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-20211264SW000000E76C

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)009/A-II/2015-16 /H989 TO H993

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-42/2021-22**
दिनाँक Date : **30.11.2021** जारी करने की तारीख Date of Issue : **08.12.2021**

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

ग Arising out of Order-in-Original Nos. **SD-02/08/AC/2014-15 dated 30.01.2015**, passed by the Assistant Commissioner, Service Tax, Div-II, Ahmedabad (At present, Central GST & Central Excise, Div-VII, Ahmedabad-North).

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

Appellant- M/s. Adani Energy Limited (Now known as M/s. Adani Gas Ltd.), 8th Floor, Heritage building, Ashram Road, Usmanpura, Ahmedabad.

Respondent- Assistant Commissioner, Service Tax, Div-II, Ahmedabad (At Present, Central GST & Central Excise, Div-VII, 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 :

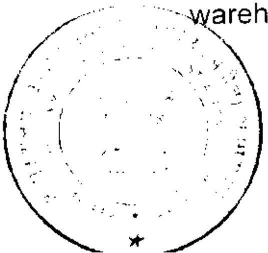
Revision application to Government of India :

(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 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.

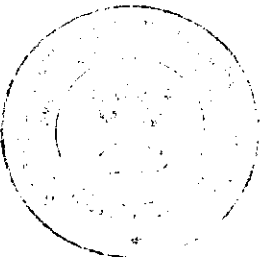
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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:

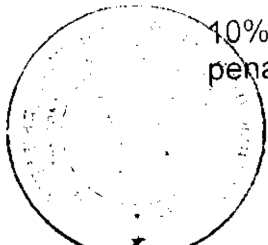
(i) amount determined under Section 11 D;

(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

1. This order arises out of an appeal filed by M/s. Adani Energy Limited (now known as M/s. Adani Gas Limited), 8th Floor, Heritage Building, Ashram Road, Usmanpura, Ahmedabad (hereinafter referred to as *'appellant'*) against Order in Original No. SD-02/08/AC/2014-15 dated 30.01.2015 (hereinafter referred to as *'the impugned order'*) passed by the Assistant Commissioner, Service Tax, Division-II, erstwhile Service Tax Commissionerate, Ahmedabad (hereinafter referred to as *'the adjudicating authority'*).

2. Facts of the case, in brief, are that the appellant is engaged in the manufacturing of Compressed Natural Gas falling under Chapter Sub-Heading Number 27112900 of the Central Excise Tariff Act, 1985. The appellant was also engaged in providing taxable services under the category of Technical Inspection and Certification, Maintenance or Repair Service, Transport of Goods by Road, Transport of Goods by Pipeline, Input Service Distributor, Advertising Space or Time, Sponsorship Service, Business Support Services, Supply of Tangible Goods for Use Service and was also holding Service Tax Registration No. AABCG5533EST001.

2.1 It was observed during the course of audit of records of the appellant carried out by the departmental audit officers that the appellant had received income under the head of Rent Income from their domestic customers. The said income was being charged by the appellant in the bill raised to customers by mentioning rental income, towards supply, installation and maintenance of measurement equipment at the customer's premises. It appeared to the audit officers that supply of measurement equipment to the customers and it's maintenance fall under 'Supply of Tangible Goods Service' defined under Section 65(105)(zzzzj) of the Finance Act, 1994 and that the 'Meter Rent Income' was consideration on which the appellant was required to pay Service Tax. Based on the audit observations, a Show Cause Notice was issued vide F.No. SD-02/SCN-56/Adani Gas/13-14 dated 17.10.2013 to the said appellant for demand and recovery of the Service Tax amounting to Rs. 4,84,755/- leviable on the amount received by them towards "Meter Rent Income" during the period from 16.05.2008 to 31.03.2013. The SCN also proposed recovery of amount alongwith interest and proposed imposition of penalty as well as late fee under relevant provisions of the Finance Act, 1994.

2.2 The show cause notice issued from F.No. SD-02/SCN-56/Adani Gas/13-14 dated 17.10.2013 has been adjudicated by the adjudicating authority vide the impugned order, as briefly reproduced below:

(i) The service provided by the appellant and the amount collected from the domestic customers under head "Meter Rent Income" squarely fall within the purview of the definition of "taxable service" of "Supply of Tangible Goods under Section 65(105)(zzzzj) of the Finance Act, 1994. Accordingly, the demand of Service Tax amounting to Rs. 4,84,755/-has been confirmed under the category of "Supply of Tangible Goods Services" under Section 73 (1) of the Finance Act, 1994, by invoking the extended period alongwith interest thereon at the applicable rate under the provisions of Section 75 of the Finance Act, 1994.

(ii) A penalty of Rs. 4,84,755/- has been imposed on the appellant under Section 78 of the Finance Act, 1994.

(iii) He also imposed Penalty on the appellant amounting to Rs. 200/- per day or at the rate of 2% of such tax per month whichever is higher starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax under Section 76 of the Finance Act, 1994 calculated for the period from 01.04.2008 to 09.05.2008 as per the amendment in Finance Act, 1994.

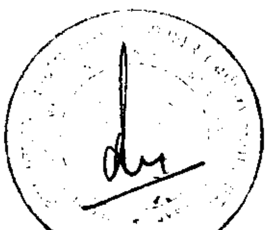
(iv) He also imposed penalty of Rs. 10,000/- on the appellant under Section 77(1)(a) of the Finance Act, 1994 for failure to obtain Service Tax Registration under the category of Supply of Tangible Goods Services.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds as reproduced in following paragraphs.

3.1 The appellant contended that the demand is not sustainable on merits, as per the following grounds:

- Mere supply, installation and maintenance of the measurement equipment does not make them the service provider and that rendition of a service was a *sine qua non* for charging Service Tax under the Act. In the present case, the appellant had not provided any service and in absence of service, liability of Service Tax cannot arise.

- The arrangement between the appellant and their customers was not one of rendition of any service but it was only for supply of gas and for the said purpose, the appellant supplied and installed "measuring



equipment" at the customers cost at their premises. The ownership of the equipments remained with the appellant at all times and the appellant used the equipment for their own purpose viz. for monitoring the use of gas by the customers and billing. Since there was no service per se involved in the transaction, there cannot be liability of Service Tax.

- Mere recovery of the cost of equipment by the appellant from their customers in accordance with the agreement to supply gas, did not mean that the said amounts had been recovered by them towards providing any services to the customers.

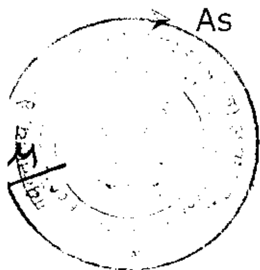
- Without prejudice to the aforesaid, assuming that there was an element of rendition of service involved in the transaction, the appellant was not liable for payment of Service Tax as the appellant was providing the service to themselves to facilitate the supply of gas to their customers which was being supplied through the gas pipelines and that the equipments were installed only for metering and measuring pressure without which the appellant shall not be in a position to bill their customers for the quantum of gas supplied to them.

- Whether the appellant is providing taxable service of "Supply of tangible goods" is dependent on two points. The first point is that service receiver should use the equipment and secondly, right of possession should not be transferred to the service receiver i.e. customers. In the present case, the customer cannot and does not use the equipment in terms of the agreement and thus, present activity will not fall under the category of service and accordingly, the amount collected towards meter rent per se will not form part of net tax liability.

- The adjudicating authority erred in holding that the appellant is carrying out the activity of maintenance of the measurement equipment for which they are charging from their customers. The appellant is providing maintenance service to their customers and charging a separate amount alongwith Service Tax and the same being discharged to the exchequer from the beginning and therefore the findings are devoid of factual aspects involved in the matter.

3.2 The appellant contended for the benefit of cum duty price as under:

- As the appellant has not charged the amount of Service Tax



separately, in terms of the principles of valuation provided under Section 67 of the Finance Act, 1994 containing the principles of cum duty price, their liability for payment of Service Tax would be Rs. 4,37,888/- instead of Rs. 4,84,755/- demanded and confirmed vide the impugned order.

- Section 67 of the Finance Act, 1994 provides that the gross amount charged for the service is inclusive of Service Tax payable, in a case when no tax has been separately collected on service and tax has been demanded subsequently and in such situations, the money recovered by service providers from the service receiver would have to be considered as cum tax price as the service providers would not be in position to recover the amount as Service Tax from their customers.

- The appellant has also relied upon the judgment of Hon'ble Larger Bench of Tribunal in case of Sri Chakra Tyres Versus CCE (Madras) reported at [1999 (108) ELT 361] and Hon'ble Supreme Court in case of Maruti Udyog Ltd. reported at [2002 (141) ELT 3 (SC)] in support of their contention.

3.3 The appellant also contended that in the present case that none of the conditions for invoking the extended period of limitation are satisfied and hence the demand confirmed by the adjudicating authority vide impugned order is hit by the bar of limitation, as per the grounds reproduced hereunder:

- The extended period of limitation can be invoked only when there is suppression, omission or failure to disclose information with intent to evade the payment of service tax.

- The audit party audited the records/books of accounts of the appellant every year and did not raise any objection for demanding Service Tax on 'Meter Rent' particularly when the Show Cause Notices were issued for demanding Service Tax on other services. The appellant was earlier issued Show Cause Notices F.No. STC/4-55/O&A/DNII/10-11 dated 04.10.10, F.No. STC/R-IX/O&A/11-12 dated 19.08.2011 and F.No. STC/4-18/O&A/12-13 dated 08.10.2012 by the Commissioner of Service Tax, Ahmedabad wherein Service Tax demanded under the category of 'Supply of tangible goods service' on the gas connection charges received by the appellant from their customers. Accordingly, the Revenue was very well aware of the facts that the appellant is receiving 'Meter Rent' from its customers, even then no demand was raised at the relevant time and therefore, the present proceeding is

barred by limitation.

- The appellant has relied upon the following judgments in support of their contention:
  - Pushpam Pharmaceutical Company Versus CCE, Bombay [1995 (78) ELT 401 (SC)]
  - Geo Tech Foundations Versus CCE, Pune [2008 (224) ELT 177 (SC)]
  - Pahwa Chemicals Private limited Versus Commissioner of C. Ex., Delhi [2005 (189) ELT 257 (SC)]
  - Anand NishiKawa Co. Ltd. Versus C.C.Ex.,[2005 (188) ELT 149 (SC)]
  - C.C.Ex. Versus Bajaj Auto Limited [2010 (260) ELT 17]

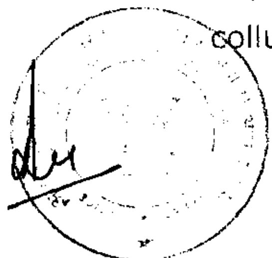
3.4 The appellant has also contended that the penalties imposed in the present case are not imposable, as per the grounds reproduced hereunder:

- It was held by the Hon'ble Supreme Court in case of Commissioner of Central Excise Versus HMM Ltd. [1995 (76) ELT 497 (SC)] as well as in case of Commissioner of C. Ex., Aurangabad Versus Balakrishna Industries [2006 (201) ELT 325 (SC)] and by the Hon'ble Tribunal in the case of Hyva India P. Ltd. Versus Commissioner of C. Excise, Bangalore-III [2008 (226) ELT 264 (Tri. Bang.)] as well as in case of Godrej Soaps Versus Commissioner of Central Excise, Mumbai [2004 (174) ELT 25 (Tri. LB)] held that where the demand is unsustainable, the imposition of penalty cannot sustain. In view of the bonafides of the appellant in the matter and the fact that they are not liable to pay any Service Tax whatsoever, no penalty can be imposed on them.

- The appellant has no malafide intent to evade the payment of tax and therefore penalty should not be imposed in terms of Section 76 of the Act and also relied upon the decision of the Hon'ble Tribunal in Hariala Depot Service Versus CCE, Ahmedabad reported in [2009 (15) STR 277 (T)]in support of their contention.

- Since the appellant is already registered with Service Tax department and have been filing periodical Service Tax Returns, penalty imposed under Section 77(1)(a) of the Act on the premise that the appellant failed to obtain Service Tax registration under the category of "Supply of Tangible Goods Services" is not legally proper.

- In terms of settled law, penalty under Section 78 of the Act can be imposed only when Service Tax has not been paid by reason of fraud, collusion, willful mis-statement or suppression of facts with intent to

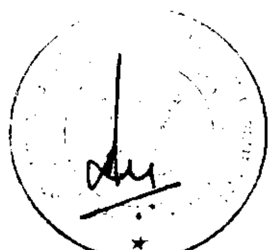


evade payment of Service Tax and in absence of such circumstances, the imposition of penalty is clearly unsustainable. None of the ingredients for applicability of Section 78 have been dealt with in the impugned order passed by the adjudicating authority and therefore the same has been passed without appreciating the contentions of the appellant. Hon'ble Supreme Court in case of Tamilnadu Housing Board Versus CCE reported at [1994 (74) ELT 9 (SC)] and also in case of Hindustan Steel Ltd Versus State of Orissa reported at [1978 (2) ELT 159(SC)] held that in the absence of an intent to evade payment of duty, a penalty should not be imposed.

- In terms of the amendment made in the Section 78 by the Finance Act, 2008 w.e.f 10.5.2008, the provisions of Section 76 shall not apply if the penalty is imposed under Section 78 of the Act.

- The appellant was having bonafide belief that the activities undertaken by them were not liable for payment of Service Tax at the relevant time and therefore, the appellant had not charged amount of Service Tax from customers and not paid amount Service Tax to the department. In view of the said facts, they were entitled to the benefit of Section 80 of the Act and therefore, penalty should not have been imposed by the adjudicating authority under Section 76, 77 and 78 of the Act.

4. The appellant was granted opportunity for personal hearing on 29.10.2015 by the erstwhile Commissioner (Appeals-II), Central Excise, Ahmedabad. The learned advocate appeared on behalf of the appellant intimated that a similar matter were pending in the Hon'ble Tribunal and they have also been granted stay in the subject matter. Accordingly, the present appeal was transferred in the 'Call Book' on 11.12.2015 in terms of the CBEC Circular No. 162/73/95-CX dated 14.12.1995. Subsequently, the said Appeal No. ST/13196 of 2013 filed by the appellant in a similar matter was disposed off by the Hon'ble CESTAT vide their Order dated 05.04.2019 and the department had filed a Civil Appeal No. 2633/2020 before the Hon'ble Supreme Court against the said CESTAT Order dated 05.04.2019. Thereafter, the Civil Appeal No. 2633/2020 filed by the department has been disposed off by Hon'ble Supreme Court vide their Order dated 28.08.2020. Accordingly, the present appeal has been retrieved from 'Call Book' and taken up for further appeal proceedings.



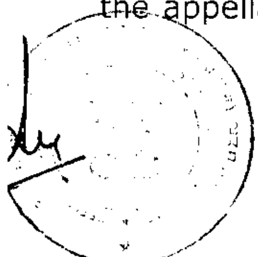
5. The appellant was granted opportunity for personal hearing on 27.10.2021 through video conferencing. Shri Rahul Patel, Chartered Accountant, appeared for personal hearing as authorised representative of the appellant. He re-iterated the submissions made in Appeal Memorandum. He contended the demand on the aspect of limitation and submitted the following case laws in support of his contention:

(i) Decision of Hon'ble Gujarat High Court in case of CCE Versus N.R. Agrawals Industries [2014 (300) ELT 213]
(ii) Decision of Hon'ble Gujarat High Court in case of CCE Versus Charak Pharma [2012 (278) ELT 319]
(iii) Decision of Hon'ble Madhya Pradesh High Court in case of CCE Versus Zyg Pharma Pvt. Ltd. [2017 (358) ELT 101]

6. 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 amount of Rs. 4,84,755/- confirmed by the adjudicating authority vide the impugned order against the appellant under the category of "Supply of Tangible Goods Services" for the period from 16.05.2008 to 31.03.2013 is legally correct, on the grounds of merit or otherwise?
- Whether the demand of Service Tax confirmed vide impugned order against the appellant by the adjudicating authority, invoking the extended period of limitation is correct or otherwise?
- Whether the contention of the appellant that in the present case, the demand of Service Tax should be raised on cum tax value of the services and not on the entire value of 'Meter Rent Income', is sustainable or otherwise?
- Whether the penalties imposed on the appellant vide the impugned order by the adjudicating authority under Section 76, Section 77(1)(a) and Section 78 of the Finance Act, 1994 are correct or otherwise?

7. Accordingly, I first take up the issue of demand of Service Tax amount of Rs. 4,84,755/- confirmed on account of 'Meter Rent Income' recovered by the appellant from their customers, being covered within the purview of the



definition of "taxable service" of "Supply of Tangible Goods" under Section 65(105)(zzzzj) of the Finance Act, 1994.

7.1 As per the facts mentioned in the impugned order, it is observed that the 'Meter Rent Income' was charged by the appellant in the bill raised to domestic customers towards supply and installation of measurement equipment at the customer's premises and also the appellant has nowhere raised any dispute as regards the said facts.

7.2 As mentioned in Para-4 above, a Civil Appeal No. 2633/2020 was filed by the department in a similar matter of the appellant before the Hon'ble Supreme Court against the CESTAT Order dated 05.04.2019. The said appeal has been disposed off by Hon'ble Supreme Court vide their Order dated 28.08.2020. I have gone through the said order of the Hon'ble Supreme Court and find that:

(i) The appeal filed by the department before Hon'ble Supreme Court was against the Order dated 5.4.2019 passed by the Hon'ble Tribunal vide which the decision of Commissioner of Service Tax, Ahmedabad dated 30.03.2011 has been reversed and the demand is set aside for payment of Service Tax on the charges collected by the appellant for supply of pipes and measuring equipment to its customers under Section 65(105)(zzzzj) of the Finance Act, 1994;

(ii) The issue before the Hon'ble Supreme Court under consideration was "*Whether Section 65 (105) (zzzzj) of the Finance Act, 1994 is applicable in the said case, that is, whether the supply of pipes and measurement equipment (SKID equipment), charged under the head of "gas connection charges" by M/s. Adani Gas Ltd (appellant of the present case who was respondent in the said appeal) to its industrial, commercial, and domestic consumers, amounts to supply of tangible goods for their use.*";

(iii) After analyzing the provisions of Section 65 (105) (zzzzj) of the Finance Act, 1994, Hon'ble Supreme Court expressed their views at Para-20 of the said order dated 28.08.2020 that "*The taxable service is defined as a service which is provided or which is to be*

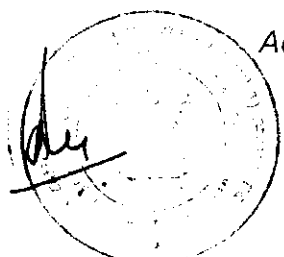
provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances".

(iv) After examining all the facts on record of the case, Hon'ble Supreme Court concluded at Para-23 and Para-30 of the said Order as under:

> *"23. At the outset, it is clear............ Thus, the ingredient of not transferring the ownership, possession or effective control of the goods under Section 65(105)(zzzzj) is satisfied."*
>
> *"30. Thus, we are of the view that the supply of the pipelines and the measurement equipment (SKID equipment) by the respondent, was of use to the customers and is taxable under Section 65(105)(zzzzj) of the Finance Act 1994".*

(v) Further, I find that the Hon'ble Supreme Court after analyzing all the relevant provisions and examining the facts of the case, held as under:

> *"38. Thus construed, we are of the view that the Adjudicating Authority was correct in concluding that the buyer of gas is as interested as the seller in ensuring and verifying the correct quantity of the gas supplied through the instrumentality of the measurement equipment and the pipelines. Additionally, the role of regulating pressure and ensuring the safety of supply of gas performed by the measurement equipment is an essential aspect for the 'use' of the consumer.*
> *The SKID equipment fulfils the description in Section 65(105)(zzzzj) of a taxable service: service in relation "tangible goods" where the recipient of the service has use (without possession or effective control) of the goods.*
>
> *39. For the above reasons, we are of the view that the Tribunal was in error in interfering with the findings and order of the Adjudicating Authority. The judgment of the Tribunal shall*



accordingly stand set aside. The order of the Adjudicating Authority is restored. The appeal is allowed in the above terms."

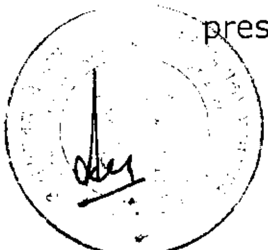
7.3 In the present case, I find that the demand has been raised against the appellant in respect of the amount which has been collected by the appellant from the domestic customers under head "Meter Rent Income" towards supply and installation of measurement equipment at the customer's premises. The same is squarely covered by the judgment of Hon'ble Supreme Court in appellant's own case. Hence, by respectfully following the judgment of Hon'ble Supreme Court vide Order dated 28.08.2020, I find that the amount collected by the appellant from the domestic customers under head "Meter Rent Income" in the present case would be squarely covered within the purview of the definition of "taxable service" of "Supply of Tangible Goods under Section 65(105)(zzzzj) of the Finance Act, 1994.

7.4 In view of the above, I find that the demand of Service Tax amounting to Rs. 4,84,755/-confirmed by the adjudicating authority against the appellant vide the impugned order under the category of "Supply of Tangible Goods Services" is legally proper on merit.

8. Further, I find that as per the contention of the appellant the demand is time barred and the impugned order invoking extended period on the grounds of suppression of facts is not sustainable.

8.1 As regards the said contention, it is observed from the facts emerged during the audit and on verification of records of the appellant that the appellant had suppressed the material facts from the department by not disclosing the details of the amounts collected from domestic customers under the head "Meter Rent Income", which falls within the purview of the definition of "taxable service" of "Supply of Tangible Goods" under Section 65(105)(zzzzj) of the Finance Act, 1994, in their ST-3 returns. Hence, as per the facts on record, I find that there was suppression of facts on the part of appellant and the submission of the appellant is not correct.

8.2 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 find that in the present case, the appellant failed to assess and discharge Service Tax on the said service under Section 68 of the Finance Act, 1994 read with Rule 6 of the 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 and thereby suppressed material facts with an intent to evade payment of Service Tax amounting to Rs. 4,84,755/- leviable on the amount collected from the domestic customers under head "Meter Rent Income" covered under the purview of the definition of "taxable service" of "Supply of Tangible Goods under Section 65(105)(zzzzj) of the Finance Act, 1994 and hence the same are correctly liable to be recovered from the appellant invoking extended period of limitation prescribed under proviso to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 of the Finance Act, 1994.

8.3 I have gone through the judgements relied upon by the appellant (as mentioned in Para-5 above) in support of their contention and findings are as under:

➢ Decision of Hon'ble Gujarat High Court in case of CCE Versus N.R. Agrawals Industries [2014 (300) ELT 213]

In the said case, the issue involved was eligibility of particular item for Modvat Credit as Capital Goods and the respective assesse had decision in their favour in own previous case. Hence, contention as bonafide act was accepted. In the present case, I find that there is no such substantial ground exits in the present case, to accept the contention of the appellant for bonafide belief. Hence, the said judgment would not be applicable in the present case.

➢ Decision of Hon'ble Gujarat High Court in case of CCE Versus Charak Pharma [2012 (278) ELT 319]

In the said case, the issue involved was valuation of the physician's samples. The matter was referred to the Larger Bench and there were

contrary views on the issue. In the present case, the facts are not similar. Hence, the said judgment would not be applicable in the present case.

- Decision of Hon'ble Madhya Pradesh High Court in case of CCE Versus Zyg Pharma Pvt. Ltd. [2017 (358) ELT 101]

  In the said case, the issue involved was availment of inadmissible Cenvat Credit and the details of availment of subject credit was already shown in the monthly returns. In the present case, the facts are different and hence the said judgment would not be applicable in the present case.

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

> "***4.4*** *Now coming to the issue of limitations, we find that appellants had not declared the gross amount received in the returns filed by them. The Commissioner in his order has observed as follows :*
>
> > *"26.1 It has been contended by M/s. MBS that the demand is barred by limitation considering the fact that they were regularly paying Service Tax and filing ST-3 returns and the department was fully aware of their business activities, I find that M/s. MBS had in the ST-3 returns, periodically filed by them, declared the category of Service provided by them; Gross amount received by them; Taxable Value and the Service Tax paid by them. I find that the Gross Amount declared in the ST-3 returns was the same as taxable Value, which clearly means that they had only declared the amount received by them towards the management fees and did not declare the total amount charged and received by them from ICICI bank and TTSL. They have also not declared the amount charged by them as 'Pure Agent' in the ST-3 returns. I observe that in the present system of self-assessment documents like invoices and other transaction details are not supplied to the Department. Moreover, M/s. MBS did not furnish the required details of amount of taxable value to the Department, the intention will have to be believed as that of evasion. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with intent to evade payment of Service Tax is conspicuous by the peculiar facts and circumstances of the case as discussed above. In view of the above discussion and findings, the ratio of cases relied by the said service provider cannot be applied in the case before me."*
>
> *<u>The argument of the appellant that they had bona fide belief is bases on the decision of LB of Tribunal in case of Bhagawathy Traders (supra). We do not find merits in the said argument. The ST-3 form prescribes disclosure of all amounts received in respect of service even if not part of Assessable value. Failure to disclose the same amounts to misdeclaration. Thus, the appellant's argument on limitation is dismissed</u>. Even if they believed that the said amount claimed as reimbursed were not includible in taxable value they were required to declare the same in ST-3 return, in the column prescribed for it."*

8.5 Accordingly, considering the facts of the present case on record and following the decision of Hon'ble Tribunal as discussed above, I find that the adjudicating authority has rightly invoked the extended period of limitation

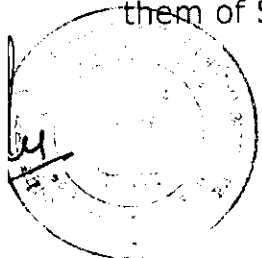
on the grounds of willful mis-statement and suppression of facts by the appellant with an intent to evade payment of service tax.

9. As regards the contention of the appellant for the benefit of 'cum tax value' while confirming the demand of Service Tax against them vide impugned order, I find that the provisions of Section 67(2) of the Finance Act, 1994 are as under:

> *"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."*

9.1 In the present case, it is observed that there is no evidence on record to show that the invoices specifically indicated that the gross amount charged included the amount of Service Tax. The appellant has also not produced any such invoices either before the adjudicating authority or during appeal proceedings. Further, I have also gone through the judgment of Hon'ble Tribunal in case of Shakti Motors reported at [2008 (12) STR 710 (Tri.Ahmd.)] and judgment of Hon'ble Supreme Court in the case of Amit Agro Industries Ltd. Vs. CCE, Ghaziabad reported at [2007 (210) ELT 183 (SC)] relied upon by the adjudicating authority while dealt with the said aspect in the impugned order.

9.2 Considering the facts of the present case and in terms of the judgments of Hon'ble Tribunal as well as Hon'ble Supreme Court, as discussed in above para-9.1, I do not find any reason to intervene in the findings of the adjudicating authority that the appellant is not entitled for cum tax value benefit, as contended and the demand confirmed against them of Service Tax amounting to Rs. 4,84,755/- is correct.



10. Further, as regards the contention of the appellant against imposition of penalty of Rs. 4,84,755/- under Section 78 of the Finance Act, 1994, I also find that the ingredients of suppression of facts and wilful mis-statement with an intent to evade payment of service tax to the tune of Rs. 4,84,755/- 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 of the Finance Act, 1994. Accordingly, penalty imposed of Rs. 4,84,755/- on the appellant vide the impugned order by the adjudicating authority under Section 78 of the Finance Act, 1994 is legally correct.

11. As regards the contention of the appellant against the penalty imposed under Section 76 of the Finance Act, 1994, I find that after the amendment with effect from 10.5.2008, last proviso to Section 78 of the Finance Act, 1994 states that if penalty is payable under such section, the provisions of Section 76 of the Finance Act shall not apply. Further, I also find that the Hon'ble High Court of Gujarat in Commissioner of CGST & Central Excise Vs. Sai Consulting Engineering Ltd. - 2018 (15) GSTL 708 (Guj.) also held that "*simultaneous penalties under Section 76 as well as 78 of the Finance Act cannot be imposed*".

Accordingly, in the present case, considering the fact that the demand of Service Tax of Rs. 4,84,755/- confirmed is for the period from 16.05.2008 to 31.03.2013 only and penalty of Rs. 4,84,755/- also imposed under Section 78 of the Finance Act, 1944, I find that the penalty imposed by the adjudicating authority on the appellant vide the impugned order under Section 76 of the Finance Act, 1994 is not legally sustainable and liable to be set aside.

12. As regards the contention of the appellant against the penalty imposed under Section 77(1)(a) of the Finance Act, 1994, it is observed that the adjudicating authority has imposed penalty of Rs. 10,000/- on the appellant under Section 77(1)(a) of the Finance Act, 1994 for 'failure to obtain Service Tax registration under the category of Supply of Tangible Goods Services'. However, I find that as per the facts mentioned in the impugned order, the appellant is holding Service Tax Registration having Service Tax Registration No. AABCG5533EST001. Accordingly, I find that the penalty of Rs. 10,000/- imposed on the appellant by the adjudicating authority vide the impugned order under Section 77(1)(a) of the Finance Act, 1994 is not legally sustainable and hence, liable to be set aside.

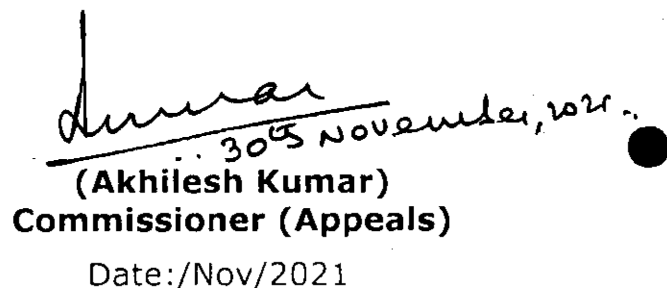
13. On careful consideration of the relevant legal provisions and submission made by the appellant, in view of the discussion in the foregoing paras, I pass the Order as per details given below:

(i) As regards the demand of Service Tax amount of Rs. 4,84,755/- confirmed against the appellant under the category of 'Supply of Tangible Goods Services' under the proviso of Section 73(1) of the Finance Act, 1994 by invoking the extended period of limitation alongwith interest under Section 75 of the Finance Act, 1994, I find that the contentions of the appellant are not sustainable, so as to intervene in the impugned order passed by the adjudicating authority. Hence, the impugned order is upheld to that extent and appeal filed by the appellant to that extent is rejected.

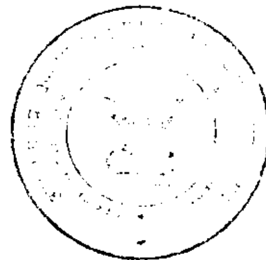
(ii) Further, I find that the impugned order to the extent of Penalty of Rs. 4,84,755/- imposed by the adjudicating authority on the appellant under the provisions of Section 78 of the Finance Act, 1994 is also legally correct and accordingly, the impugned order to that extent is upheld. The appeal filed by the appellant to that extent is rejected.

(iii) Further, I find that the Penalty imposed by the adjudicating authority on the appellant vide the impugned order under Section 76 of the Finance Act, 1994 and also under Section 77(1)(a) of the Finance Act, 1994, are not legally sustainable. Accordingly, the impugner order to that extent is set aside and appeal allowed to that extent.

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



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



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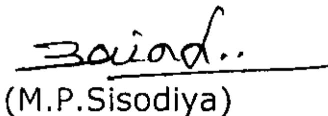

(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D
M/s. Adani Energy Limited
(now known as M/s. Adani Gas Limited),
8th Floor, Heritage Building,
Ashram Road, Usmanpura, Ahmedabad.

Copy to :

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