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-20220364SW0000111CE7

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/813 & 826/2021 -Appeal-O/o Commr-CGST-Appl-Ahmedabad / 6523-28

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-71 & 72/2021-22**
दिनाँक Date : **28.02.2022** जारी करने की तारीख Date of Issue : **02.03.2022**

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

ग Arising out of Order-in-Original Nos. **33/JC/MT/2020-21 dated 11.01.2021**, passed by the Joint Commissioner, Central GST & C. Ex., Ahmedabad-North.

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

Appellant-

01. M/s. Abhik Advertising Pvt. Ltd., Plot No. 29, Aditya Bunglows, Nr. Goyal Intercity, Opp: T. V. Tower, Thaltej, Ahmedabad.

02. Shri Mukesh B. Patel, Director of M/s. Abhik Advertising Pvt. Ltd., Plot No. 29, Aditya Bunglows, nr. Goyal Intercity, Opp: T. V. Tower, Thaltej, Ahmedabad.

Respondent-The Joint Commissioner, Central GST & Central Excise, Ahmedabad-North.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी 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 .

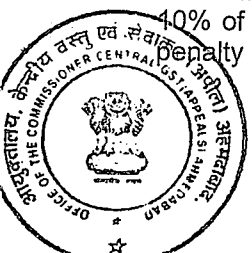
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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

Following appeals have been filed against the OIO No.33/JC/MT/2020-21 dated 11.01.2021 (in short '*impugned order*') passed by the Joint Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

Sr.No.	Appeal No.	Appellants
01	GAPPL/COM/STP/813/2021	M/s. Abhik Advertising Pvt. Ltd., Plot No. 29, Aditya Bunglows, Near Goyal Intercity, Opposite T.V. Tower, Thaltej, Ahmedabad hereinafter referred to as ***'Appellant -1'***
02	GAPPL/COM/STP/826/2021	Shri Mukesh B. Patel, Director, M/s. Abhik Advertising Pvt. Ltd., Plot No. 29, Aditya Bunglows, Near Goyal Intercity, Opposite T.V. Tower, Thaltej, Ahmedabad hereinafter referred to as ***'Appellant -2'***

2. The facts of the case, in brief, are that on the basis of the information gathered by the officers of CGST, Ahmedabad North (Preventive), it was noticed that Appellant-1 was providing 'Advertising Agency Service' through print media, electronic media and through hoardings, but they neither regularly paid service tax nor filed service tax returns on time. It was also gathered that Appellant-1 did not pay interest on late payment of service tax and late fees for late filing of ST-3 returns, filed on 21/22.07.2016 covering period October, 2013 to March, 2016. Further, it was also noticed that several tax paid challans mentioned in the ST-3 returns for April, 2015 to March, 2016, were also not in existence. Huge difference was also noticed in the income shown in Balance Sheet and ST-3 returns. Detailed investigation was, therefore, initiated and statement of Shri Mukesh B. Patel, Director of Appellant-1, was recorded on 18.10.2016, wherein he admitted the above facts and also informed that they were availing exemption on income from hoarding during July, 2012 to September, 2014, and, on print media income, they were discharging tax liability only on 15% of the income, claiming abatement on the remaining 85% of the income. He also informed that they were not maintaining separate accounts as they have not availed CENVAT credit on hoarding income. A detailed investigation conducted by the officers revealed following discrepancies;

a. On verification of the Gross Income shown in the Balance Sheet / Books of Accounts and other details, it appeared that the appellant has suppressed the value of taxable services in their ST-3 Returns filed during F.Y. 2015-16. Further, the ST-3 return for April, 2016 to September, 2016 was not filed at the time of commencement of investigation. Thus, service tax liability of Rs.36,57,694/- was worked on the suppressed taxable value of the services provided during F.Y. 2015-16 to F.Y. 2016-17 (upto September) and interest liability of Rs.3,90,418/- was also worked out on such non-payments.

b. In respect of 'Advertising in Print Media', the appellant were claiming abatement/exemption of 85% and were paying tax only on 15% of the taxable value, without mentioning the exemption notification number in the ST-3 returns. The service tax liability of Rs.33,35,077/- was, thus, worked out on the gross

amount charged by the appellant during the F.Y. 2012-13 to F.Y. 2016-17 (up to Sept). Interest liability on the above amount was also required to be paid.

c. Late Fee of Rs.1,45,000/- for delayed filing of ST-3 returns was also worked out for F.Y. 2011-12 to F.Y. 2016-17(up to September)

2.1 A Show Cause Notice (SCN) No.STC/15-35/OA/2017 dated 07.11.2017 was, therefore, issued proposing the service tax demand of Rs.36,57,694/- alongwith interest of Rs.3,90,418/- and appropriation of said amount which they already paid; service tax demand of Rs.33,35,077/- alongwith interest, u/s 73(1) & 75 respectively. Penalty u/s 78 and u/s 77 was also proposed. Late Fee of Rs.1,45,000/- for delayed filing of ST-3 returns was also proposed u/s 70 of the Finance Act (F.A), 1994. Personal penalty u/s 78(A) was also proposed on Appellant-2 (Shri Mukesh B. Patel, Director).

2.2 The said SCN was adjudicated vide the impugned order, wherein the service tax demand alongwith interest was confirmed and amount paid was appropriated against the said demands. Penalty of Rs.69,92,771/- u/s 78 and Rs.10,000/- u/s 77 was also imposed on Appellant-1 alongwith late fee of Rs.1,45,000/- u/s 70. Personal penalty of Rs.1,00,000/- u/s 78A was also imposed on Appellant-2.

3. Aggrieved by the impugned order, both the appellants filed the present appeals contesting the confirmed demand and penalties on following grounds;

- The service tax demand of Rs.33,35,077/- was confirmed towards providing Advertising Agency Service pertaining to print media. Since selling of space for advertisements in print media falls under negative list provided under Section 66D (g), therefore tax liability does not arise. Even prior to negative list regime, the advertisement in print media was exempted under provisions of Section 65 (105)(zzzm). They argued that any amount paid by the advertising agency for space and time of advertisement in print media is not includible in value of the taxable service in fact it is the commission amount (15% as per the standard practice) which forms the taxable value. In support of their aforesaid argument they placed reliance on CBEC Circular No.341/43/96 dated 01.11.1996 and Circular No. 341/43/2001-TRU dated 18.10.2001. They also relied on the decisions passed in the case of Adbur Pvt. Ltd- [2017(5) GSTL 334-Tri-Del]; Adwise Advertising Pvt. Ltd. –[2001(131) ELT 529-Madras H.C.] and stated that the demand on remaining 85% of the invoice value is, therefore, required to be set-aside.
- The demand is hit by limitation as the entire income and service charges were declared in the books of account. Amount of Rs.19,48,750/- declared and reflected at clause 26(i)(B)(b) of the Income Tax Returns and in 3CD of Income Tax Auditor report has been disallowed in ITR which includes the unpaid amount of service tax of Rs.16,54,805/-. Similarly, with previous half yearly return, on account of lack of liquidity, they were not able to make payment of service tax on monthly basis but returns were filed timely. This proves there was no intention to suppress the fact from the department. They placed reliance on catena of decisions some are produced below;
  - ✓ Zee Media Corporation Ltd. -2018(18) GSTL 32 (All. HC)
  - ✓ Mega Trends Advertising Ltd. – 2020 (38) GSTL (Tri-Allahabad)

- Penalty under Section 78 is not imposable as all the transactions were recorded in the statutory public records (i.e. Book of Accounts & Balance Sheet) hence suppression cannot be invoked.
- In para 9.1 to 9.5 of the SCN, the appellant vide various letters have intimated the department regarding payment of service tax due along with interest (Rs.36,57,694/-Tax + Rs.3,90,418/-Int). Therefore, imposition of penalty to that extent is not maintainable. Reliance placed on judgment passed in the case of Tirupathi Fuels Pvt. Ltd[2017(7) GSTL 142 (AP)], C Ahead Info Technologies India Pvt Ltd.-2017 (47) STR 125 (Kar-HC)].
- Penalty u/s 77 not imposable as service tax liability was correctly assessed and discharged in the ST-3 returns.
- They requested for waiver of late fees of Rs.1,45,000/- u/s 70 as the service tax was paid along with interest in such cases. Also, as there is no revenue loss, the late fees may be set-aside. They placed reliance on the judgment of Hon'ble Apex Court passed in the case of Hindustan Steel Ltd- [1978 (2) ELT (J159) SC].
- Personal Penalty u/s 78A cannot be imposed in the absence of any evasion of service tax on the part of the appellant company hence should be set-aside.

4. Personal hearing in the matter was held on 17.01.2022, through virtual mode. Shri Darshan Parikh, Chartered Accountant, appeared and represented the case on behalf of the appellants. He reiterated the submissions made in both the appeal memorandums.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in both the appeal memorandums as well as the submissions made at the time of personal hearing. The main issues to be decided under the present appeal are;

i. Whether Appellant-1 is liable to pay service tax amount of **Rs.36,57,694/-** worked out on the suppressed taxable value of the service provided during F.Y. 2015-16 to F.Y.2016-17 (up to September, 2017) and interest amount of **Rs.3,90,418/-** on such non-payments?

ii. Whether Appellant-1 was liable to pay service tax amount of **Rs.33,35,077/-** on the gross amount charged for providing Advertising Agency service rendered during the F.Y. 2012-13 to F.Y. 2016-17 (up to September)?

iii. Whether late fees of Rs.1,45,000/- is imposable on Appellant-1 for delayed filing of ST-3 returns during the F.Y. 2011-12 to F.Y. 2016-17(up to September)?

iv. Whether personal penalty of Rs.1,00,000/- is imposable on Appellant-2 (Shri Mukesh B. Patel, Director)?

6. It is observed that the service tax demand of **Rs.36,57,694/-** for the F.Y. 2015-16 to F.Y.2016-17 (up to September) was confirmed by the adjudicating authority on the grounds that Appellant-1 has willfully suppressed the facts by not reflecting the actual taxable income (as shown in their Balance Sheet/Ledger) in their respective ST-3 returns. In the ST-3 return for the period April-September, 2015, they showed service tax payment of Rs.34,72,000/-, made through challans, however, none of these challans mentioned in the ST-3 returns were found in existence. It was only when the department had detected the discrepancy in challans that they discharged their tax liability for the period [April to September, 2015] and made the payment of Rs.24,72,000/- & Rs.10,00,000/- (Total:

Rs.34,72,000/-) vide Challan dated 04.01.2016 & 06.02.2016, respectively. Similarly, in ST-3 returns for October, 2015 to March, 2016, service tax payment of Rs.1,32,21,561/- was shown as paid vide various challans, but none of these challans were found in existence. Subsequently, during the course of investigation they vide challan dated 01.10.2016, paid an amount of Rs.5,00,000/- and later few more payments were made, which were duly appropriated against the confirmed demand by the adjudicating authority. The appellant have not contested the above findings of the adjudicating authority, in fact, they before the adjudicating authority acknowledged that the due to lack of liquidity they were unable to make the payment of service tax on monthly basis and while preparing draft returns monthly serial number was mentioned assuming that the monthly challans will be paid as soon as the funds are managed. Similarly, I find that no contention was made even in their appeal memorandum contesting the above findings. While the appellant themselves have accepted the non-payment of service tax, I do not find any reason to interfere with the findings of the adjudicating authority and, therefore, I uphold the demand of **Rs.36,57,694/-** on merits.

7. It is further observed that the service tax demand of **Rs.33,35,077/-** on Advertising Agency Service rendered during the F.Y. 2012-13 to F.Y. 2016-17 (up to Sept) was raised on the grounds that Appellant-1 has charged service tax only on 15% of the amount of invoice value and evaded tax on 85% of the value, by claiming exemption on *'selling of space for advertisement in print media'*. The said demand was confirmed by the adjudicating authority on the grounds that any commission which the advertising agency gets is strictly between the "advertising agency" and the "advertising media" and this contract has got nothing to do with the clients of the advertising agency. He finds that Section 67 considers only the transaction between the "advertising agency" and "its clients" and, therefore, any transaction between the advertising agency and the media agency like print media etc shall remain outside the scope of Section 67 of the F.A., 1994. He, therefore, held that they were required to pay tax on the gross value charged from their client. Appellant-1 on the other hand are contending that as *'selling of space for advertisements in print media'*, falls under negative list, no tax liability arises for said service value. They claim that even prior to negative list regime, the advertisement in print media was exempted under the provisions of Section 65 (105)(zzzm), therefore any amount paid by the advertising agency for space and time of advertisement in print media is excludible from the taxable value and hence the tax liability arises only on the commission charged which as per the standard practice is 15%.

7.1 It is observed that the period of dispute (April, 2012 to Sept, 2017) is spread across post and pre-negative list based taxation regime, therefore, I have examined the relevant provisions prevalent during these period. In the pre-negative list based taxation, in term of Section 65(2) of Finance Act, 1994 "**advertisement**" *includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas.* **"Advertising agency"** under Section 65(3) of F.A, 1994, was defined as *any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant.* Further, Advertising Service was defined as taxable service under Section 65 (105)(e) as *any service provided or to be provided to any person, by an advertising agency in relation to advertisement , in any manner is taxable as advertising.* Thus, any expenditure or costs incurred by the service provider in the course of providing taxable service shall be treated as consideration for

the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service. Whereas in post negative list era, the term **'Advertisement'** has been defined in Section 65B of the Act as *"any form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include any presentation made in person."* Thus, going by the above definitions, I find that any service provided to any person, by an advertising agency in relation to advertisement, in any manner is taxable under advertising service.

7.2 However, such exclusion is provided under the **'Sale of Space or Time for Advertisement Service'** which, in pre-negative list era, was considered taxable service under Section 65 (105) (zzzm) of Finance Act, 1994, as *any service provided or to be provided to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organization.*

As per Explanation 1 **"Sale of space or time for advertisement"** includes,-

(i) providing space or time, as the case may be, for display, advertising, showcasing of any product or service in video programmes, television programmes or motion pictures or music albums, or on bill-boards, public places, buildings, conveyances, cell phones, automated teller machines, internet;

(ii) selling of time slots on radio or television by a person, other than a broadcasting agency or organization; and

(iii) aerial advertising

Further, Explanation 2- For the purposes of this sub-clause, defines **"Print media"** as -

(i) "newspaper" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867)

(ii) "book" as defined in sub section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867) but does not include business directories, yellow pages, and trade catalogues which are primarily meant for commercial purposes.

7.3 The negative list under section 66D, clause (g) also covers ***"selling of space for advertisement in print media".*** Thus, in the erstwhile regime and in post negative list regime, selling of space for advertisement in print media was excluded from the scope of the above taxable service.

7.4 I have also gone through Board's letter No.341/43/96-TRU dated 31.10.1996, wherein it was clarified that the amount paid (excluding their own commission), by the advertising agency for space and time in getting the advertisement published in the print media (i.e. Newspapers, periodicals etc.) or the electronic media (Doordarshan, private TV Channels, AIR etc.) will not be includible in the value of taxable service for the purpose of levy of service tax. However, the commission received by the advertising agency would be includible in the value of taxable service.

7.4.1 Similar clarification was given in respect of broadcasting services where Board vide letter F. No. 341/43/2001-TRU dated 18.10.2001, clarified that in the invoice raised by the broadcasting agency on the advertising agency, generally, the commission / discount (usually 15% of the gross amount) given to the advertising agency is deducted from gross

amount and the net amount payable by the advertising agency to the broadcasting agency is indicated and therefore the service tax is leviable only on this amount. However, such abatement is available only when the same is clearly indicated in the invoice/bill raised by the broadcasting agency. The commission/discount received by the advertising agency for getting the advertisement published in the print media (i.e. newspaper, periodicals, etc.) or the electronic media (Doordarsnan, Private Channels, AIR, etc.) however will be includible in the value of taxable service under the category of the "advertising service".

7.4.2 Thus, in both the above clarifications, the commission received by advertising agency is taxable under advertising service, however, the amount paid by the advertising agency for space and time in getting the advertisement published in the print media (i.e. Newspapers, periodicals etc.) or the electronic media (Doordarshan, private TV Channels, AIR etc.) will not be includible in the value of taxable service for the purpose of levy of service tax.

7.5 Further, in the case of *Adwise Advertising Pvt. Ltd.* v. *Union of India* reported in 2006 (2) S.T.R. 375 (Mad.), I find Hon'ble Madras High Court held that the 'Commission' earned by the advertising agency from the advertising media, shall form a part of the gross amount charged by such agency from the clients, in relation to that advertisement. Based on the above decision, in the case of Adbur Pvt. Ltd- [2017(5) GSTL 334-Tri-Del], the Hon'ble Principal Bench, New Delhi held that the appellants being an advertising agency and a pure agent is not liable to pay service tax on amount payable to media companies on behalf of their clients. The commission received by the appellant only would be chargeable to service tax. Therefore, the findings of the adjudicating authority that any commission received by the appellant from the advertising media has nothing to do with their client and shall remain outside the scope of Section 67 of the F.A., 1994, is mis-placed, in light of above decision.

7.6 It is observed that Appellant-1 is an advertising agency rendering advertising services to various clients through print media, electronic media and through hoarding. In advertising agency service, the service tax is to be computed on the gross amount charged by the advertising agency from the client for services in relation to advertisements. The gross amount includes the charges by the agency from the client for making or preparing the advertisement material. For getting the advertisement published in print media, the agency would definitely require space to publish the same which they can either buy from print media on the charges after getting the trade discount or they can sell the space of print media acting as their agent and earn commission from print media. In both the scenario, the space is subsequently sold to their clients. Excluding their own commission, the amount paid by the advertising agency for space and time in getting the advertisement published in the print media will not be includible in the value of taxable service for the purpose of levy of service tax, however, the bifurcation of the commission received from print media and from the clients as well as the reimbursement made to print media, is essential. Since the advertising agency other than selling of space for advertisement may also carry out designing or drafting of the advertisement and charge their customer, therefore copies of invoices issued by the print media and the invoices raised by the appellant to their clients are vital to find out that the gross amount

collected by Appellant-1 included the charges towards sale of space in print media.

7.7 However, I find that in spite of numerous correspondences made by the department, at the time of investigation; Appellant-1 did not submit any clarification or documentary evidences either before the investigating officers or before the adjudicating authority to justify their argument that the 85% of the abatement claimed was indeed on the reimbursed amount received from their clients towards print media cost. As the exclusion from the scope of the above taxable service is eligible only for the sale of space for advertisement in print media, I find that the copy of invoices raised by Appellant-1 to their clients and copy of invoices raised by the print media, showing the cost incurred for selling of space in print media, would be crucial to determine whether the abatement claimed was actually towards such reimbursed expenses made by them. The documents like invoices or contracts shall prove that the invoices raised by them included the amount to be reimbursement to the print media cost and the same was reflected separately. Moreover, as no documentary evidences were produced before me, I find that, the benefit of 85% abatement cannot be extended to them, merely on the basis of hypothetical statement that the amount paid was towards space and time, in getting the advertisement published in the print media. In view of the above, I find that the appellant is not eligible for such exclusion, hence, the demand of **Rs.33,35,077/-** on Advertising Agency Service rendered during the F.Y. 2012-13 to F.Y. 2016-17 (up to Sept) also sustains.

8. As regards the late fees of **Rs.1,45,000/-** imposed for delayed filing of ST-3 returns during the F.Y. 2011-12 to 2016-17 (up to September), the appellant requested for waiver under section 80, on the argument that there is no revenue loss as the service tax was paid along with interest in all such cases. I find that the provisions in Section 70 of the Finance Act, 1994, provides that a person liable to pay service tax is required to file periodical return in prescribed form with late fee for delayed furnishing of return. It also provides for the maximum amount of late fee payable. Further, Rule 7C provides that if the return is not filed by the specified due date, the assessee is required to submit the return with late fee for the period of delay. It is observed that filing of ST-3 returns beyond the stipulated time is not disputed by Appellant-1, hence, there is obvious violation of the provisions of Section 70. I find that Hon'ble Tribunal in the case of SHAYNA CONSTRUCTION reported at *2010(262) ELT 1006 (Tri-Amd),* held that;

> *"The benefit of Section 80 of Finance Act, 1994 cannot be extended to the appellant inasmuch as they were aware of their responsibility to file the return in time and to deposit tax within the period. Having not done so, they have invited the penalties under Section 76 and 77 of the Act.."*

I, therefore, find such waiver cannot be extended to them considering the fact that the service tax along with interest, though paid, was on the instance of the department. I, therefore, find that the imposition of late fee is justifiable.

9. The argument of demand being hit by limitation as the unpaid amount of service tax of Rs.16,54,805/- was declared and reflected at clause 26(i)(B)(b) of the Income Tax Returns and in 3CD of Income Tax Auditor report, is also not sustainable. The onus to disclose full and correct information about the value of taxable service lies with the service provider. The appellant deliberately misled the department by intentionally

withholding the correct taxable value, mentioning fake challans in the ST-3 returns, not filing/late filing of ST-3 returns, indulging in non-payment/short payment of tax. All these acts clearly establish the conscious and deliberate intention to evade the payment of service tax. Lack of liquidity cannot validate the deliberate contraventions. Intent to suppress the fact from the department is also evident from the fact that in spite of numerous correspondences made by the department, they did not bother to give any clarification or documents, to prove their bonafide intentions. I, therefore, find that all these ingredients are sufficient to invoke the provisions of Section 73(1) of the F.A, 1994.

10. I find that the penalty imposed under Section 78, is also justifiable as it 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'.* The Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. I find that the demand was raised based on the investigation carried out by the department and it is the responsibility of the appellant to correctly assess and discharge their tax liability. The suppression of taxable value, non-payment and short payment of tax, non-filing of ST-3 returns, clearly show that they were aware of their tax liability but chose not to discharge it correctly instead tried to mislead the department by mentioning fake invoices which undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. Thus, if any of the circumstances referred to in Section 11AC are established, the person liable to pay duty would also be liable to pay a penalty equal to the duty so determined.

11. Penalty under Section 77 is imposed for contravention of rules and provisions of Act. I find, that the appellant by not assessing the correct taxable value and service tax liability, by not discharging the correct tax liability and reflecting the same in the ST-3 returns, thereby contravened the provisions of Section 67, 68 & 70 and also failed to furnish information called by an officer or produce the documents called from them. I, therefore, find that the penalty imposed under Section 77 of the F.A., 1994, is also legal & proper.

12. Regarding the personal penalty of Rs.1,00,000/- imposed on Appellant-2 (Director, Shri Mukesh B. Patel) u/s 78A of the F.A., 1994, I find that he being the Director was looking after the activities of Appellant-1 since inception. Suppressing the taxable value, mentioning fake challans in ST-3 returns, non-payment or delayed payment of service tax and non-filing of ST-3 returns within the stipulated time, all these activities were well within his knowledge. All these contraventions were carried out to suppress the facts from the department with sole intention to evade service tax hence, the imposition of penalty is also maintainable.

13. When the demand sustains there is no escape from interest hence, the same is therefore recoverable under Section 75 of the F.A., 1994. Appellant-1 by failing to pay service tax on the taxable service are liable to pay the tax alongwith applicable rate of interest.

14. In view of the above discussions and findings, the impugned OIO is upheld and the appeals filed by the appellants stand rejected in above terms.

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

28 February, 2022

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 2.2022

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

By RPAD/SPEED POST

To,
M/s. Abhik Advertising Pvt. Ltd., - **Appellant-1**
Plot No. 29, Aditya Bunglows,
Near Goyal Intercity,
Opposite T.V. Tower, Thaltej,
Ahmedabad

Shri Mukesh B. Patel, Director, - **Appellant-2**
M/s. Abhik Advertising Pvt. Ltd.,
Plot No. 29, Aditya Bunglows,
Near Goyal Intercity,
Opposite T.V. Tower,
Thaltej, Ahmedabad

The Joint Commissioner - **Respondent**
CGST, 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.