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 :
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DIN-20220164SW000000C998

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/355/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad /5677 To 5681

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-58/2021-22**
दिनाँक Date : **07.01.2022** जारी करने की तारीख Date of Issue : **10.01.2022**

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

ग Arising out of Order-in-Original Nos. **GST/D-VI/O&A/13/Laxmi/JRS/2020-21 dated 21.12.2020**, passed by the Assistant Commissioner, Central GST & Central Excise, Div-VI, Ahmedabad-North.

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

Appellant- M/s. Laxmi Engineering Pvt. Ltd., 15-16, Orchid Mall, Nr. Govardhan Party Plot, Thaltej-Shilaj Road, Ahmedabad-380054.

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 मामले 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 ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित दो 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 मे 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 आदेश 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 है।

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

The present appeal has been filed by M/s. Laxmi Engineering Pvt. Ltd., 15-16, Orchid Mall, Near Govardhan Party Plot, Thaltej-Shilaj Road, Ahmedabad (in short '***the appellant***') against the OIO No: GST/D-VI/O&A/13/LAXMI/JRS/2020-21 dated 21.12.2020 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-VI, Ahmedabad North (in short '*the adjudicating authority* ').

2. The facts of the case, in brief, are that during the course of audit of the records of the appellant, conducted for the period from F.Y. 2014-15 to F.Y. 2017-18 (upto June, 2017), by the officers of Central Tax Audit, Ahmedabad, it was noticed that the appellant in respect of the work executed for "Space Application Centre-ISRO" ('SAC-ISRO'-for brevity), had paid service tax on 40% of the gross value by applying Rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006. However, on verification of the agreement entered with SAC-ISRO, audit officer observed that the work executed by the appellant was in the nature of installation of electrical fittings of immovable property, which is not covered within the ambit of 'original work' as defined at Explanation 1(a) of the said rules, but would fall within the ambit of Rule 2A(ii)(B) of the Service Tax (Determination of Value) Rules, 2006, which attracts service tax @70% of gross value of works contract. It, therefore, appeared that the appellant availed extra abatement of 30% (70%-40%) and paid less service tax to the tune of Rs.8,94,855/- on the extra 30% abatement availed by them. On being pointed out they did not agree with the objection but made the payment of Rs.8,94,855/-under protest.

3. On the basis of the audit observation, Show Cause Notice (SCN) No.VI/1(b)-326/Cir-III/AP-15/18-19 dated 23.09.2019, was issued proposing recovery of service tax to the tune of Rs.8,94,855/- along with interest and appropriation of amount Rs.8,94,855/- already paid towards the proposed demand. Vacation of protest lodged vide letter dated 01.07.2019 and imposition of penalty under Section 78(1) of the F.A., 1994, was also proposed. The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.8,94,855/- along with interest was confirmed and the amount of Rs.8,94,855/- paid was appropriated against the confirmed demand. The protest lodged vide letter dated 01.07.2019 was vacated and penalty of Rs.8,94,855/- was also imposed.

4. Aggrieved by the impugned order, the appellant filed appeal on following grounds that;

- The contract was for fitting electrical installations in new premises of SAC-ISRO and such installation should be considered as installation of equipment as mentioned in Explanation 1(a) (iii) of the said rules.
- The services were provided to SAC-ISRO, which is a G.O.I. establishment, hence covered under exemption granted under Sr.No. 12(a) of Mega Notification No.25/2012-ST dated 20.06.2012. Accordingly, they are entitled for the refund of service tax paid @60%. As the period from January, 2015 to March, 2015 covered in the SCN is exempted, the demand to that extent shall be dropped.

- Since the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession was exempted vide Notif.No.09/2016 w.e.f. 01.03.2016. Section 102 of the F.A., 1994 gave validation to the said exemption from 01.04.2015 to 28.02.2016, thus the demand except for 3 months prior to 01.04.2015, gets nullified as there is no service tax liability.
- They placed reliance on O-I-A No.AHM-EXCUS-002-APP-242-19-20 dated 04.06.2019 passed by the then Commissioner(Appeals) in the case of M/s. N.J.Devani, wherein it was held that the aluminum section work and electrical work provided by sub-contractor are covered under 'original work'. This case they claim is squarely applicable to them as the work carried out by them is also 'original work' as the term equipment defined in wider terms means any material, any items put together for a specific function.
- Department has taken contradictory view on the issue as earlier on the same matter SCN was issued demanding service tax on the total value alleging artificial bifurcation of material and labour, however, now audit concluded that valuation should be on 70% and only 30% abatement is allowed.
- Extended period of demand cannot be invoked as ST-3 returns were filed wherein tax paid on 60% of the gross value was shown, hence the demand is time barred as no suppression is established. Reliance placed on Cadila Pharmaceuticals Ltd. 2017(349) ELT 0694 (Guj); Gammon India 2002(146) ELT A313, Mahindra & Mahindra 2018 (11) GSTL 126 (Guj) etc.
- The adjudicating authority erred in vacating the protest lodged, until the issue attains finality.
- Penalty cannot be imposed as no malafide intention to evade payment of service tax established. Reliance placed on Sunraj Construction 2016 (42) STR 395 (Tri-Mum), Sen Brothers 2014(33) STR 704 (Tri-Kol).

5. Personal hearing in the matter was held on 12.11.2021, through virtual mode. Shri Bhavesh T. Jhalawadia, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

6. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as in the submissions made at the time of personal hearing and the records submitted by the appellant. The issue to be decided under the present appeal is, whether the execution of work in the nature of installation of electrical fittings of immovable property, is covered under the ambit of 'original work' and the service tax paid during F.Y. 2014-15 to F.Y. 2016-17, under Rule 2A(ii)A of the Service Tax (Determination of Value) Rules, 2006, were proper or otherwise?

7. I have examined the Work Order dated 15.09.2014, issued by Group Head, Construction & Maintenance Group, SAC-ISRO. From the work order, it is observed that the appellant have entered into the contract for providing Electrical works- like Internal & External Electrification, L.T.Panels, DBs for UPS Distribution, Lightning

Protection, Special Earthing, Telephone wiring, CCTV System, Fire Alarm and Smoke Detection System for facility building and sub-station building and AC room building of SAC campus.

7.1 The appellants are contending that the above work order entered with SAC-ISRO was for supply of goods and services provided to the building under construction and not to already constructed building, hence, covered under the ambit of works contract. To examine the issue in correct perspective, relevant provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 is reproduced below;

> ***RULE [2A. Determination of value of service portion in the execution of a works contract.*** *— Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-*
>
> *(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.*
>
> ***Explanation.*** *- For the purposes of this clause,.....*
>
> *(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely :-*
>
> ***(A)*** *in case of works contracts entered into for execution of* ***original works****, service tax shall be payable on* ***forty per cent*** *of the total amount charged for the works contract;*
>
> ***[Provided*** *that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.]*
>
> ***(B)*** *in case of works contract, not covered under sub-clause (A), including works contract entered into for, -*
>
> *(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or*
> *(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or* ***installation of electrical fittings of immovable property,***
> *service tax shall be payable on* ***seventy per cent****. of the total amount charged for the works contract.]*
>
> ***Explanation 1.*** *- For the purposes of this rule,-*
>
> *(a)* ***"original works"*** *means-*
>
> *(i) all new constructions;*
> *(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;*
> *(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;*

From the above provisions, it is clear that the work contract for execution of original work shall attract service tax on 40% of the gross amount charged for such contract and in case the work contract is not covered under original work, then such works contracts including installation of electrical fittings of immovable property, shall attract service tax on 70% of the gross amount charged. Further, the term 'original work' has been defined as any new construction, all types of additions and alterations to abandoned or damaged structures on land to make them workable and erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise. From the work order, it is apparent that the appellants are in fact actually installing electrical fittings of immovable property and not erecting, commissioning or installing any equipment, as declared by them. Given that the installation of electrical fittings of immovable property is explicitly covered under Rule 2A(ii)(B) and once, it is established that the work executed by them is only installation of electrical fittings, thus such work contract, cannot fall within the ambit of original work, but shall fall be covered under Rule 2A(ii)(B) of the Service Tax (Determination of Value) Rules, 2006, wherein service tax is to be paid @70% of gross amount charged for the works contract.

7.2 I find that the appellant have also taken a plea that the services rendered by them are exempted vide Mega Notification No.25/2012-ST dated 20.06.2012, Notification No.09/2016-ST dated 01.03.2016 and under the provisions of Section 102 of the F.A., 1944. I find that Notification No.25/2012-ST at Entry No. 12, exempts the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. Subsequently, vide Notification No. 6/2015-S.T., dated 1-3-2015, items (a), (c) and (f) in Entry No.12, was omitted. But later vide Notification No.09/2016 dated 01.03.2016, Entry No.12A was inserted and the above omitted clause were restored and exemption was granted w.e.f. 01.04.2016. Similarly, I find that under Section 102 of the Finance Act, 1944, no service tax was levied or collected from 01.04.2015 to 29.02.2016 in respect of services provided to government organizations by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. In short all the above services were exempted for different period. I, nevertheless, find that the above exemptions cannot be extended to the instant case because although the appellant were providing services to a government organization, but these services were neither in relation to the original work as defined in Service Tax (Determination of Value) Rules, 2006, nor were they in any way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure. Therefore, the exemption granted under the aforesaid notifications and the special exemption granted in certain cases relating to construction of government buildings under Section 102 cannot be extended to them. I, therefore, find that considering the nature of work executed by the appellant, the same cannot be considered as 'original work' and shall not merit classification

under Rule 2A(ii)(A). In fact such works contract shall be covered under Rule 2A(ii)(B) of the Service Tax (Determination of Value) Rules, 2006, as held by the adjudicating authority and shall attract service tax @70% of gross amount charged for the works contract.

7.3 The appellant have also placed reliance on OIA No.AHM-EXCUS-002-APP-242-19-20 dated 04.06.2019, passed by the then Commissioner (Appeals) in the case of M/s. N.J.Devani, in support of their claim. I have gone through the above mentioned O-I-A and find the facts distinguishable as there the invoices raised were in respect of supplying, erecting, testing and commissioning of TPN DB (electrification work) and civil electric work for development of gardens etc undertaken for new construction and new civil structure, hence, covered under 'original work'. In the instant case, however no erection, commissioning or installation, is being undertaken by the appellant, hence the ratio of above case is not squarely applicable. I also do not find any merit in the argument that department has taken contradictory view on the same issue earlier in the appellant's case because other than providing the list of SCNs issued to them they have not provided either the copy of SCNs and or the adjudication order, to examine their above contention.

7.4 Further, the appellant also argued that extended period of demand cannot be invoked as ST-3 returns were filed and tax payment on 60% of the gross value was shown therein. I have gone through the ST-3 returns submitted before me. On examining the same, I find that the appellant have not reflected any exemption claimed under Notification No.25/2012-ST dated 20.06.2012 or Notification No.09/2016-ST dated 01.03.2016. Even otherwise, I find that the demand was raised based on detection noticed during scrutiny of documents by audit. In the era of self assessment, the assessment will be made on the basis of information furnished in the return and no invoices or bills were required to be submitted along with return and the verification of invoices or bills, if any, was to be done by the audit only as has also been done by audit in the present case. The principle of self assessment and submission of self assessment in the form of return would show that it is the responsibility of the assessee to assess the goods correctly and pay the taxes correctly. It cannot be said that appellant was not aware of the statutory obligation hence cannot escape on the argument of bonafide interpretation of law. The appellants while rendering the services, are required to properly assess and discharge their tax liability, which they failed to do, they thereby suppressed/mis-declared the fact with an intent to evade payment of service tax. Therefore, the conclusions of the adjudicating authority confirming the demand of Rs.8,94,855/- has to be upheld. When the demand sustains there is no escape from interest, the same is therefore recoverable with applicable rate of interest.

7.5 Another contention on the appellant is that the adjudicating authority erred in vacating the protest lodged as the issue has not attained finality. I find that in the instant case, the appellant had paid the entire duty under protest which was against the probable tax liability. The mark of protest is an information to the department that the assessee is not making payment voluntarily and, therefore, department has to initiate proceedings to vacate protest and pass speaking order, which in this case was done by the adjudicating authority, wherein the demand was confirmed and the

deposit made under protest was appropriated against the tax confirmed. In support of the above argument, I place my reliance upon the ratio of the law laid down in the case of *CCE, Meerut* v. *Prestige Engg.*, 1989 (41) E.L.T. 530, wherein it has been observed that the protest of the assessee while depositing the duty has to be vacated by the Department by passing an appealable order. There cannot be any automatic vacation of the protest. Similar view was taken by Hon'ble Tribunal in *Commissioner of Central Excise, Chandigarh* v. *Kaushal Steel Rolling Mills* [2004 (165) E.L.T. 255 (Tribunal-Del.)]. As in the present case, I find that the Assistant Commissioner had passed an appealable order by vacating the protest, therefore, the argument put forth by the appellant is not legal hence not sustainable.

7.6 The decisions relied by the appellants in the case of Cadila Pharmaceuticals Ltd. *2017(349) ELT 0694 (Guj);* Gammon India *2002(146) ELT A313,* Mahindra & Mahindra *2018 (11) GSTL 126 (Guj)* are also distinguishable on facts. In *Cadila Pharmaceuticals,* the cenvatable invoices of capital goods on which the assessee claimed Cenvat credit on capital goods were defaced by the Superintendent of Central Excise, Dholka by putting endorsement "Modvat credit availed under Rule 57" which means that the Department was fully aware that the assessee had taken credit on the capital goods in question. In *Gammon India*, Hon'ble Tribunal had held that show cause notice was issued nearly two years after the completion of the enquiry. Furthermore, the fabrication of trusses, shuttering, pipe lines, etc. was done in full view of the general public and hence suppression was not possible. In *Mahindra & Mahindra*, the periodical Show Cause Notices were issued from 19-7-2005 to 16-9-2010, beyond the normal period of limitation, hence were held to be time barred on the reasoning that the suppression was detected in January, 2001 itself. However, in the instant case, the matter came in the knowledge of the department after carrying out the audit of the appellant's records, based on which this demand was raised. Therefore, I find that the extended period has been rightly invoked.

7.7 Further, the contention of the appellant that penalty under Section 78 is not imposable as mala fide intention not established, is also not tenable. I find that Section 78 of the Finance Act, 1994, provides penalty for suppressing the value of taxable services. The crucial words in Section 78(1) of the Finance Act, 1994 are *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'* should be read in conjunction with *'the intent to evade payment of service tax'.* I find that the demand was raised based on detection noticed during scrutiny of records by audit. It is the responsibility of the appellant to correctly assess their tax liability and pay the taxes. The work executed by them was not covered under the ambit of original work had it been so they would have definitely availed the exemption granted under the notifications discussed above. Therefore, it is apparent that they were aware of their tax liability but chose not to discharge their tax liability properly instead short paid the tax which undoubtedly brings out the fact that there was willful misstatement with intent to evade payment of service tax, hence I find that the penalty imposed under Section 78, sustains.

8. In view of the above discussions and findings, the impugned order is upheld and the appeal filed by the appellant stand rejected in above terms.

9. 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.

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 1.2022

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

By RPAD/SPEED POST

To,
M/s. Laxmi Engineering Pvt. Ltd. - **Appellant**
15-16, Orchid Mall,
Near Govardhan Party Plot,
Thaltej-Shilaj Road,
Ahmedabad

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.