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-20211164SW0000515265

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1263, 1265 and 1266/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad / 4352 TO 4356

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-35 to 37/2021-22**
दिनाँक Date : **17.11.2021** 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. **GST/D-VI/O&A/17, 18 & 19/SAI/JRS/2020-21 dated 07.01.2021**, passed by the Assistant Commissioner, Central GST & Central Excise, Div-VI, Ahmedabad-North.

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

Appellant- M/s. Sai Consulting Engineers Pvt. Ltd., Block A, Satyam Corporate Square, B. H. Rajpath Club, Bodakdev, Ahmedabad-380059.

Respondent- Assistant Commissioner, Central GST & Central Excise, Div-VI, 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 :

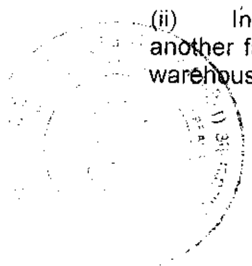
Revision application to Government of India :

(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 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 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 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.

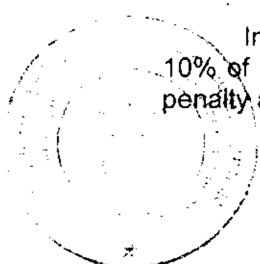
यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने **के लिए पूर्व शर्त बना दिया गया है** .

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."



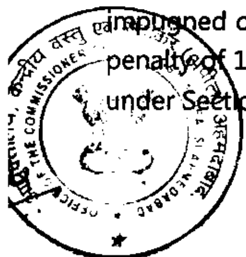
ORDER IN APPEAL

M/s. Sai Consulting Engineers Pvt. Ltd., Block-A, SAI House, Satyam Corporate Square, B/h Rajpath Club, Bodakdev, Ahmedabad-380059 (hereinafter referred to as '*the appellant*') have filed following appeals against the Order-in-Originals mentioned in the table below (in short '*impugned orders*') passed by the Assistant Commissioner, Central GST, Division-VI, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

Sr.No.	Appeal No.	OIO No.	Period involved	S.Tax Demand (in Rs.)
01	GAPPL/COM/STP/1265 /2021	GST/D-VI/O&A/17/SAI/JRS/2020-21 dated 07.1.2021	April,2016 to Sept,2016	42,66,578/-
02	GAPPL/COM/STP/1266 /2021	GST/D-VI/O&A/18/SAI/JRS/2020-21 dated 07.1.2021	Oct,2016 to March,2017	45,80,808/-
03	GAPPL/COM/STP/1263 /2021	GST/D-VI/O&A/19/SAI/JRS/2020-21 dated 07.1.2021	April,2017 to June, 2017	22,75,846/-

2. The facts of the case, in brief, are that the appellant are engaged in providing taxable services of Consulting Engineer service and were availing CENVAT credit facility. During the course of EA 2000 audit of the records maintained by the appellant, it was noticed that the appellant during the F.Y. 2012-13, wrongly availed Cenvat credit on input services used in exempted services in terms of Rule 6(3) of the CCR, 2004 and also failed to pay service tax under reverse charge mechanism on the expenses made in foreign currency under head 'Professional fees-foreign' for Consulting Engineers Service received from foreign service providers. First SCN was issued on 08.05.2014 covering the period F.Y.2012-2013 and thereafter subsequent SCNs were issued covering the period till F.Y. 2015-16. For the succeeding period, information regarding service tax paid and service tax payable was sought from the appellant by the Range officers and from the details submitted by the appellant, it was noticed that though they started reversal of Cenvat credit on input services used in exempted services in terms of Rule 6(3) of the CCR, 2004, but continued non-payment of service tax under Consulting Engineers Service received from foreign service providers. As the said service does not fall under the ambit of negative list, therefore, in terms of provisions of Section 66D of the F.A, 1994, they are liable to pay service tax under reverse charge mechanism. Periodical SCNs (listed in the table above) in terms of Section 73(1A) of the Finance Act, 1994 were consequently issued to the appellant for the disputed period mentioned in the table above.

3. These SCNs proposed demands and recovery of service tax mentioned in the table above under proviso to Section 73(1) of the F.A, 1994 alongwith interest under Section 75. Imposition of penalty under Section 76 (for non-payment of service tax demanded) & penalty under Section 77 of the Act ibid (for failure to self-assess the tax liability & failure to declare taxable value in ST-3 Return) were also proposed. These SCNs were adjudicated by the adjudicating authority vide the aforementioned impugned orders, wherein he confirmed the demands alongwith interest and imposed penalty of 10% of the service tax demand under Section 76 and penalty of Rs.10,000/- under Section 77(2).



4. Aggrieved with the impugned orders, the appellant preferred the present appeals, mainly on following grounds:-

- They had entered contracts with sub-consultants who actually rendered services in foreign countries (like Ghana, Kenya, Uganda, Ethiopia etc). The services were actually performed and consumed in such foreign countries, and not in India therefore Section 66C and Rule 3 of POP Rules shall be applicable only to those services, which were received and consumed in India. The contracts with the sub-consultants were entered into, performed and consumed in a country other than India. The judgment of the Hon'ble Delhi High Court in case of Orient Crafts Ltd. **2006 (4) STR 81 (Del.)** was also not considered while deciding the demand by the adjudicating authority.

- As per s.no.10 of Notification No.30/2012-ST, reverse charge is applicable in respect of any taxable services provided by any person located in a non- taxable territory and received by a person located in the taxable territory. The contracts were entered into were performed by foreign sub consultants and such services are fully and wholly consumed in countries other than India. Therefore, confirmation of demand under Rule 3 of the POP Rules read with Section 66C of the said Finance Act and Notification No.30/2012-ST is illegal and without jurisdiction.

- They placed reliance on following:

  - Intas Pharmaceuticals - 2009(16)STR 748
  - Infosys Ltd. -2014-T10L-409-CESTAT-BANG
  - KPIT Technologies Ltd. -2014 (36) STR 1098
  - Circular No. 36/4/2001 dated 8.10.2001

- All the projects awarded to the appellant were either executed directly or through sub consultants in relation to immovable properties like roads, highways and such civil works. The sub-consultants to whom payments have been made by the appellant company under the head 'Project Work (Sub Contract)" is for rendering Consulting Engineer Services in relation to such immovable properties. The place of provision of services would not be India but such foreign countries where such immovable properties were located, therefore, no liability of service tax would arise in the present case. In similar issue, a Special Civil Application No.4420 of 2019 is pending wherein the constitutional validity of Rule 3 of the Place of Provision of Services Rules, 2012 has been challenged as ultra-vires, before Hon'ble High Court of Gujarat, therefore the issue is sub-judice.

- The service tax paid is fully admissible as Cenvat credit and such Cenvat credit could have been utilized for paying service tax on other services rendered in India or full refund would have been allowed to them if service tax initially paid in cash/PLA because under reverse charge mechanism, it
  was not possible to utilize such credit for discharging service tax liability on other domestic transactions. Therefore the issue is revenue neutral and settled.

- They placed reliance on catena of decisions held in the case of;
  - CCE V/s. Coca-Cola India Pvt. Ltd. 2007 (213)ELT 490 (SC),

- ~ Narmada Chematur Pharmaceuticals Ltd. 2005(179) ELT 276 (SC),
- ~ Reliance Industries Ltd.-2009 (244) ELT 253
- ~ SRF Ltd. 2007 (81) RLT 479,
- ~ PTC Industries Ltd. - 2003 (159) ELT 1046 and
- ~ Jayshree Instruments Pvt. Ltd. - Final Order No.A/927-928/WZB/AHD/2012 dated 12.06.2012/03.07.2012

- ➢ In the present case, there has been no intention to evade payment of service tax on the appellant's part and therefore, Section 76 was not applicable. Non-payment of tax was under bonafide impression that there were no such liability to be discharged and the procedures adopted were in accordance with the law.

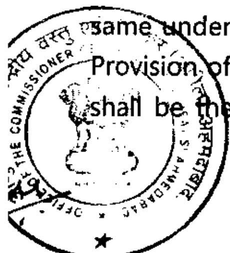
- ➢ The imposition of further penalty under Section 77(2) is without jurisdiction because the appellant could not have been penalized under different sections for the same alleged offence. In the facts of the present case where no suggestion or allegation of any malafide intention to evade payment of duty is made out against the appellant, there is no justification in the imposition of penalty in law as well as in facts. Reliance placed on decision in the case of Hindustan Steel Ltd – 1978 ELT (J159).

- ➢ Section 75 provides for interest in addition to tax where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment of service tax. In the instant case, there is no short levy or short payment or non-levy or non-payment of any service tax with intent to evade payment of service tax hence payment of interest under Section 75 of the Act is also bad and illegal.

5. Personal hearing in the matter was held on 26.10.2021 through virtual mode. Shri Amal P. Dave, Advocate and Shri Sudhashu Bissa, Advocate appeared on behalf of the appellant. They reiterated the submissions made in the appeal memorandum and also submitted a compilation of case laws as part of the submissions made during hearing.

6. I have carefully gone through the facts and circumstances of the cases, the impugned orders passed by the adjudicating authority, submissions made in the three appeal memorandum and the evidences available on records. The limited issues to be decided under the present appeals are whether the appellant is liable to pay service tax under reverse charge mechanism on the payments made in respect of Consulting Engineers Service in foreign exchange and reflected in their book of account under 'Professional fees-foreign' as a recipient of service. The demands pertain to the period F.Y. 2016-17 to F.Y. 2017-18 (upto June, 2017).

7. It is observed that the adjudicating authority has confirmed the service tax liability on the appellant, on the argument that the appellant having fixed establishment in India, gave contracts /sub-contracts to various experts for executing works in foreign countries for which they paid the disputed amounts and grouped the same under the head 'Professional fees-foreign', which in terms of Rule 3 of Place of Provision of Services Rules, 2012 (POPS) is taxable as the place of provision of service shall be the place of service recipient. The appellant, being recipient of service and



having base in Indian taxable territory, are liable to pay service tax as recipient of service under Section 66B & 68(2) of the F.A, 1994.

7.1 It is observed that the activities of Consulting Engineers service neither falls under the negative list nor is exempted by virtue of any notification, therefore, it shall fall under the purview of the definition of "**service**" as defined under Section 66B (44) of the F.A., 1994. The taxability of service or the charge of service tax has been specified in section 66B of the F.A., 1994, which is reproduced below;

> ***SECTION 66B- Charge of service tax on and after Finance Act, 2012*** *—There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]*

In terms of Section 66B, a service is taxable if provided within the taxable territory. To determine the place where the services are provided or agreed to be provided, **"place of its provision"** shall be essential.

7.2 The Place of Provision of Services Rules, 2012 (POPS) have been framed in the exercise of powers conferred by sub–section (1) of Section 66C of the Act, to determine the taxing jurisdiction for a service in the context of import or export of services. The 'Place of Provision of Services Rules, 2012 has replaced the 'Export of Services, Rules, 2005' and 'Taxation of Services (Provided from outside India and received in India) Rules, 2006, therefore to examine the case on hand, POPS Rules has to be examined.

7.3 In order to examine the issue in proper perspective, Rule 3 of POPS Rules, 2012 are reproduced below;

> ***RULE 3. Place of provision generally*** *— The place of provision of a service shall be the location of the recipient of service:*
>
> ***Provided*** *that in case of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

In terms of Rule 3 above, generally the place of provision of service shall be the location of the recipient of service. This rule further provides that in case location of service recipient is not available in ordinary course of business, place of provisioning of services shall be the location of service provider. The appellants are contending that the services were actually rendered by sub-contractors and were performed and consumed outside the taxable territories of India, therefore, Section 66C of the Finance Act, 1994 and Rule 3 of POP Rules, 2012 shall not apply. To examine whether Rule 3 of POPS, 2012 is applicable to the instant case, I will first examine the location of the recipient of the service.

7.4 It is observed that all the projects awarded to the appellant, were either executed directly by them or through sub-consultants in relation to immovable properties like roads, highways and such civil works, located abroad. The appellant had

entered contracts with sub-consultants for rendering services in foreign countries and payments have been made to these sub-consultants by the appellant under the head 'Project Work (Sub Contract)" for rendering Consulting Engineers Services in relation to such immovable properties. The appellant have argued that in the given scenario, the place of provision of services would be foreign countries where these immovable properties were located.

7.5 I find from the case records that the appellant have entered into contracts with sub-consultants and engaged them for providing Consulting Engineers Services to the foreign clients. These sub-consultants provided Consulting Engineers Services on behalf of the appellant to the foreign clients for the completion of the contracts/projects undertaken by the appellant. Thus, these sub-consultants were actually providing Consulting Engineers Service to the appellant in relation to immovable properties like roads, highways and such civil works located in foreign countries on behalf of the appellant, for which the appellant paid professional fees in foreign currency to them. I, therefore, find merit in the argument of the adjudicating authority that the sub-consultants were actually rendering services to the appellant by providing services to the foreign clients on behalf of the appellant, who is based in India. The tax liability has arisen since the appellant has incurred foreign exchange expenditure towards services received from overseas sub-consultants for getting their projects completed through these overseas sub-consultants. The argument, that the contracts were entered into, performed and consumed in a country other than India, has no relevance because in terms of Notification No.30/2012-ST dated 20.06.2012 in respect of any taxable services provided by any person located in a non- taxable territory and received by a person located in the taxable territory, the service tax under reverse charge is to be paid by the recipient of the service. As long as it is not disputed that the contract for providing consultancy/technical services were entered by the appellant from India and their location in the instant case was taxable territory of India, the taxable event under reverse charge mechanism shall be the receipt of service and of course their liability would arise when payment is made. I, therefore, find that the appellant is liable to pay service tax in terms of Section 66C of the Finance Act, 1994 read with Rule 3 of POP Rules, 2012 and Notification No.30/2012-ST dated 20.06.2012.

7.6 It is further observed that the appellant have placed reliance on the judgment of the Hon'ble Delhi High Court in case of Orient Crafts Ltd. **2006 (4) STR 81 (Del.)** stating that constitutional validity of Section 66A of Finance Act, 1994 was challenged. It is noticed that Hon'ble High Court dismissed the appeal holding that they did not find anything unconstitutional in this scheme. As the period involved in the present appeals are April, 2016 to June, 2017 and Section 66A of the F.A. 1994 has no relevance as it would not apply after 01.07.2012.

7.7 They also placed reliance on the decision passed in the case of Intas Pharmaceuticals - **2009(16) STR 748** which I find is distinguishable as it dealt with Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. Further, in the case of Infosys Ltd. **-2014-T10L-409-CESTAT-BANG** and KPIT Technologies Ltd. **-2014 (36) STR 1098**, the dispute was regarding taxability under Section 66A and the appellant had incurred foreign exchange expenditure towards receipt of sub-contract services from overseas sub-contractor, as the appellant

had overseas branches, who used the service of sub-contractors, and got the job done. As the legal provisions and facts of the cases being completely different, I, therefore, find that rationale of these cases would not apply to the present appeal.

7.8 It is further observed that the appellant also strongly contended that the issue is sub-judice as a Special Civil Application No.4420 of 2019 is pending before Hon'ble High Court of Gujarat, wherein the constitutional validity of Rule 3 of the Place of Provision of Services Rules, 2012 has been challenged as ultra-vires. I find that the SCA was filed by M/s. John Energy Ltd hence cannot be applied to the appellant's case. Similarly, Circular No. 36/4/2001 dated 8.10.2001 has no relevance to the present case as in that circular, board has clarified that the services provided beyond the territorial waters of India are not liable to Service Tax, as provisions of Service tax have not been extended to such areas so far. Whereas in the case on hand the services are provided to the appellant, who are based in India thus the services are provided within the territorial water of India.

7.9 The appellant by relying on various case laws have also emphasized that the issue is revenue neutral as even if they are liable to service tax, they were eligible for refund because under reverse charge mechanism it was not possible to utilize such credit for discharging service tax liability on other domestic transactions. I find that the purpose of service tax levy would have been pointless if the tax payer did not pay tax by taking the plea of revenue neutrality merely because they were eligible for refund/Cenvat credit. Hon'ble Tribunal in the case of Forbes Marshall Pvt Ltd reported in 2015 (38) S.T.R. 843 (Tri. - Mumbai), at para-6 held that ***"When law requires tax to be paid it has to be paid as per time specified".*** If the issue was revenue neutral then appellant would have paid the service tax and taken the credit/refund, if admissible, rather than pursuing and litigating the matter. I, therefore, do not agree with the above argument, hence same stands rejected. The appellant placed reliance on catena of decisions but in none of the case laws pertaining to Hon'ble Supreme Court or the courts have laid down a general principle that in a revenue neutral situation an assessee is not required to pay the duty.

8. The appellant have contended that penalty under Section 76 & 77 is not imposable as there non-payment of tax was under bonafide impression that there were no such liability to be discharged and the procedures adopted were in accordance with the law and that they should not be penalized under different sections for the same alleged offence. Such an argument is unsustainable especially when periodical SCNs were being issued to the appellant bringing out the correct legal interpretation of the Act, in spite of this they chose not to discharge their tax liability which bring out the fact that the non-payment was not under bonafide belief but with an intent to evade tax. Non-payment of service tax automatically attracts provisions of Section 76, therefore, the appellant are liable for penalty under Section 76 which is imposed on account of service tax not levied or paid or on account of short-payment or short levy for any reason with an intent to evade the payment of service tax. Moreover, the appellant has not given any reasons so I, find no grounds to interfere in the quantum of penalty imposed by the adjudicating authority. Likewise, penalty under Section 77 was imposed for failure to self-assess the tax liability under Section 70 and failure to declare the taxable value in the ST-3 returns filed. As both these

offences are different from the offence of failure to make the payment of service tax, I find penalty under Section 77 (2) is rightly imposed by the adjudicating authority. Considering the fact that in present appeals, notices were issued under Section 73(1) of the F.A. and since the OIOs adjudicating the earlier demand notices for same offences were upheld by the then Commissioner (Appeals) vide his O-I-A No.AHM-EXCUS-002-APP-127-18-19 dated 20.11.2018, I find the penalty imposed under Section 76 & 77 are justifiable.

9. When the demand sustains there is no escape from interest hence the same is therefore recoverable under Section 75 of the F.A., 1994. The appellant by failing to pay service tax under reverse charge mechanism on the taxable service are liable to pay the tax alongwith applicable rate of interest.

10. In view of the above discussions and findings, the impugned OIOs are upheld and the appeals filed by the appellant stand rejected in above terms.

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

17 November 2021

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 11.2021

Attested

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

By RPAD/SPEED POST

To,
M/s. Sai Consulting Engineers Pvt. Ltd., - **Appellant**
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B/h Rajpath Club, Bodakdev,
Ahmedabad-380059

The Assistant Commissioner - **Respondent**
CGST, Division-VI
Ahmedabad North
Ahmedabad

Copy to:
1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.