आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : **टेलेफैक्स** 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211164SW0000333FC0

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1374/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad/4313 TO 4321

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-33/2021-22**
दिनाँक Date : **11.11.2021** जारी करने की तारीख Date of Issue : **22.11.2021**

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

ग Arising out of Order-in-Original Nos. **25/ADC/2020-21/MLM dated 26.11.2020**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

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

Appellant- M/s. Cadila Pharmaceuticals Ltd., Cadila corporate Campus, Sarkhej Dholka Road, Bhat, Ahmedabad-387810.

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 के अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

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

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण 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 दिनॉक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–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

1. This order arises out of an appeal filed by M/s. Cadila Pharmaceuticals Ltd., Cadila Corporate Campus, Sarkhej-Dholka Road, Village-Bhat, Dist-Ahmedabad-387810 (hereinafter referred to as '*appellant*') against Order in Original No. 25/ADC/2020-21/MLM dated 26.11.2020 (hereinafter referred to as '*the impugned order*') passed by the Additional Commissioner, CGST & Central Excise, Commissionerate:Ahmedabad-North (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant is engaged in the manufacturing of medicaments and was also holding Service Tax Registration No. AAACC6251EST002 for discharging Service Tax under Reverse Charge Mechanism for various categories of services.

2.1 Audit of the records of the appellant was carried out by the departmental audit officers for the period from April, 2014 to June, 2017. Based on the audit observations, a show cause notice vide F.No. VI/1(b)/CTA/Tech-39/SCN/Cadila/2019-20 dated 04.10.2019 was issued to the said appellant for demand and recovery of the Service Tax not paid/short paid by them, on account of different points as discussed therein.

2.2 The show cause notice issued from F.No. VI/1(b)/CTA/Tech-39/SCN/Cadila/2019-20 dated 04.10.2019 has been adjudicated by the adjudicating authority vide the impugned order, as briefly reproduced below:

(i) The demand of Service Tax amounting to Rs. 34,48,399/- has been confirmed [as per Revenue Para-2: Non-payment of service tax on notice pay income recovered from employees] and ordered to pay the same under Section 73 (2) of the Finance Act, 1994, alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994.

(ii) The demand of Service Tax amounting to Rs. 9,71,082/- has been confirmed [as per Revenue Para-3: Short payment of service tax expenditure in foreign currency on account of reconciliation of ST-3 with Financial Accounts under the category of Import of Service under RCM] and ordered to pay the same under Section 73 (2) of the Finance Act, 1994, alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994.

(iii) Penalty of Rs. 44,19,481/- has been imposed on the appellant under the provisions of Section 78(1) of the Finance Act, 1994.

(iv) The demand of Service Tax of Rs. 96,92,030/- [demanded as per Revenue Para-1: Non/Short payment of Service Tax on expenditure in foreign currency for product registration fee and other expenses made to foreign government under the category of Import of Service under RCM] has been dropped alongwith proposal of interest and penalty in respect of the same.

(v) Penalty of Rs. 1000/- imposed for late filing of ST-3 Returns (Revenue Para-4) under Section 70 of the Finance Act, 1994. Since the amount has been paid by the appellant, the same has been appropriated.

(vi) The demand of Service Tax of total Rs. 39,700/- [demanded as per Revenue Para-5 & Revenue Para-6] has been confirmed. Since the amount has been paid by the appellant alongwith interest and penalty, the same has been appropriated.

(vii) The demand of interest of Rs. 15,037/- [on late payment of Service Tax as per Revenue Para-7] has been confirmed. Since the amount has been paid by the appellant, the same has been appropriated.

3. Being aggrieved with the impugned order, the appellant preferred this appeal, only in respect of the demands of Service Tax confirmed by the adjudicating authority on two issues, as shown at Para No. 2.2 (i) and Para No. 2.2 (ii) above and also the penalty imposed in respect of the same, as mentioned at Para 2.2 (iii) above. The grounds of appeal are reproduced in following paragraphs.

3.1 The demand of Service Tax of Rs. 34,48,399/- [as shown at Para No. 2.2 (i) above] is made in respect of the notice pay recovered from the employees during the period from 01.04.2014 to 30.06.2017. The issue is covered by the decision of Hon'ble Madras High Court in the matter of GE T&D India Limited (formerly Alstom T&D India Limited) Versus CCE reported in [2020 (1) TMI 1096- Madras High Court].

The notice pay deducted/recovered is as per the agreement of employer with the employee. The agreement gives an option to the employee either to give notice and at the end of the notice period can leave the organisation or optionally pay the notice pay if the employee does not desire to serve during the notice period. Thus, the payment is in terms of the agreement and is not in the nature of compensation and therefore, not covered under the clause (e) of the Section 66E of the Finance Act, 1994.

In order to become a declared service, there should be an agreement

to agree to obligation *"to refrain from an act"*, or *"to tolerate an act or a situation"*, or *"to do an act"*. In the facts of the present case, there is a contract with an employee wherein there is a clause for termination. The notice pay amount received is, therefore, in terms of the said contract and not for any other consequent action for breach of the contract. Any employee, opting to make payment, is only exercising his right under the contract and is not compensating us in any manner for breach of the contract. The condition of the contract giving option to the party cannot simply breach of the contract and the termination of the contract also is not a breach of the contract when it is in terms of the contract itself. If there is a breach of the employment contract and pursuant to such breach some right/compensation/action arises and such right/compensation/action is, by a separate agreement, agreed to refrain or tolerate the act or a situation for a money consideration, then possibly the clause (e) of the Section 66E of the Finance Act, 1994 may have application. This clause will not have application when the amounts are received pursuant to a contract, which had a termination clause. Clearly, therefore, the facts of the present case are not covered within the said clause and, therefore, there is no declared service under this situation.

Further, in the present case, the appellant are holding a clear belief that the transactions in question are not covered as declared services and hence, not taxable. Accordingly, when the disputed transactions are not even service, question of paying tax thereon or giving information never arose. Hence, the extended period is not available to the department.

3.2 The demand of Service Tax of Rs. 9,71,082/- [as shown at Para No. 2.2 (ii) above] is made in respect of expenses made in foreign currency under four different heads viz. (i) Hiring of field staff in foreign countries (ii) Professional & Consultancy Fees (iii) Business Promotion Expenses & (iv) Patent and Trademark Expenses [as per table under Para no. 38 of the impugned order] during the period from F.Y. 2014-15 to June, 2017.

The appellant has full-fledged office in Russia and Vietnam. The present demand does not cover expenses of these two offices. However, in other countries they have senior persons (employee) working and handling all affairs/business normally from their residence who practically operate as independent office in respective country. Normally, there is no source of income/receipt and therefore all required funds are transferred from India. Since there is no other structural support, many of the payments for expenses, normal y would have been made by them, are directly made from

India. It can be seen that for all purposes, our employee constitutes office abroad. There is no reason to give different treatment to such offices and they are on par with other office abroad.

The appellant has relied upon the judgment of the Tribunal in the matter of M/s. Tech Mahindra Ltd. Millind Kulkarni Versus CCE, Pune reported in [2016 (44) STR 71 (Tri. Mumbai)], in support of their contention that no service tax is payable in such cases. Further, they have also relied upon the decision of the Tribunal in case of Steel Authority of India Limited versus Commissioner of Service Tax, New Delhi reported in [2020 (4) TMI 346] and submitted that the expenses of field staff is salary paid to the staff and hence not taxable.

Further, the appellant has submitted that they were eligible to avail credit of taxes, if paid, on reverse charge basis. This has the effect of rendering the situation to be revenue neutral and therefore, they could not have any intention to evade taxes which is a prime condition for invocation of extended period of demand. Hence, the demand would be hit by limitation.

4. The appellant was granted opportunity for personal hearing on 17.09.2021 through video conferencing. Shri S. J. Vyas, Advocate, appeared for personal hearing as authorised representative of the appellant. He re-iterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellant at the time of hearing. The issues to be decided in the present appeal are as under:

- Whether the demand of Service Tax confirmed against the appellant, in respect of 'Notice Pay Income' recovered from their employees is correct or otherwise?
- Whether the demand of Service Tax confirmed against the appellant under reverse charge mechanism, in respect of 'expenditure in foreign currency' for the category of import of Service is correct or otherwise?
- Whether the demand confirmed by invoking the extended period of limitation and accordingly, penalty imposed under Section 78(1) of the Finance Act, 1994 is correct or otherwise?

6. Accordingly, I first take up the issue of demand of Service Tax of Rs. 34,48,399/- confirmed on account of 'Notice Pay Income' recovered by the appellant from their employees. As per the facts mentioned in the impugned order, the amount recovered from the employee towards 'notice pay' is the amount stipulated in the employment contract for breach in serving (not serving) before the stipulated notice period.

6.1 On going through the impugned order, I find that the adjudicating authority has contended that the appellant had offered employment to their employees on the terms and conditions as mutually decided upon wherein one of the conditions was to continue in employment for the prescribed period and in case of premature resignation or leaving the employment, employee would have to pay a pre-decided amount to the employer i.e. appellant. Accordingly, in case of breach of the condition to continue in employment for the prescribed period by the employee, he would be required to pay pre-determined amount to the employer, which is called notice pay'. Thus, the employer has agreed to tolerate the breach of the condition by the employee regarding prescribed notice period subject to the payment of the amount by the employee agreed upon and hence, such notice pay recovered by the employer i.e appellant from the employees is to be treated as consideration for declared services, as defined in terms of the provisions of clause (44) of Section 65B of the Finance Act, 1994 read with clause (e) of Section 66E of the Finance Act, 1994.

6.2 I find that the term "service" has been defined in clause (44) of Section 65B of the Finance Act, 1994 reads as under:

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

Further, the 'declared service' is defined as per clause (e) of the Section 66E of the Finance Act, 1994, reproduced as under:

> *The following shall constitute declared services, namely:—*
>
> *(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;*

6.3 Further, it is the contention of the appellant, in the present case that there is a contract with an employee wherein there is a clause for termination, like any normal commercial contract. It is this clause of termination, which gives an option to both the parties, to terminate the employment agreement by either rendering service for specified notice period or to pay specified amount in lieu of not working during the notice period. Thus the notice pay amount received is, therefore, in terms of the said contract and not for any other consequent action for breach of the contract. Therefore, the facts of the present case are not covered within the clause (e) of the Section 66E of the Finance Act, 1994.

6.4 Further, I find that the appellant has relied upon the decision of Hon'ble Madras High Court in the matter of GE T&D India Limited (formerly Alstom T&D India Limited) Versus CCE reported in [2020 (1) TMI 1096-Madras High Court]. I have gone through the said judgement and the relevant contents are reproduced here under:

> ***"11.*** *The query raised relates to a contra situation, one, where amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof. The Board has answered in the negative, pointing out that such amounts would not be related to the rendition of service. Equally, so in my view, the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit.* ***The definition in Clause (e) of Section 66E as extracted above is not attracted to the scenario before me as, in my considered view, the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard****.*
>
> ***12.*** *Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee."*

On going through the above judgment, I find that the Hon'ble High Court has clearly held that the employer by receiving certain amounts in lieu of notice period from outgoing employees, have not 'tolerated' any act of the employee, but has permitted a sudden exit upon being compensated by the employee for the same. Accordingly, such scenario is not covered under the definition of 'declared services' as per the clause (e) of the Section 66E of the Finance Act, 1994.

6.4.1 However, as regards the abovementioned judgment of Hon'ble Madras High Court in the matter of GE T&D India Limited relied upon by the appellant, the contention of the adjudicating authority as per his findings mentioned at para 107.10 of the impugned order are that "The Hon'ble High Court held that the employer cannot be said to have rendered any taxable service as per Section 66E(e) of the Finance Act, 1994 (i.e. toleration of an act) and has merely facilitated the exit of the employee upon imposition of cost for the sudden exit. Since, the Hon'ble High Court has not appreciate the term 'declared service' under Section 66E(e) of the Act in terms of the facts of the case such as the contractual agreement between the two parties, the breach of contract by the employee and the payment made by the employee, as a penalty/damages towards such breach of contract. Therefore, the ratio of said case law is not applicable to the facts of the present case."

As regards the said contention of the adjudicating authority, on going through the said judgement of Hon'ble High Court, I find that the facts and the issue involved in the said case were similar to the present case and also pertain to the period after introduction of 'Negative list of Services'. Accordingly, I find that the findings of the Hon'ble High Court in respect of the applicability and coverage of the definition of 'declared service' in terms of the Section 66E(e) of the Act to the facts of the relevant case are clearly applicable to the present case and hence, the contention of the adjudicating authority is not acceptable.

6.4.2 It is also observed that as regards the issue of coverage of 'liquidated damages/penalty collected for non-compliance of the terms of the contracts/breach of contract' under the definition of 'declared service', the Hon'ble CESTAT, Chennai in a recent case of M/s. Steel Authority of India Ltd., Salem Versus Commissioner of GST & Central Excise, Salem [Service Tax Appeal No. 40052 of 2019] vide Final Order No. 41707/2021 dated 26.07.2021 held as under:

> ***"15.*** *The Tribunal rejected the contentions advanced on behalf of the Department that penalty amount, forfeiture of earnest money deposit and liquidated damages had been received by the said appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act.*
>
> ***16.*** *In this connection it would be appropriate to reproduce the relevant portions of the decision of the Tribunal in South Eastern Coalfields and they are as follows:*

*"**25**. It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:*
(i) consideration for agreeing to the obligation to refrain from an act; or
(ii) consideration for agreeing to tolerate an act or a situation; or
(iii) consideration to do an act.

***26**. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a "declared service" under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).*

***27**. It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and the parties was for supply of coal; for supply of goods; and for availing various types of services. The consideration contemplated under the agreements was for such supply of coal, materials or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.*

***28**. It also needs to be noted that section 65B(44) defines "service" to mean any activity carried out by a person for another for consideration. Explanation (a) to section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from other party 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.

29. *The situation would have been different if the party purchasing coal had an option to purchase coal from "A" or from "B" and if in such a situation "A" and "B" enter into an agreement that "A" would not supply coal to the appellant provided "B" paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E (e).*

30. *The activities, therefore, that are 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."*

6.5 In view of the above discussion and following the above mentioned judgements of Hon'ble Madras High Court and also of Hon'ble Tribunal, Chennai, I find that the amount recovered from the employees towards 'notice pay' in the present case cannot be considered as "*consideration*" for "*tolerating an act*" leviable to service tax in terms of the provisions of Section 66E(e) of the Finance Act,1994.

Accordingly, I find that the demand of Service Tax amounting to Rs. 34,48,399/- confirmed by the adjudicating authority against the appellant in respect of 'Notice pay income recovered from employees' is not sustainable on merit and is liable to be dropped. Further, when the duty confirmed is set aside, there is no question of interest and imposition of penalty to that extent.

7. Now, I take up the issue of demand of Service Tax of Rs. 9,71,082/- confirmed against the appellant under reverse charge mechanism, in respect of 'expenditure in foreign currency' for the category of import of Service. As per the facts mentioned in the impugned order, such expenditure made by the appellant in foreign currency were under four different heads viz. (i) Hiring of field staff in foreign countries (ii) Professional & Consultancy Fees (iii) Business Promotion Expenses & (iv) Patent and Trademark Expenses [as per table under Para no. 38 of the impugned order] during the period from F.Y. 2014-15 to June, 2017.

7.1 On going through the impugned order, it is observed as per the contention of the adjudicating authority that the Government has issued Notification No. 30/2012-ST dated 20.06.2012, as amended, wherein the class of services under the reverse charge mechanism; the person liable to pay service tax; and the extent of service tax payable by such person, has been specified. The relevant contents of the said notification are reproduced hereunder:

".....the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

I. The taxable services,-

B) provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;"

The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified at Para (I), Clause (B) to Notification No. 30/2012-ST as amended has been specified at the Table at Para (II) of the said Notification and the relevant portion is reproduced as under:

TABLE

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
10	In respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	NIL	100%

Further, the person liable to pay service tax under the reverse charge mechanism has also been stipulated under Rule 2(1)(d) of the Service Tax Rules, 1994 which reads as under:

"Rule 2(1)(d) "person liable for paying service tax",-

(i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means,-

(A) .....

(B) .....

(G) in relation to any taxable service provided or agreed to be provided by any person which is located in a non-taxable territory and received by

any person located in the taxable territory, the recipient of such service;

In view of the above provisions, it was held that as the appellant has received services in respect of (i) Hiring of field staff in foreign countries (ii) Professional & Consultancy Fees (iii) Business Promotion Expenses & (iv) Patent and Trademark Expenses etc. provided from the non-taxable territory during the period from 2014-15 to June 2017 on which they were liable to discharge 100% service tax, as recipient of service, under Reverse Charge Mechanism in terms of the provisions of Sec. 68(2) of the Finance Act, 1994 read with Rule 2(1)(d) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST, as amended.

7.2 Further, I find in the present case that the appellant has also made contention that "they have senior persons (employee), in some of the foreign countries, working and handling all affairs/business normally from their residence who practically operate as independent office in respective country. Normally, there is no source of income/receipt and therefore all required funds are transferred from India. Since there is no other structural support, many of the payments for expenses, normally would have been made by them, are directly made from India. It can be seen that for all purposes, our employee constitutes office abroad. There is no reason to give different treatment to such offices and they are on par with other office abroad".

As regards the said contention of the appellant, I find that in the present case, they have made expenses on various nature of services which are covered under the category of import of services which are attracting Service Tax under RCM in terms of the statutory provisions, as discussed in para-7 and para-7.1 above. However, the appellant has neither submitted any convincing explanation nor provided any documentary evidences so as to accept their contention that the said services availed by them are not covered under import of service, which made them liable to pay the service tax under the reverse charge mechanism.

7.3 Further, it is observed that the appellant has relied upon judgement in case of M/s. Tech Mahindra Ltd. Millind Kulkarni Versus CCE, Pune reported in [2016 (44) STR 71 (Tri. Mumbai)] and also the decision of the Tribunal in case of Steel Authority of India Limited versus Commissioner of Service Tax, New Delhi reported in [2020 (4) TMI 346].

I have gone through the above mentioned judgement of Hon'ble Mumbai and find that in the said case, the issue under consideration before Hon'ble Tribunal was "whether any service rendered to other contracting party by overseas branch as a branch of service provider would be within the scope of Section 66A of the Finance Act, 1994 or otherwise and accordingly, whether the amount paid to branches towards reimbursement or a consideration would be liable to service tax or otherwise. Further, I find that the said provision i.e. Section 66A of the Finance Act, 1994 was the statutory provisions for "charge of service tax on services received from outside India." , which was applicable for the period upto 30.06.2012. In the present case, it is observed that the demand pertains to the period from F.Y. 2014-15 to June, 2017 and confirmed in terms of the statutory provisions made applicable w.e.f 1.07.2012. Accordingly, I find that the ratio of the said judgement is not applicable to the present case.

Further, I have also gone through the decision of the Hon'ble Tribunal in case of Steel Authority of India Limited and find that the issue before the consideration of the Hon'ble Tribunal in the said case was also the applicability of the provisions of Section 66A of the Finance Act, 1994 in respect of the facts of the said case, at the relevant time. Accordingly, I also find that the ratio of the said judgement is not applicable to the present case. Further, I also find that the contention of the appellant that "the expenses of field staff is salary paid to the staff and hence not taxable" is also not backed by any supporting documentary evidences and liable to be rejected.

7.4 Further, it is also observed that the appellant has submitted that they were eligible to avail credit of taxes, if paid, on reverse charge basis. This has the effect of rendering the situation to be revenue neutral and therefore, they could not have any intention to evade taxes which is a prime condition for invocation of extended period of demand. Hence, the demand would be hit by limitation.

As regards the said contention, I find that the issue of entitlement of Cenvat Credit and liability to pay Service tax are two different issues. Further the entitlement of Cenvat credit is always dependent upon the fulfilment of eligibility criteria and also producing of prescribed documents, statutorily prescribed under the relevant provisions. Accordingly, I find that the contention of the appellant is not sustainable.

7.4.1 Further, it is observed that the appellant is a well-established body corporate and are no novices to the laws governing the charge of service tax. Despite the clear provisions of law, the appellant have failed in the present case to declare the taxable value of such services in their ST-3 returns. In the era of self assessment, a service provider is not required to maintain any statutory or separate records under the provisions of the Finance Act and Rules made thereunder. Therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on them. Such incidence of short-payment of service tax by the appellant would never have been noticed, if the audit officers had not pointed out these issues. These acts of the appellant tantamount to wilful suppression, concealment and mis-statement of facts with an intent to evade the payment of service tax. Accordingly, I am in agreement with the findings of the adjudicating authority that in the present case, the appellant failed to assess Service Tax on the said service under Section 68 of the Finance Act, 1994 read with Rule 2(1)(d) of the Service Tax Rules, 1994, failed to pay Service Tax as provided under Rule 6 of Service Tax Rules, 1994, failed to declare taxable value in their ST-3 returns filed by them from time to time under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 and thereby suppressed material facts with an intent to evade payment of Service Tax amounting to Rs. 9,71,082/- leviable on expenditure made in foreign currency on import of services under RCM and hence the same are liable to be recovered alongwith interest from the appellant invoking extended period of limitation prescribed under proviso to Section 73(1) of the Finance Act, 1994. Further, I also find that the ingredients of suppression of facts and wilful mis-statement with an intent to evade payment of service tax clearly exists in this case and hence, the said act on the part of the appellant has also made them liable for penalty under the Section 78(1) of the Finance Act, 1994.

7.5 In view of the above, I find that the demand of Service Tax of Rs. 9,71,082/- alongwith interest confirmed by the adjudicating authority against the appellant, in respect of 'expenditure in foreign currency' for the category of import of Service under reverse charge mechanism, invoking the extended period of limitation is legally correct. Further, I also find that the impugned order imposing penalty to the extent of Rs. 9,71,082/- on the appellant under Section 78(1) of the Finance Act, 1994 is also correct.

8. On careful consideration of the relevant legal provisions and submission made by the appellant, I pass the Order as per details given below:

(i) As regards the demand of Service Tax amount of Rs. 34,48,399/- alongwith interest in respect of the 'Notice pay income recovered from employees', which has been confirmed by the adjudicating authority, is not sustainable on merits, as discussed in Para-6.1 to Para-6.5 above. Accordingly, the impugned order is set aside and appeal allowed to that extent. Further, when the duty confirmed is set aside, there is no question of penalty to that extent.

(ii) As regards the demand of Service Tax amount of Rs. 9,71,082/- alongwith interest confirmed against the appellant under reverse charge mechanism, in respect of 'expenditure in foreign currency' for the category of import of Service, I find that the contention of the appe lant are not sustainable, as discussed in Para-7.1 to Para-7.5 above, so as to intervene in the impugned order passed by the adjudicating authority. Hence, the impugned order is upheld to that extent. Further, the penalty of Rs. 9,71,082/- imposed by the adjudicating authority on the appellant under the provisions of Section 78(1) of the Finance Act, 1994 is also accordingly upheld. The appeal filed by the appellant to that extent is rejected.

9. The appeal filed by the appellant stands disposed off in above terms.

11th November, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 11/Nov/2021

Attested

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

By Regd. Post A. D

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Copy to :

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