consultants & Technocrats Pvt. Ltd. [2018 (10) GSTL 401(SC)] is squarely applicable to the present case.

3.3 The adjudicating authority has not discussed various case laws relied upon by the appellant and simply held at para-49 of the impugned order that "those case laws are not relevant to the present case as facts and circumstances are different and therefore, I hold that the said case laws are not comparable to the present case". The findings must, in fact, be clearly discussed which has not been done and therefore, the impugned order in non-speaking order.

3.4 While invoking the extended period of five years, the adjudicating authority in the impugned order observed that in the event of non-detection of the case after investigation by DGGSTI, the same would have gone unnoticed. The appellant had filed all the ST-3 returns in time and the same have been passed through the process of

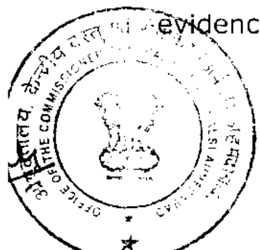
scrutiny, without any observation or objection with respect thereto. In such situation, extended period is not invokable simply on the strength saying that had there been no investigation by DGGSTI, the case would have gone unnoticed. Even in the era of self-assessment, the CBEC has vide issuing Circular No. 185/4/2015-ST dated 30.06.2015 imposed strict checks by way of prescribing preliminary scrutiny and detailed scrutiny of ER-1 & ER-3 and ST-3 returns.

The scrutiny-checks have been so provided to exercise check on the mistakes or mal-practices, if any, committed by the assesse, so that necessary action can be taken within the prescribed time limit. Had these checks been carried out in the manner prescribed, no tax evader could have any chance to commit fraud. The appellant has relied upon the following decision in support of their contention.

- Ultratech Cement Ltd. Versus Commissioner of Central Excise, Raipur [2016 (332) ELT 356 (Tri. Delhi) affirmed 2017 (347) ELT 3 (Chhattisgarh)]
- Commissioner of C.Ex.,Cus. & ST, Bilaspur Versus Ultratech Cement Limited
- Jammu & Kashmir Cements Ltd. Versus Commissioner of C. Ex., Jallandhar [2014 (314) ELT 334 (Tri. Delhi)]
- Sterlite Telelink Ltd Versus Commissioner of Central Excise, Vapi[2014 (312) ELT 353 (Tri. Ahmd)]
- Accurate Chemicals Industries Versus Commr. of C. Ex., Noida [2014 (300) ELT 451 (Tri. Del.)], affirmed in [2014 (310) ELT 441 (All.)]

3.5 The adjudicating authority in para-45.4 of the impugned order held that there is an intentional mis-declaration of service as "Business Auxiliary Service"; that the appellant purposely bifurcated gross amount receivable/received (gross receipt) from their clients into two parts namely Salary/Wages and Admin Charges/Vahivati Charges/SevaShulk with an intention to evade payment of Service Tax on the gross amount of Income received and based on such observations, passed the impugned order. However, there is no ingredient like fraud, misrepresentation, suppression etc. existed, as upheld and this being the issue of classification, imposition of penalty is unjust, unfair and without the authority of law.

The extended period has been invoked based on the oral evidence i.e. the statements of director of the appellant, recorded on



17.09.2017. However, these statements had been retracted by way of affidavit dated 21.09.2017, as not having been voluntary but recorded under force and duress. These affidavits were attempted to be produced at the time of personal hearing, however, the same were not allowed to be so produced. In such eventuality, the evidentiary value of these statements is endangered. In such a case, the initial burden, cast on the department has not been discharged, by production of material/documentary evidence to show that the appellant was guilty of any of the situations visualized in the proviso to Section 73 (1) of the Finance Act, 1994. The appellant has also relied upon the following judgments, in support of their contention.

- Reliance Communications Infrastructure Ltd. Versus C.C. (I), Nhava Sheva [2015 (320) ELT 306 (Tri. Mumbai)]
- Elpro International Ltd. Versus Collector of Central Excise, Pune [2002 (149) ELT 1383]
- Adani Gas P. Ltd. Versus Commissioner of C. Ex. & S.T, Ahmedabad [2017 (349) ELT 349 (Tri. Ahmd)], affirmed by Gujarat High Court in the case reported as [2017 (356) ELT 54 (Guj)]

3.6 In the present case, when the matter is such as involving question of interpretation of law, the penalty is not imposable, as decided in the plethora of the cases. The appellant has relied upon the following judgments:

- National Institute of Banking Studies & Corporate Management Versus Commissioner of Cus, C.Ex. & ST, Noida [2019 (29) GSTL 325 (Tri. All.)]
- Balaji Society Versus Commissioner of Central Excise, Pune-III [2015 (38) STR 139 (Tri. Mumbai)]
- VedAutomotivesVersus Commissioner of Central Excise, Kanpur [2016 (44) STR 140 (Tri. All.)]
- Greatship (India) Ltd. Versus Commissioner of Service Tax, Mumbai-I [2015 (37) STR 533 (Tri. Mumbai)]
- I2IT Pvt. Ltd. Versus Commissioner of Central Excise, Mumbai [2014 (34) STR 214 (Tri. Mumbai)]

3.7 There is no discussion or findings in the impugned order, based on any documentary evidence, except the observations of the adjudicating authority, in para-45.4 & para-46, on the statements of the director of the appellant. In such an eventuality, without supporting the allegation of the SCN, by way of findings, based on

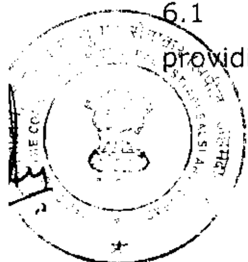
documentary evidence, no penalty can be imposed. Thus, the penalty of Rs. 1,95,09,380/- imposed under Section 78 ibid is liable to be set aside. Further, there is no suppression/mis-declaration on the part of the appellant with an intent to evade payment of Service Tax, in view of the fact that all the ST-3 Returns have been filed in time, disclosing all the information.

4. Being aggrieved with the impugned order, the 'appellant-2' has also preferred an appeal viz. 'appeal-2' as mentioned in above para-1 and contended that the imposition of penalty of Rs. 50,000/- upon him by the adjudicating authority vide the impugned order under Section 78A of the Finance Act, 1994 is unsustainable in law and liable to be dropped. He reiterated the grounds of appeal, submitted by the 'appellant-1' in the appeal memorandum filed with their 'appeal-1' and contended that the demand of Service Tax confirmed against 'appellant-1' is not sustainable and hence, consequent liability of interest and penalty, cast upon 'appellant-1' and of penalty cast upon 'appellant-2', is also liable to be dropped.

5. The appellants were granted opportunity for personal hearing on 13.10.2021 through video conferencing platform. Shri V.H. Hakani, Advocate, appeared for personal hearing as authorised representative of both the appellants. He re-iterated the submissions made in the Appeal Memorandum. He further stated that the demand is barred by limitation.

6. I have carefully gone through the facts of the case available on record, grounds of appeal in respective appeal memorandum filed in both appeals and submissions made by the representative of the appellants at the time of hearing. It is observed that the issues to be decided in case is whether the impugned order confirming demand against appellant-1 by treating services under category of Manpower Recruitment or Supply Agency Service under Section 65(105)(k) of the Finance Act, 1994 till 30.06.2012 and thereafter under category of Taxable Services under Section 65(B)(51) of the Finance Act, 1994 and imposing penalty on both the appellants are legal and proper or otherwise. The demand pertains to period F.Y. 2012-13 to F.Y. 2016-17 (upto September, 2016).

6.1 In the present case, it is observed that the appellant-1 was providing manpower to different govt. offices on contractual basis.



Tenders were being floated by different government organizations as per their requirement of Casual Manpower/Data Entry Operator /Drivers/Peons/Sweepers/Cook/Gardner/Watchmen etc. on contractual rate and on being selected during tendering process, work orders for supply of such manpower were being issued to the appellant-1. On being awarded the work orders, appellant-1 deployed the suitable manpower as per the work requirement. The appellant-1 was not paying Service Tax on the gross receipt against the taxable service provided by them. As per their contention, they were providing payroll management service, which was categorized under 'Business Auxiliary Service' and were paying service tax on the amount received as "service charge or administrative charges" from the recipient. However they were not paying Service Tax on the rest of amounts being "Wages/Salary" received from the recipient for payment to the contractual manpower, which is not liable to service tax. It is the contention of the department that the appellant-1 provided service under category of manpower recruitment or supply service and were required to discharge the service tax on gross amount received from service recipient.

6.2 To understand the nature of the service provided by the appellant-1 in the present case, I find it proper to go through the scanned copy of the Work Order dated 12.07.2012 issued by the Collector & District Magistrate, Dahod, appended at Para-8.7 of the Show Cause Notice F.No. DGCEI/AZU/36-57/2017-18 dated 15.11.2017 issued in the present case and also discussed by the adjudicating authority at Para-7.6 of the impugned order. Since the said work order was issued in Gujarati language, the free translation in English of the Order portion and the conditions thereof are reproduced here under:

*:**ORDER**:*

Impretion System Pvt. Limited, Ahmedabad, being lowest bidder, has been awarded contract to provide 'Data Entry Operators' in Civic Centers of total 7 nos. of Taluka Mamlatdar offices and also in Prant Offices/Sub-Division offices of Dahod, Zalod, Limkheda and Devgarh Baria falls under the jurisdiction of this district as well as Dahod District Collector Office, as per the requirements of Data Entry Operators, for the period from 01.04.2012 to 31.03.2013, at a fixed monthly payment of Rs. 2825/- per Data Entry Operator as per their quotation consisting of fixed amount of Rs. 2500/- per Data Entry Operator plus Rs. 325/- towards administrative charge @ 13% thereof, subject to the following conditions.

:***CONDITIONS***:

(1) *The working as Data Entry Operator will be at the civic center of the respective Mamlatdar Office.*

(2) *This service has to be provided through outsourcing at fixed cost of total Rs. 2825/- which is included of Rs. 2500/- per person and Rs. 325/- towards administrative charge @ 13% thereon.*

(3) *This contract is awarded on a temporary and provisional basis, for a fixed tenure of one year for the period from 01.04.2012 to 31.03.2013.*

(4) *This contract can be terminated after issuing a notice for a period of one month.*

(5) *For such work, the remuneration has to be paid as per the days for which service received. In case of absence of any Data Entry Operator, any other Data Entry Operator has to be provided as an alternate arrangement. As an alternate arrangement, 20% of the total numbers of Operators has to be kept available.*

(6) *A fixed deposit for an amount of Rs. 50,000/- has to be made in the name of the Collector, Dahod as 'Security Deposit' and original copy thereof has be submitted to this office. Such deposit will be returned on completion of the tenure of contract, without any interest.*

(7) *Any kind of taxes like Income Tax, Sales Tax, General Tax etc. in respect of this work contract will have to be borne by the contractor.*

(8) *An agreement on a stamp paper of Rs. 50 has to be made, within 7 days of the approval of the contract.*

(9) *Data Entry Operators have to attend office, as per the official timings fixed for the respective office.*

(10) *Any increase in the fixed amount, dearness allowance or any other benefit will not be entitled/paid.*

(11) *Prior approval of this office has to be obtained, in case of relieving or changing the Operators in any circumstances.*

(12) *Data Entry Operators has to be timely paid fixed remuneration by the contractor during the date from 1st to 5th of every month without fail. In case of a need arise, more Operators will also to be made available under this contract.*

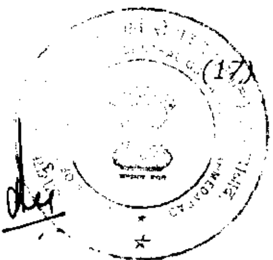
(13) *This office will have a right to terminate this contract at any point of time, in terms of the direction of Judicial Orders or such instructions from Government.*

(14) *In case of breach of any of the conditions, this contract will be terminated without any notice and the amount of deposit will be seized.*

(15) *If, any of the court matter arise in this regard will be subjected to the jurisdiction of Dahod.*

(16) *The Collector, Dahod will have a right to impose any additional condition or to make changes in any of the above mentioned conditions. The same will be binding to the contractor.*

(17) *The expenditure for all Data Entry Operators of Civic*



Centre/ATVT will be made from the income generated at the Civic Centre of the respective Taluka. The expenditure for Data Entry Operators at District Collector Office and Sub-Divisional Officers at Dahod, Zalod, Limkheda and Devgarh Baria will be made from the District Head-2053 by the District Administration Head.

(18) *A statement for the expenditure made in this regard will be submitted regularly on a monthly basis by all the Mamlatdar and Divisional Officer."*

6.2.1 On going through the copy of the work order, as mentioned in para-6.2 above as well as copies of the correspondence submitted by the appellant-1 as 'Exhibit-F' to the appeal memorandum, I find that:

- The appellant-1 has provided Manpower designated as Peon, Clerk, Data Entry Operators etc. to various offices run by the Government;
- The persons provided by the appellant-1 were working under control and superintendence of respective Service Recipients; however, such persons deployed by the appellant-1 were neither having status of an employee of the service recipients nor they were holding any right to claim salary/wages directly from such service recipient.
- The value of service had a direct correlation to the number of manpower deployed by the appellant-1 and the period/month for which such persons deployed at the offices of the service recipients;
- The Service Recipients have paid a consolidated amount to the appellant-1 per person per month, as per their quotation submitted during tendering process which comprising of minimum wages payable to the person employed plus the service/administrative charges. However, it had not been mentioned anywhere in the work order or in any agreement that they were paying amount for 'reimbursement of wages'.

6.2.2 Further, it is observed as per the copy of ST-3 return filed for the period of April, 2012 to June, 2012 that the appellant-1 has classified their service as "Business Auxiliary Service". **For the period prior to 30.06.2012**, the 'Business Auxiliary Service' was defined under the provisions of Section 65(19) of the Finance Act, 1994, which is reproduced as under:

*"**business auxiliary service**" means any service in relation to, -*

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

*[**Explanation.**- For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]*

(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, [A28][but does not include any activity that amounts to manufacture of excisable goods.]

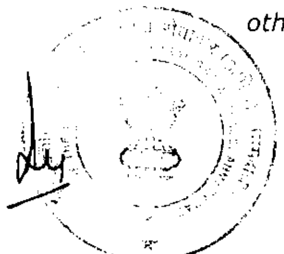
6.2.3 Further, it is also observed that Section 65 (105) (k) of the Finance Act, 1994 defines the taxable service of "manpower recruitment or supply agency" as under:

"Taxable Service" means any service provided or to be provided to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner."

[Explanation. For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate].

Whereas, Section 65(68) of the Finance Act, 1994, as amended defines the term "manpower recruitment or supply agency" as under:

"manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person".



Further, Rule 2 (g) of the Service Tax Rules, 1994 defines "supply of manpower as under:

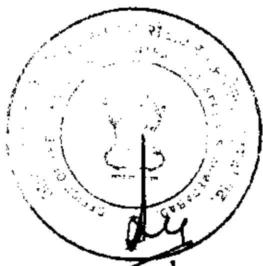
> *(g) "supply of manpower" means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control.*

In view of the nature of the services provided by the appellant-1 in the present case, as per the facts on record as mentioned in Para-6.2 and Para-6.2.1 above and the definitions of "Business Auxiliary Service" as well as the "Manpower recruitment and supply" (applicable for the period prior to 30.06.2012), I find that the services provided by the appellant-1 in the present case were rightly classifiable under 'Manpower supply service' at the relevant time and hence, the appellant-1 has wrongly classified the same as 'Business Auxiliary Service' in their ST-3 returns.

6.2.4 Further, as regard the valuation of the taxable service for charging service tax, I find it proper to examine the relevant provisions. Accordingly, the provisions of Section 67 of the Finance Act, 1994 and Rule 5 (1) of the Service Tax (Determination of Value) Rules, 2006 as well as the clarification issued by the CBEC vide Circular F.No. B1/6/2005-TRU dated 27.07.2005, particularly in case of 'Manpower Recruitment Service' are reproduced as under:

<u>SECTION 67</u>. <u>Valuation of taxable services for charging service tax</u>.

> *(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —*
> *(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
> *(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;*
> *(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.*
>
> *(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.*



(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service. (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed

Rule 5 :Inclusion in or exclusion from value of certain expenditure or costs.–

(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service..

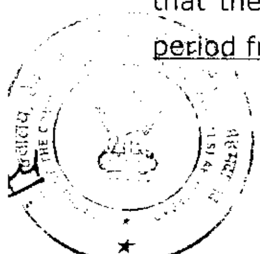
Circular issued from F.No. B/1/6/2005-TRU dated 27th July, 2005

"22. Manpower Recruitment Service:-

22.4 Service tax is to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. Salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the Salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount."

In view of the above provisions contained under Section 67 of the Finance Act, 1994 read with Rule 5 (1) of the Service Tax (Determination of Value) Rules, 2006 and the clarification issued by the CBEC vide Circular F.No. B1/6/2005-TRU dated 27.07.2005, I find that the service provider has to discharge Service Tax liability on the gross amount received from the recipients which includes Salary/Wages, PF/ESI and admin charges/charges, while providing the manpower supply service. Further, I also find that even in case of 'Business Auxiliary Service' also, the Service Tax is chargeable on the gross amount charged by the service provider for such service provided in terms of the above mentioned provisions. Accordingly, in the present case, the service provider i.e. the appellant-1 has failed to pay the applicable Service Tax on the gross receipt/income received by them against the supply of manpower services.

6.3 Further, as regards the nature and taxability of services, I find that the relevant provisions of the Finance Act, 1944 effective for the period from 01.07.2012 onwards are as under:



Section 65(B)(51) of the Finance Act, 1994 defines taxable service as under:

> *"Taxable Service" means any service on which service tax is leviable under Section 66B of the Finance Act, 1994.*

Further Section 65(B) (44) of the Finance Act, 1994 defines 'Service' as under:

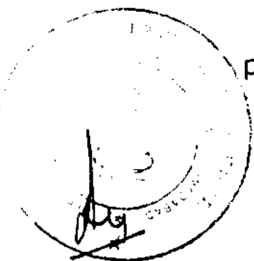
> *"Service means any activity earned out by a person for another for consideration, and includes a declared service, but shall not include- (a) to (c)...*

6.4 In the present case, as mentioned in para-3.1 above, the appellant has contended that "the issue of the categorization of service provided is irrelevant w.e.f 01.07.2012 and in such an eventuality, it can be concluded that service provided by them was the taxable service for getting done different activities of E-dhara cell in pursuance of computerization of land records of State Government and Payroll Management Services".

6.4.1 As regards the contention of the appellant-1, I have gone through the copy of a work order issued by the Collector, Dahod reproduced at para-6.2 above and find that:

- The work order was issued to the appellant-1 to provide/deploy the person in the post designated as Data Entry Operator at a consolidated cost of Rs. 2825/- per month per person (which includes Rs. 2500/- fixed monthly per person and administrative charge @13%);
- The work order was not on the basis of any quantum of a particular work;
- In absence of any person i.e. Data Entry Operator, an optional arrangement to deploy another person has to be made by the appellant;
- As per the condition no. (11), the appellant-1 may relieve or change any person with the prior approval of the service recipient. Accordingly, the contention of the appellant-1 that "they neither have any authority to appointment/recruit any person for service at recipient end nor has any power to sack the person so appointed/recruited" is not correct and contradictory to the facts on record.

In view of the above, in the present case, I find that the persons deployed/provided by the appellant-1 to various government

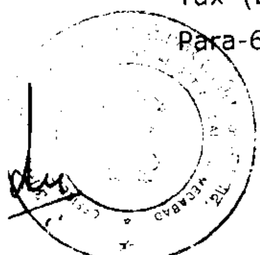


organizations were neither holding status of a direct employee of such service recipients nor they were having any right to claim their salary/wages directly from such service recipients. Further, it is also undisputed that the employer-employee relationship always persists between such employees and the appellant-1 as their employer and the liability to pay wages to them was always a legal responsibility of the appellant-1. Accordingly, the contention of the appellant-1 that the services provided by them were regarding getting done different activities of E-dhara Cell in pursuance of computerization of land records of State Government and Payroll Management Services are not backed by any of the documentary evidences and hence, not sustainable.

6.5 Further, it is observed as per the contention of the appellant-1 that the reimbursable expenses towards wages/salaries of persons deployed has not got any nexus with the service provided, which is in the nature of getting done different activities of E-Dhara Cell in pursuance of computerization of land records of State Government.

In the present case, I find that the work orders issued to the appellant-1 were neither to get done any activity of E-dhara Cell of the Government of Gujarat nor the cost/charges was decided to accomplish any specific work. In fact, the work orders were issued to provide/deploy 'Man power support' designated as 'Data Entry Operator' etc. to attend work in the E-dhara Cell and such other offices, under the supervision of the officials of the respective State Government department and a consolidated amount was paid to the appellant-1 at the rate of per person per month, as quoted by them in the tender. Accordingly, considering the facts on record, I find that the above said contention made by the appellant is contrary to the documentary evidence on record and hence, are liable to be rejected.

6.6 As regards the issue of Valuation of taxable services for charging service tax, I find it very clear that the service provider has to discharge Service Tax liability on the gross amount charged and received from the service recipients in terms of the provisions of SECTION 67 of the Finance Act, 1994 read with Rule 5 (1) of Service Tax (Determination of Value) Rules, 2006, as already discussed at Para-6.2.3 above.

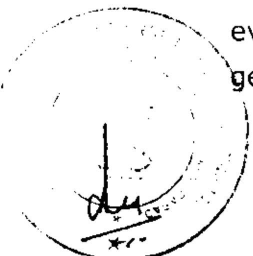


6.6.1 In the present case, it is observed that the appellant has also relied upon the decision of the Apex Court in the case of Union of India Versus Intercontinental Consultants & Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)], wherein Hon'ble Apex Court held that:

> *"Finance Act, 1994 - Section 67(1) - Meaning of expression 'such' before and after amendment to this section on May 1, 2006 - To determine value of taxable services for charging Service Tax, gross amount charged for providing 'such' taxable services has to be found - Hence,* ***any other amount, which is calculated not for providing such taxable service, cannot part of that value - Value of tax service cannot be anything more or less than consideration paid as quid pro qua for rendering such service*** *- Service Tax is to be paid only on services actually provided by service provider - This meaning did not change after amendment. [para 24]*
>
> *Service Tax (Determination of Value) Rules, 2006 - Rule 5 - Reimbursible expenses - Inclusion of reimbursible expenses in valuation of services - Under Section 67 of Finance Act, 1994, amount which is not calculated for providing taxable service cannot part of valuation of service - Hence, Rule 5 ibid was ultra vires Section 67 ibid - It was more so* ***as amendment to Section 67 ibid by Finance Act, 2015 to include reimbursable expenditure or cost in consideration for services, indicated realisation of legislature that these were not includible before amendment*** *- This amendment was prospective as it was substantive and not merely declaratory. [paras 24, 29]*

The appellant-1 relying upon the abovementioned judgment of the Hon'ble Supreme Court contended that there has to a nexus between the reimbursable expenses and the service in the connection of which such reimbursable expenses are incurred and in their case, the reimbursable expenses towards wages/salaries of persons deployed has not got any nexus with the service provided, which is in the nature of getting done different activities of E-dhara cell in pursuance of computerization of land records of State Government.

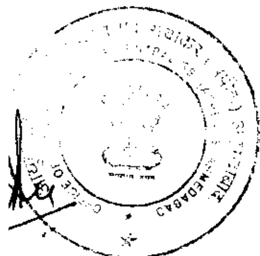
As regards the said contention, as already discussed in earlier Para-6.4.1 and Para-6.5 above, I find that the work order granted to the appellant-1 was to provide/deploy specific number of persons/Manpower of different designations to work in different offices of the state government under the supervision of respective officials and the appellant-1 was being paid a consolidated amount (as per their approved tender which is inclusive of fixed wages, administrative charges, service charges etc.) per person per month. Further, it is observed that the appellant-1 has nowhere produced any documentary evidence showing that they were granted any separate work order for getting done any work on a quantum base or lumpsum basis either in



E-dhara Centre or any other offices of state government. Accordingly, I find that the contention of the appellant-1 that the wages/salaries received in respect of the persons deployed has not got any nexus with the service provided by them which is in the nature of getting done different activities of E-dhara Cell is not backed by any of the documentary evidences and can be specifically said, contrary to the facts on record. Accordingly, I find that the facts of the present case are different and hence, the above mentioned decision of Hon'ble Supreme Court relied upon by the appellant-1 would not be applicable to the present case.

6.6.2 Further, I also find that Hon'ble CESTAT, Ahmedabad in case of Modern Business Solutions Versus Commissioner of S.T, Ahmedabad, reported at [2019 (24) GSTL 353 (Tri-Ahmd)] held as under:

> "**4.1** The argument of the appellant that no conclusion regarding nature of services provided can be reached on the basis of scope of the agreement of 2009 is misplaced. A perusal of the agreement of 2009, clearly indicates that it is a continuation of earlier arrangement. The fact that agreement of 2004 does not at all describe the nature of service to be provided cannot be used by appellant in his favour in these circumstanced. It is apparent that the appellants were engaged in providing BAS where the remuneration was based on actual expenses by adding a percentage of margin over certain expenses. That does not convert the expenses into reimbursement. In terms of the decision of Hon'ble Apex Court in *Intercontinental Consultant and Technocrats Pvt. Ltd.* (supra) reimbursements cannot be included in the assessable value, however, what constitutes reimbursement has to be determined in light of the decision of larger bench in the case of *Bhagawathy Traders* (supra). The Larger Bench has clarified as follows :
>
>> "6.1 Having analyzed the various decisions cited on behalf of the assessee and on behalf of the department, it would be appropriate to consider the scope of the term "reimbursements" in the context of money realized by a service provider. A person selling the goods to another cannot treat cost of raw materials or the cost of labour or other cost components for inputs services, which went into the manufacture of the said goods as reimbursements. If the buyer enters into a contract for supply of raw materials after negotiating prices from the supplier for the raw materials and the raw materials are received by the manufacturer and the manufacturer pays the amounts to the supplier of raw materials and recovers the same from the buyer, it can certainly be considered as reimbursements. It is to be noted that in such a case, the manufacturer has no role about choosing the source of the materials procured or the price at which the materials procured and the manufacturer is not under any legal or contractual obligation to pay the amount to the supplier. However, if the manufacturer procures raw materials from a source of his choice at a price negotiated between him and supplier of the raw materials and uses the material for manufacture of the final products which he sells, the question of his collecting the cost of raw materials as reimbursement does not arise. The concept of reimbursement will arise only when the person actually paying was under no obligation to pay the amount and he pays the amount on behalf of the buyer of the goods and recovers the said amount from the buyer of the goods.



6.2 Similar is the situation in the transaction between a service provider and the service recipient. Only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise. For example, when rent for premises is sought to be claimed as reimbursement, it has to be seen whether there is an agreement between the landlord of the premises and the service recipient and, therefore, the service recipient is under obligation for paying the rent to the landlord and that the service provider has paid the said amount on behalf of the recipient. The claim for reimbursement of salary to staff, similarly has to be considered as to whether the staff were actually employed by the service recipient at agreed wages and the service recipient was under obligation to pay the salary and it was out of expediency, the provider paid the same and sought reimbursement from the service recipient.

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

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

In the instant case, in the context of BAS, the rent and cost of manpower is not a reimbursable expense but a cost of service. Just by terms of the contract, an assessee cannot convert a cost into a reimbursable expense. The Institute of Cost Accountants of India, a statutory body under an Act of Parliament has a Cost Accounting Standard Board. It has formulated procedure to determine the cost. The CASI prescribes classification of costs. It classified cost under different heads like:

(1) Direct Material Costs to factor in expenses on purchase of material.
(2) Direct Labour Costs to factor in expenses in employees labour directly involved in production.
(3) Overheads to factor in expenses on capital goods over a period of time.

And so on. All the costs have an associated expense that need to be factored in.

Now the question arises if all the expenses can be converted into reimbursable expenses by way of a contract, or are these expenses which are so integral to the activities of the service provider that they cannot perform without incurring those expenses.

Here the distinction between the so called 'reimbursable expenses' and 'free supplies' become relevant. A free supply changes the nature of contract. For example a contract for 'painting of building' would become 'a labour contract' if paint and painting equipment is supplied free. However, a painting contract will remain a painting contract even if the

agreement has clause where actual cost of paint and equipment is reimbursed. All expenses incurred by a service provider cannot be called reimbursable expenses, only the expenses that qualify the test laid down in the decision of *Bhagawathy traders* (supra) can be called reimbursable expenses.

In this backdrop, the appellants are not entitled to exclude the rent and salaries from the assessable value. The demand on this count in respect of services provided to ICICI is upheld on merits.

6.6.3 Accordingly, in terms of the facts of the present case, as per the discussion made in the Para-6.6.1 above and also following the judicial pronouncement of Hon'ble Tribunal, Ahmedabad as mentioned in Para-6.6.2 above, I find that the contention of the appellant-1 that the amount paid by him to the persons deployed to service recipients towards salary/wages from the gross amount received from such service recipients are not includible in the amount liable for payment of Service Tax, is not sustainable on merits and is liable to be rejected.

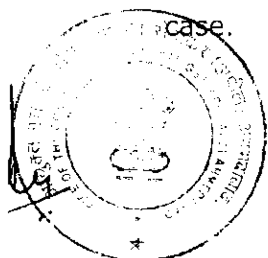
6.7 Further, as mentioned in Para-3.3 above, the appellant has contended that the adjudicating authority has not discussed the following judgments relied upon by them and hence, the impugned order is non-speaking order.

(1) S.S Associates Versus Commissioner of Central Excise, Bangalore [2010 (19) STR 438 (Tri. Bang.)]

(2) Divya Enterprises Versus Commissioner of Central Excise, Mangalore [2010 (19) STR 370 (Tri. Bang.)]

(3) Ritesh Enterprises Versus Commissioner of Central Excise, Bangalore [2010 (18) STR 17 (Tri. Bang.)]

I have gone through the said judgments and find that in all the said cases, the issue was pertain to "the Contract for execution of work of loading, unloading, bagging, stacking and destacking - Records silent on/not indicating supply of manpower." Whereas, in the present case, I find that the work order/contract was granted to supply/deploy Manpower i.e. a specific number of persons on payment of an amount per person per month. Accordingly, I find that the facts of the present case are not similar to the said cases and hence, the abovementioned judgments would not be applicable in the present case.



6.8 Further, it is also observed that the appellant has also contended that the demand is time barred and the impugned order invoking extended period on the grounds of suppression of facts is not correct.

It is observed from the facts emerged during the investigation of the instant case that the appellant had suppressed the material facts from the department by not disclosing the details of taxable services to the extent of salary/wage part of the gross income received against the supply of manpower service/taxable service, in their ST-3 returns. Hence, as per the facts on record, I find that the submission of the appellant is not correct.

6.8.1 Further, it is also observed as per the contention of the appellant-1 that the extended period of limitation in the instant case is not sustainable as the issue involved is of classification, they were under bonafide belief that the service tax is not leviable and has no malafide intention.

As regards the said contention of the appellant, I find that the appellant was statutorily required to disclose the gross amounts including export of services and exempted service, amount received in advance, amount received where bills not issued, amount charged as pure agent, amount charged for exempted services and export of services and amounts of any other deductions in the ST-3 returns. Hence, not entering these vital details in the service tax returns cannot be treated as bonafide mistake but intentional breach of law, particularly when they had made such claims of different classification without any substantial evidences, at the time of investigation of the books of accounts by DGGSTI. It is further observed that Section 70 of the Finance Act, 1994 stipulates that every person liable to pay the service tax shall himself assess the tax due. In the present case, the appellant-1 has failed to properly assess the service tax liability and also failed to submit the correct information in the ST-3 returns and resorted to suppression of material facts.

I have gone through the judgements relied upon by the appellant-1 (as mentioned in para-3.5 and para-3.6 above) in support of their contention. I find that the issue involved and the facts of the case of the said judgments are not similar to the present case and hence, the same are not applicable. Further, I also find that Hon'ble ÇESTAT, Ahmedabad in a similar case of Modern Business Solutions Versus Commissioner of S.T., Ahmedabad, reported at [2019 (24) GSTL 353 (Tri-Ahmd)] also held as under:

*"**4.4** Now coming to the issue of limitations, we find that appellants had not declared the gross amount received in the returns filed by them. The Commissioner in his order has observed as follows :*

> *"26.1 It has been contended by M/s. MBS that the demand is barred by limitation considering the fact that they were regularly paying Service Tax and filing ST-3 returns and the department was fully aware of their business activities, I find that M/s. MBS had in the ST-3 returns, periodically filed by them, declared the category of Service provided by them; Gross amount received by them; Taxable Value and the Service Tax paid by them. I find that the Gross Amount declared in the ST-3 returns was the same as taxable Value, which clearly means that they had only declared the amount received by them towards the management fees and did not declare the total amount charged and received by them from ICICI bank and TTSL. They have also not declared the amount charged by them as 'Pure Agent' in the ST-3 returns. I observe that in the present system of self-assessment documents like invoices and other transaction details are not supplied to the Department. Moreover, M/s. MBS did not furnish the required details of amount of taxable value to the Department, the intention will have to be believed as that of evasion. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with intent to evade payment of Service Tax is conspicuous by the peculiar facts and circumstances of the case as discussed above. In view of the above discussion and findings, the ratio of cases relied by the said service provider cannot be applied in the case before me."*

The argument of the appellant that they had bona fide belief is bases on the decision of LB of Tribunal in case of Bhagawathy Traders (supra). We do not find merits in the said argument. The ST-3 form prescribes disclosure of all amounts received in respect of service even if not part of Assessable value. Failure to disclose the same amounts to misdeclaration. Thus, the appellant's argument on limitation is dismissed. Even if they believed that the said amount claimed as reimbursed were not includible in taxable value they were required to declare the same in ST-3 return, in the column prescribed for it."

6.8.2 Accordingly, considering the facts of the present case on record and following the decision of Hon'ble Tribunal as discussed above, I find that the adjudicating authority has rightly invoked the extended period of limitation on the grounds of suppression of facts by the appellant-1 with an intent to evade payment of service tax. Further, as regards the contention of the appellant-1 that "the extended period has been invoked based on the oral evidences i.e. the statements of director of the appellant-1, which had been retracted by way of affidavit, as not having been voluntarily but recorded under force and duress", I find that the adjudicating authority has categorically proved the charges of suppression of facts framed against appellant-1 with an intent to evade payment of service tax, only on the basis of the facts of the case as well as the statutory records maintained by the appellant-1 i.e. ST-3 returns, Work Orders, ledger, books of account etc. Accordingly, the retraction in respect of his statement made by the director of appellant-1 by way of affidavit does not affect the findings of the adjudicating authority as regards the invocation of extended period and hence, the said contention of the appellant-1 is not sustainable.

6.8.3 In view of the above, I am in agreement with the findings of the adjudicating authority that the non-payment of service tax by the appellant-1 in respect of the taxable service provided by them in the present case, is liable to be recovered by invoking the extended period of limitation as provided under Section 73 of the Finance Act, 1994 alongwith interest in terms of the provisions of Section 75 of the Finance Act, 1994. Accordingly, I do not find any grounds to interfere in the impugned order as regards the demand confirmed in respect of Service Tax amounting to Rs. 1,95,09,380/- under proviso to Section 73(1) of the Finance Act, 1994 as well as imposition of the penalties of Rs. 10,000/- and of Rs. 1,95,09,380/- by the adjudicating authority on the appellant-1 under the provisions of Section 77 of the Finance Act, 1994 and Section 78 of the Finance Act, 1994 respectively.

6.9 Further, as regards the contention of the appellant-2 made vide filing 'appeal-2' against the penalty imposed upon him vide the impugned order under Section 78A of the Finance Act, 1994, it would be proper to examine the relevant provision, which is reproduced hereunder:

"SECTION 78A. Penalty for offences by director, etc., of company —

Where a company has committed any of the following contraventions, namely :—

(a) evasion of service tax; or

(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

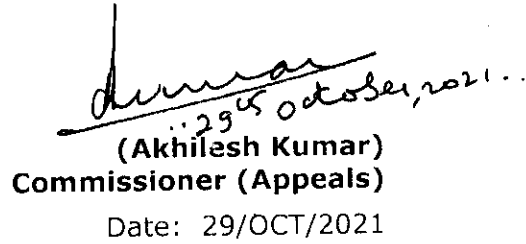
(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due, then any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to one lakh rupees."

6.9.1 As regards the status of the appellant-2, I find as per the affidavit made by the appellant-2 on date 24.09.2016 as well as on date 21.09.2017 and copy produced alongwith appeal memorandum, the 'appellant-2' is 'Promoter-Managing Director' of M/s. Impretion Systems Pvt. Ltd. (appellant-1) and being Promoter-Director, he was well aware about all the aspects of business of the said company i.e. appellant-1.

Accordingly, the appellant-2 was knowingly concerned with such contraventions & evasion of Service Tax by the 'appellant-1' and all these acts of omission and commission on the part of 'appellant-2" has rendered himself liable for penalty under Section 78A of the Finance Act, 1994. In view the same, I find that the penalty of Rs. 50,000/- imposed on 'appellant-2' under Section 78A of the Finance Act, 1994 is legally correct and the 'appeal-2' filed by the 'appellant-2' against the said penalty imposed by the adjudicating authority is not sustainable.

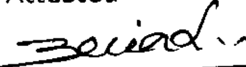
7. On careful consideration of the submission made by the 'appellant-1' and 'appellant-2' in their respective appeal memorandum as well as during the personal hearing, the relevant legal provisions and judicial pronouncements, I do not find any merit in the contention of both the said appellants in view of the discussions made in the foregoing paragraphs so as to intervene in the impugned order passed by the adjudicating authority. Accordingly, the impugned order passed by the adjudicating authority is upheld and both the appeals i.e. 'appeal-1' filed by the 'appellant-1' and 'appeal-2' filed by the 'appellant-2' against the impugned order are rejected.

8. All the appeals i.e. (i) 'appeal-1' and (ii) 'appeal-2'filed by the respective appellants, as mentioned in para-1 above stands disposed off in above terms.

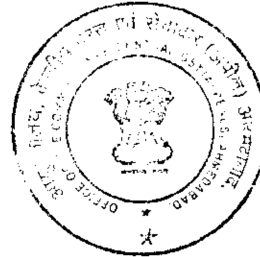


(Akhilesh Kumar)
Commissioner (Appeals)
Date: 29/OCT/2021

Attested



(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad



By Regd. Post A. D

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Ankur Complex, Ankur Cross Road,
Naranpura, Ahmedabad.

(2) Appellant-2: Shri Yagnesh J. Dave,
Directorof M/s. Impretion System Pvt. Ltd,
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Ankur Complex, Ankur Cross Road,
Naranpura, Ahmedabad.

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Commissionerate:Ahmedabad-North.
3. The Deputy /Asstt. Commissioner, Central GST, Division-VII, Commissionerate:Ahmedabad-North.
4. The Deputy/Asstt. Commissioner (Systems), Central GST, Ahmedabad-North.
5. Guard file
6. PA File