सत्यमेव जयते

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
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DIN-20211164SW000000EB9D

स्पीड पोस्ट

H264 To H268

क फाइल संख्या : File No : GAPPL/COM/CEXP/399/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-32/2021-22**
दिनाँक Date : **10.11.2021** जारी करने की तारीख Date of Issue : **12.11.2021**

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

ग Arising out of Order-in-Original Nos. **15/DC/Demand/2020-21/S. Tax dated 24.09.2020**, passed by the Deputy Commissioner, Central GST & Central Excise, Div-I, Ahmedabad-North.

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

Appellant- M/s. Ingersoll Rand (India) Ltd., Plot No. 21-30, GIDC Estate, Naroda, Ahmedabad-382330.

Respondent- Deputy Commissioner, Central GST & Central Excise, Div-I, 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 की 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.

(ग) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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

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

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

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

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

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

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

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

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

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

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

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

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

M/s. Ingersoll Rand (India) Ltd., Plot No.21-30, GIDC Estate, Naroda, Ahmedabad-382330 (hereinafter referred to as '*the appellant*') have filed the instant appeal against the OIO No.15/DC/Demand/2020-21/S.Tax dated 24.09.2020 (in short '*impugned order*') passed by the Deputy Commissioner, Central GST, Division-I, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that during the course of audit conducted by the officers of Central GST Audit, Ahmedabad, on reconciling ST-3 returns with the ledgers and Balance Sheet of the appellant company, it was noticed that the appellant during the period July, 2015 to March, 2017;

a) incurred expenses towards renting of cab but failed to pay service tax amount of **Rs.6,10,651/-** under RCM as per Notification No. 30/2012. On being pointed out, they paid the tax alongwith interest of Rs.1,90,170/- however, they did not pay the penalty;

b) short paid service tax under RCM on legal consultancy fee paid by them in F.Y. 2015-16. On being pointed out by audit, they paid the service tax amount of **Rs.1,56,577/-** alongwith interest of Rs.61,387/-, however, they did not pay the penalty;

c) forfeited advance income of Rs.41,01,552/- in Miscellaneous income Ledger. This amount was recovered from their customer against the cancellation of order, i.e., an income for tolerating the act of his customers. It appeared that the said activity was taxable and was covered under declared service "*Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to tolerate an act or a situation, or to do an act*" defined under Section 66E of the Finance Act (F.A), 1994. The appellant, however, argued that the forfeiture of amount received as advance was towards sale of goods and does not fall within the scope of said service. Therefore, service tax liability of **Rs.6,15,233/-** alongwith interest and penalty, on the said income was not paid by them.

3. Based on the above audit observation, a Show Cause Notice (SCN for brevity) SCN No.VI/1(b)-01/C-V/AP-31/2017-18 dated 23.07.2018 was issued to the appellant invoking extended period of limitation and proposing; demand and recovery of total service tax amount of **Rs.13,82,461/-** under proviso to Section 73(1) of the F.A, 1994 and appropriation of service tax amount of Rs.6,10,651/- and Rs.1,56,577/- already paid against this demand; recovery of interest on aforesaid demand under Section 75 and appropriation of Rs.1,90,170/- and Rs.61,387/- already paid against their interest liability; and also proposing imposition of penalty under Section 78 (1) of the Act ibid.

4. Subsequently, the appellant in terms of Section 142(3) of CGST Act, 2017 read with Section 11B of the CEA, 1944, claimed refund of cenvat credit of service tax paid under Legal Consultancy Service for the reason that they were unable to avail the cenvat credit of service tax amount of Rs.1,56,577/- paid on 06.06.2018 in the post GST regime. The refund was sanctioned by D.C., Div-I, CGST, Ahmedabad North vide OIO No: 01/DC/19-20/Refund dated 20.06.2019 in terms of Section 142(3) of CGST

Act, 2017 read with Section 11B of the CEA, 1944. However, in post audit, it was observed that in terms of Section 142(8)(a) of CGST Act, 2017, the refund claimed by the appellant is not admissible as input tax credit hence should be treated as arrears. Therefore, SCN was issued to the appellant on 16.03.2020 proposing recovery of erroneously sanctioned refund of Rs.1,56,577/- alongwith interest. This SCN was later adjudicated vide OIO No: 04/DC/20-21/Dem dated 25.06.2020, wherein recovery of Rs.1,56,577/- alongwith interest was ordered.

5. Meanwhile the demands raised vide SCN No. VI/1(b)-01/C-V/AP-31/2017-18 dated 23.07.2018, proposing recovery of service tax to the tune of **Rs.13,82,461/-** (Rs.6,10,651/- + Rs.1,56,577/- + Rs.6,15,233/-) was adjudicated vide the impugned order (OIO No.15/DC/Demand/2020-21/S.Tax dated 24.09.2020). The adjudicating authority confirmed and ordered recovery of service tax demand of Rs.6,10,651/- alongwith interest and appropriated the amount of Rs.6,10,651/- & Rs.1,90,170/- already paid by the appellant against tax and interest liability respectively; he also imposed a penalty of Rs.6,10,651/-. On the service tax demand on Legal Consultancy service, the adjudicating authority held that as the demand of Rs.1,56,577/- alongwith interest is already adjudicated vide OIO No: 04/DC/20-21/Dem dated 25.06.2020, therefore the only issue left to be decided is the imposition of penalty. He, therefore, considering that the tax and interest liability already stands decided, imposed the penalty of Rs.1,56,577/- under Section 78. The demand of service tax on forfeiture of advance income was also confirmed and he ordered recovery of service tax of Rs.6,15,233/- alongwith interest and imposed a penalty of Rs.6,15,233/-.

6. Aggrieved by the demand confirmed in the impugned order, the appellant preferred the present appeal, mainly on following grounds:-

a) Penalty for short payment of service tax on Rent a Cab and Legal Consultancy services is not imposable as tax alongwith interest was paid before issuance of SCN. Short payment of service tax cannot construe willfull mis-statement or suppression of facts as there was no *mens rea* on their part and as tax has been paid on the basis of the tax ascertained by an officer, benefit of Section 73(3) should be granted. To support their contention they placed reliance on Board's Instruction dated 18.08.2015; 2017 (347) ELT 71 (HC Kar), 2016(46) STR 866 (Tri-Chennai), 2017 (49) STR 229 (Tri-Del); 2009(238) ELT 3 (SC).

b) Since the service tax paid on Legal Consultancy service under RCM is available as credit, the entire demand is revenue neutral. Reliance placed on citations 2009(241) ELT 153 (Tri.Ahmd), 2005 (179) ELT 20 (SC), 2005 (179) ELT 276 (SC), 2007 (214) ELT 321 (SC).

c) On the demand on forfeiture of advance income, they contended that as per the Purchase Order agreement entered with their customer, for sale of customized goods, they received certain amount as advance from the customer however, on cancellation of the sale agreement by the customer, they forfeited the advance amount received because by the time the customer terminates / cancels the contract, the appellant had already incurred some expenses towards such customized products. It is against such cost incurred & upon termination of sale contract that they retain the amount of advance

received from such customer and does not return the payment back to the customer. The act of forbearance from which the other person is not actually being benefitted cannot be construed as amount towards sale of goods or consideration for any taxable activity carried out by the contractee as envisaged u/s 66E(e) of the Act.

d) In terms of para 2.3.2 of the CBEC Service Tax Education Guide, 2012 advance forfeited for cancellation of an agreement to provide a service would be taxable, if such forfeited amount represent consideration for the agreement that was entered into for the provision of service. The said advance was not a consideration for the provision of service of towards service agreed to be provided but an advance for sale of goods governed by separate laws. Reliance placed on 2013 (298) ELT 534 (Tri.LB), 2007 (216) ELT 51 (Tri-Mumbai).

e) When the demand is not sustainable, interest u/s 78 is also not payable. Reliance placed on 1996 (88) ELT 12 (SC).

f) Similarly, penalty is also not imposable u/s 78 as activity undertaken does not construe to rendition of service for consideration. Moreover, non-payment was under bonafide belief that there would be no service tax liability as the advance was received towards sale of goods. Reliance placed on 2001 (134) ELT 679 (Tri-Delhi).

7. Personal hearing in the matter was held on 13.10.2021 through virtual mode. Shri Ashish Dave, Assistant Manager (Finance) appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

8. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum and the evidences available on records. As the appellant have not disputed the tax and interest liability on Rent a Cab services and Legal Consultancy services, therefore, limited issues to be decided under the present appeal are as under;

a) Whether penalty of Rs.7,67,228/- [Rs.6,10,651/- + Rs.1,56,577/-] imposed in impugned order for short payment of service tax under RCM on Rent a Cab services and Legal Consultancy services, is legally sustainable or not?

b) Whether service tax demand of Rs.6,15,233/- on account of forfeiture of advance by the appellant towards cancellation of order is liable for service tax or not?

9. I find that the adjudicating authority confirmed the service tax demand of Rs.6,10,651/- alongwith interest under Rent a Cab services and appropriated the payment of tax and interest made by the appellant against such tax and interest liability. He also imposed equivalent penalty of Rs.6,10,651/-.

9.1 The demand of Rs.6,10,651/- has been raised under proviso to Section 73 (1) of the F.A, 1944, by invoking extended period of limitation, on the ground that the

appellant under RCM short paid service tax on Rent a Cab services, by suppressing the nature and value of taxable service with an intent to evade payment of tax. The appellant voluntarily paid the tax alongwith interest before issuance of SCN and contested imposition of penalty in the present appeal by contesting that short payment of service tax cannot construe willfull mis-statement or suppression of facts. It was also contended that as payment of tax alongwith interest was made before issuance of SCN, they are eligible for benefit of Section 73(3) of the F.A., 1944. To examine their claim, both Section 73(3) and 73(4) are reproduced below;

Section 73(3) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :*

Provided *that the [Central Excise Officer] may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*

Explanation.[1] *— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.*

*[**Explanation 2.** — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.]*

Section 73(4) *Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —*

(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

It is clear from the legal provisions above that if the assessee pays service tax alongwith interest under Section 73(3), no show cause notice shall be issued. Conversely, sub-section (4) of section 73 mentions that nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax. Since the appellant have not contested the demand of tax & interest demanded under proviso to Section 73(1), which deals with the demand of

service tax not paid by reasons of fraud or willful mis-statement, I find that the benefit of waiver of penalty under Section 73(3) cannot be extended to them in terms of Section 73(4) which clearly state that in case of willful mis-statement or suppression of facts, sub-section (3) shall not be applicable.

9.2 The adjudicating authority has imposed penalty under Section 78 of the Finance Act, 1994 which deals with penalty for failure to pay service tax for reasons of fraud, etc. Sub-section (1) of Section 78 states that where any service tax has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person, who has been served notice under the proviso to sub-section (1) of Section 73, shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty, which shall be equal to 100% of the amount of such service tax.

9.3 Thus, the crucial words in Section 78(1) of the Finance Act, 1994 are *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'* should be read in conjunction with *'the intent to evade payment of service tax'*. I find that the demand was raised based on detection noticed during scrutiny of documents by audit. It is the responsibility of the appellant to correctly assess their tax liability and pay the taxes. The charges incurred by the appellant under Rent a Cab service and payment of tax made thereof clearly show that they were aware of their tax liability but chose not to discharge their tax liability properly instead short paid the tax which undoubtedly bring out the fact that there was willful misstatement with an intent to evade payment of service tax, hence are liable for penalty under section 78.

9.4 The appellant have placed reliance on Board's Instruction dated 18.08.2015 issued vide F.No.137/46/2015-ST, wherein it was clarified that in cases not involving fraud, suppression of facts, etc., if the assessee pays the tax and interest thereon, on the basis of his own ascertainment or that ascertained by the department, no penalty is payable and no show cause notice shall be served under sub-section (1) of Section 73 in respect of the amount so paid. In the instant case, I find that the demand has been raised by invoking suppression of facts, hence, aforesaid instruction cannot be made applicable to the present appeal. Further, the case laws relied by the appellant are also not squarely applicable to the present case, as Hon'ble CESTAT, Chennai in the case of C. Ramachandran 2016(46) STR 866 (Tri-Chennai), held that *"We find that the said amounts have already been disclosed in the ST-3 returns and that the tax along with interest has already been deposited during the course of audit and before the issuance of show cause notice"*. As the value of taxable service in the instant case was suppressed, the above decision cannot be relied upon.

9.5 I place reliance on para 8 of the decision of Hon'ble High Court of Bombay in the case of Responsive Industries Ltd **[2019(026) GSTL 457 Bom.],** wherein it was held that;

"8. From the record it is undisputed that Appellant had not paid the service tax as the outward transportation under the category of GTA for the period from April, 2009 to December, 2011, this even though they had admittedly incurred expenses for the same. ***It is only during the course of EA 2000 audit that above non-payment of service tax on the part of the Appellant was discovered by the revenue. This discovery on the part of the Revenue led the Appellant to deposit the service tax as well as interest thereon even before the show cause notice was issued by the revenue. In the above circumstances, even if the tax and the interest on the same was paid before the issue of notice, it is not open to the Appellant to take benefit of Section 73(3) of the Act as the non-payment of the service tax was on account of suppression with a mala fide intention to evade payment of service tax. Thus in view of Section 73(4) of the Act, the benefit of Section 73(3) of the Act, claimed by the Appellant would not be available."*** Emphasis supplied.

Thus, applying the ratio of above decision of Hon'be High Court of Bombay, I, uphold the penalty imposed by the adjudicating authority under Section 78 in respect of short payment of tax under Rent a Cab service.

10. On the issue of service tax demand on Legal Consultancy service, it is observed that the adjudicating authority has imposed equivalent penalty of Rs.1,56,577/- on the appellant without deciding the demand of service tax and interest, on the reasoning that the same stands decided vide OIO No: 04/DC/20-21/Dem dated 25.06.2020.

10.1 From the facts of the case, it is clear that two demand notices were issued to the appellant. The SCN dated 23.07.2018 proposed **(i)** demand and recovery of service tax of Rs.1,56,577/- alongwith interest short paid, **(ii)** appropriation of Rs.1,56,577/- and Rs.61,387/- interest respectively paid against the tax demand and interest and **(iii)** proposed imposition of penalty. While the second SCN dated 16.03.2020 was issued proposing recovery of erroneous sanctioned refund of cenvat credit of such tax paid under Legal Consultancy service. Both the SCNs covered different matters. The OIO dated 25.06.2020, decided the second SCN covering issue of erroneous refund of CENVAT credit of tax paid and not the issue of short payment of service tax under Legal Consultancy service to the tune of Rs.1,56,577/- alongwith interest & appropriation thereof. The law requires that any demand notice issued needs to be decided. Unless the tax liability raised in first SCN is decided, penalty for non-payment of service tax for reasons of fraud there under cannot be imposed.

10.2 In the present appeal, the demand of Rs.1,56,577/- alongwith interest raised vide SCN No. VI/1(b)-01/C-V/AP-31/2017-18 dated 23.07.2018, was not decided by the adjudicating authority on the ground that said demand alongwith interest stands decided vide OIO No: 04/DC/20-21/Dem dated 25.06.2020 by recovering the erroneous refund sanctioned. Such an interpretation by the adjudicating authority appears to be not backed by law and shall not sustain in the court of law as demand raised for short payment of service tax and subsequent refund of CENVAT credit of such tax paid are altogether different matters. Tax liability cannot be denied merely on the ground that CENVAT credit /refund of unutilized credit is subsequently admissible to the appellant.

10.3 It is observed that the appellant in the present appeal have neither contested the demand of service tax and interest liability nor disputed the appropriation of amount paid by them against these demands. Instead they preferred to challenge only the imposition of penalty. In the interest of justice, the adjudicating authority while imposing the penalty should have first decided the service tax demand and interest liability, which I find was not done in the impugned order. However, considering the wordings of Section 78 which stipulate that, if any person who has failed to pay service tax with an intent to evade payment of tax and where notice has been issued under the proviso to sub-section (1) of section 73, then in addition to the service tax and interest specified in the notice, he is also liable to pay a penalty equal to hundred per cent of the amount of such service tax.

> ***SECTION [78. Penalty for failure to pay service tax for reasons of fraud, etc.*** *— (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :*

As the non-payment of service tax on the part of appellant was discovered by the revenue during the course of audit, therefore, by applying the ratio of decision of Hon'ble High Court of Bombay passed in the case of Responsive Industries Ltd **[2019(026) GSTL 457 Bom.],** I find that the benefit of Section 73(3) cannot be extended to the appellant and therefore hold that penalty under Section 78 was rightly imposed by the adjudicating authority. In light of above discussion and the fact that the appellant have accepted their tax and interest liabilities, I, uphold the penalty imposed under Section 78.

11. On the issue whether advance of Rs.41,01,522/- forfeited towards cancellation of order is liable for service tax or not, it is observed that the adjudicating authority confirmed the demand of **Rs.6,15,233/-** on the argument that such advance was a consideration received by the appellant or penalty imposed on the buyer for not executing the contractual obligation, hence covered under declared service provided *"Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"* as provided under Section 66E (e) of the Act.

11.1 The appellant, however, are contesting that the advance amount was forfeited for failure to honour contract hence cannot be construed as a consideration for the provision of service agreed to be provided. It is in fact charged as penalty or compensation to claim the damages from the customer to recover the cost incurred towards customized products in the context of contract for sale of goods which were earlier proposed to be sold. It is against such cost incurred & upon termination of sale contract that the advance was forfeited. They also argued that the act of forbearance from which the other person is not actually being benefitted cannot be construed as amount towards sale of goods or consideration for any taxable activity carried out by the contractee as envisaged u/s 66E(e) of the Act.

11.2 To examine whether the amount forfeited by the appellant was a consideration against a service, Section 67 shall be relevant. The manner of determining the value of service on which service tax becomes payable is provided in Section 67 of the Finance Act 1994. It deals with valuation of taxable service for charging service tax. Section 67 of the Finance Act is reproduced below:-

> ***SECTION [67. Valuation of taxable services for charging service tax.*** *— (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.*
>
> ***Explanation.*** *— For the purposes of this section, —*
>
> *(a) ["**consideration**" includes —*
>
> *(i)any amount that is payable for the taxable services provided or to be provided;*
>
> *(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;*
>
> *(iv) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.']*
>
> *[(b) * * * *] (emphasis supplied)*

It is, thus, clear that where service tax is chargeable on any taxable service with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of sub-section (1) of Section 67. What needs to be noted is that each of these refer to "where the provision of service is for a consideration", whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a "consideration" for the

provision of such service. Explanation to sub-section (1) of Section 67 clearly provides that only an amount that is payable for the taxable service will be considered as "consideration".

11.3 The term 'consideration' has not been defined in the Act. As per explanation (a) to Section 67 of the Act "consideration" includes any amount that is payable for the taxable services provided or to be provided. However, it is defined in section 2 (d) of the Indian Contract Act, 1872 as under-

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

In simple terms, 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of non-monetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory. In the instant appeal, the advance retained or forfeited cannot be considered a consideration against provision of service as the appellant are engaged in manufacture of Air Compressor and spare parts and had received advance from their customer in terms of the contract for sale of customized goods and not against provision of any service.

11.4 This aspect is further explained in **Para 2.3.1** of the CBEC taxation of services (Education Guide) which clarifies that to be a service an activity has to be carried out for a consideration. Therefore, fines and penalties which are legal consequences of a person's actions are not in the nature of consideration for an activity. The appellant in the instant case was recovering the compensation for cancellation of sale deed contract and not receiving any consideration as was held in the impugned order. Here it is relevant to refer Section 53 of the Indian Contract Act which is reproduced below;

" When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes viodable at the option of the party so prevented: and he is entitled to ***compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract"***

It is evident from the above legal provisions that compensation is entitled from the other party who prevented from performing the contract, for any loss which he may sustain as a consequence of the non-performance of the contact. What the appellant charged was compensation for the loss incurred in consequence of the non-performance of the sale contract. Para 2.3.2 of the CBEC Taxation of Services (Education Guide) further clarified that advance forfeited would represent consideration if it was for cancellation of an agreement entered for provision of service. Whereas in the instant case the agreement was for sale of customized product and not for any provision of service hence such forfeited advance shall not represent consideration.

11.5 The Kolkata Eastern Bench of Hon'ble Tribunal in the case of M/s. Amit Metaliks Ltd has dealt with a similar issue as in the present case and at para 27, held that:

> *27. As far as the compensation received from M/s. Amit Mines is concerned, the show cause notice mentions the leviability of Service tax on the amount received towards the compensation for non-supply of the agreed quantity of manganese ore under Section 64E(e) of Finance Act which is even otherwise is purely the transaction sale of the iron ore to the appellant by M/s. Amit Mines. Thus, the compensation amount is towards default on the sale of the goods. The sale could not be effected and, therefore, appellant received the liquidated damage by way of raising the debit note which was honoured by M/s. AML. Thus, this amount of compensation/liquidated damage cannot be treated as service under Section 64E(e) of the Act. The demand is thus not sustainable on this aspect also.*

11.6 Larger Bench of Hon'ble Tribunal South Zonal Bench in the case of Repco Home Finance Ltd [2020 (42) G.S.T.L. 104 (Tri.-LB)] while answering the reference made on the divergent views expressed by Division Benches of the Tribunal on the issue as to whether foreclosure charges levied by the banks and non-banking financial companies on premature termination of loans are leviable to service tax under the head "banking and other financial services" held that;

> *" **51.** It is not possible to accept the reasoning given by the Bench in Hudco in view of the discussions made above. The amount of damages is clearly stipulated in the contracts and no element of service is sought to have been rendered by the banks to borrowers. In fact, as noticed above, the contract has been broken by the borrowers for which the banks are entitled to claim damages. **The foreclosure charges are nothing but damages which the banks are entitled to receive when the contract is broken. The amendment made in Section 65(12) of the Finance Act in the definition of "banking and other financial services" by addition of "lending" is not relevant at all for the purpose of determining whether service tax can be levied on foreclosure charges."***
> Emphasis supplied.

11.7 Likewise, Principal Bench of Hon'ble Tribunal, New Delhi in the case of Lemon Tree Hotel [2020 (34) G.S.T.L. 220 (Tri. - Del.)] while dealing with the issue whether an obligation to refrain from an act or to tolerate an act or situation would result in supply of services when a sum paid as a deposit by a client to a hotelier, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, can be regarded as consideration for the supply of a reservation service, held that;

> *" **5.** Having considered the rival contentions, I find that the aforementioned observation of the Commissioner (Appeals) are erroneous and have no legs to stand. Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus; under the terms of the contract, they are entitled to retain the whole amount or part of it. **Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no***

service tax is attracted under the provisions of Section 66E(e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant." Emphasis supplied.

11.8 A similar issue was also decided by me earlier in the case of M/s. Hi Tech Industries vide **OIA No:AHM-EXCUS-002-APP-17/2021-22 dated 21.09.2021** wherein relying on various decision of Hon'ble Tribunal, it was held that the amount booked as Order Cancellation income which is in fact forfeiture of amounts/penalty paid by the buyer to the appellant is in the nature of compensation for non-performance of contractual obligation and such transaction, being compensation against breach of contractual obligation, does not per se amount to a consideration and does not per se constitute any service or declared service s envisaged under Section 65B(44) and Section 65E(e) of the Act.

11.9 I, therefore, find that the recovery of liquidated damages/penalty from customer cannot be said to be towards any service *per se*, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance. The activities, therefore, contemplated under section 66E(e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

11.10 Thus, applying the ratio of above decisions and in view of the aforesaid discussion, it is, therefo e, not possible to sustain the view taken by the adjudicating authority that advance amount forfeited have been received/retained by the appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act. I, therefore, hold that the impugned order confirming the demand in the matter fails to sustain legally on merits and deserves to be set-aside. Accordingly, when the demand fails, there cannot be any question of interest and penalty.

12. In view of above discussion and the decisions of the various judicial forum, I pass the following order:

(i) I uphold the impugned Order-in-Original to the extent it relates to imposition of penalty of **Rs.6,10,651/- & Rs.1,56,577/-** for service tax short paid under Rent a Cab and Legal Consultancy services respectively, during the disputed period;

(ii) I set aside the impugned Order-in-Original to the extent it relates to demand of **Rs.6,15,233/-** alongwith interest and penalty confirmed under declared service "*Agreeing to the obligation to refrain from an act, or to tolerate an act*

or a situation, or to do an act" under Section 66E (e) of the Act during the disputed period.

13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 11.2021

Attested

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

By RPAD/SPEED POST

To,
M/s. Ingersoll Rand (India) Ltd., - **Appellant**
Plot No.21-30,
GIDC Estate, Naroda,
Ahmedabad-382330

The Deputy Commissioner - **Respondent**
CGST, Division-I
Ahmedabad North
Ahmedabad

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Deputy Commissioner, CGST, Division-I, Ahmedabad North
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.