सत्यमेव जयते

आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
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DIN-20220664SW000000C081

1942 To 1946

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2033/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-10/2022-23**
दिनाँक Date : **20.06.2022** जारी करने की तारीख Date of Issue : **21.06.2022**

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

ग Arising out of Order-in-Original Nos. **01/JC/D/JS/2021-22 dated 27.04.2021**, passed by the Joint Commissioner, Central GST & Central Excise, Ahmedabad-North.

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

Appellant- M/s. Adient India Pvt. Ltd., Plot No. A-1, Tata Motor Vendor park, North Kothpura, Virochnagar, Sanand, Ahmedabad-382170.

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

This appeal has been filed by M/s. Adient India Pvt Ltd., Plot No.A-1, Tata Motor Vendor Park, North Kothpura, Virochnagar, Sanand, Ahmedabad-382170 (in short '*appellant*') against the OIO No.01/JC/D/JS/21-22 dated 27.04.2021 (in short '*impugned order*') passed by the Joint Commissioner (in-situ), Central GST, Ahmedabad North (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that during the course of audit of central excise and service tax records of the appellant for the period April,2013 to June,2017, conducted by the officers of the CGST, Audit Commissionerate, Ahmedabad, certain discrepancies were noticed, which were detailed in audit paras raised vide FAR No.931/2018-19 dated 07.02.2019. The revenue paras relevant to this appeal are detailed below;

Para 6: The appellant during the period F.Y. 2015-16, manufactured automobile seats of model "Kite 4", using moulds supplied free of cost by Tata Motors. They neither determined the amortization cost of moulds used in the manufacture of seats nor paid duty on amortization cost of the same. As per the CA certificate provided by them, the amortization cost of moulds comes to Rs.1,44,96,079/- and central excise duty was ascertained at Rs.18,12,010/-. They agreed to the objection and paid the duty alongwith interest of Rs.5,29,768/-.

Para 8: The appellant was paying service tax under RCM on royalty charges paid to their parent company located in non-taxable territory, for technical knowhow services received by them. On scrutiny of ST-3 returns, it was noticed that the appellant has not paid service tax on royalty charges for the period October, 2016 to June, 2017. On being asked, they informed that the service tax of Rs.9,43,316/- and interest of Rs.1,18,625/- had been paid in post GST era alongwith GST on other RCM based services, (for the period Oct,2016 to March, 2017). On scrutiny of GST challan and Electronic Cash Ledger, it was noticed that the payment was made under head 'Integrated Tax' (IGST) and in Electronic Credit Ledger, they took ITC of Rs.2,06,87,204/- in the month of Dec, 2017, which includes IGST paid on royalty charges and other RCM based services and utilized the said credit for discharging IGST liability for the month of December,2017.

During the pre GST period, service tax was applicable on Technical knowhow services and after introduction of GST, IGST is applicable on such services. In both the situation, being import of service, the liability to pay tax under RCM is on the service recipient. The service tax on royalty charges paid under GST era is considered as arrears and is required to be paid under CGST head and cenvat credit /ITC of such payment is not admissible. The appellant, by wrongly making the payment of service tax under the head IGST (instead of CGST), has taken inadmissible ITC and utilized the same for discharging the IGST liability for the month of December, 2017. Thus, the amount of Rs.9,43,316/- was required to be recovered. Similarly, for the period April, 2017 to June, 2017, it was noticed that the appellant had determined service tax on royalty charges @12% and

paid Rs.30,32,385/- under IGST head and utilized the ITC credit such IGST paid. Further, during the said period, royalty charges attracted service tax @15%, thus short payment of service tax to the tune of Rs.7,56,486/- was noticed. Thus, total service tax amount of **Rs.16,99,802/-** (Rs.9,43,316+Rs.7,56,485/-) not paid was required to be recovered alongwith interest. This amount was subsequently revised to **Rs.19,35,630/-** (Rs.11,79,145/- +Rs.7,56,485/-) (as per Corrigendum dated 30.09.2020).

2.1 Based on the audit paras raised in aforementioned FAR, SCN No.VI/1(b)-207/IA/AP 36/C-VI/2017-18 dated 30.05.2019 was issued to the appellant. In respect of Audit Para-6, recovery of central excise duty on the amortized value of moulds was proposed alongwith interest u/s 11A(4) of the CEA, 1944 and Section 11AA, respectively. Penalty u/s 11AC was also proposed. In respect of Audit Para-8 above, service tax demand of Rs.19,35,630/- u/s 73(1) and interest u/s 75 of the Finance Act, 1994 was proposed. Penalty u/s 78 & 76 was also proposed. The said SCN was adjudicated vide impugned order wherein the recovery of demands alongwith interest and penalty u/s 11AC was imposed and the amount paid by the appellant was appropriated against the demand. However, penalty proposed u/s 78 & 76 in respect of Para-8 was not imposed.

3. Aggrieved by the impugned order, the appellant preferred the present appeal disputing on limited issues (i) the demand confirmed on Audit Para-8 & (ii) seeking refund of excess penalty paid in respect of Audit Para-6. The appeal is primarily on following grounds;

- As per Section 21 of the IGST Act, 2017, all imports of services made on or after the appointed day will be liable to integrated tax regardless whether the transactions for such import of services had been initiated before the appointed day. However, if the tax on such import of services had been paid in full under the existing law, no tax shall be payable on such import under this Act and if the tax on such import of services had been paid in part under the existing law, the balance amount of tax shall be payable on such import under this Act. Since the determination of tax was done post GST, the tax on import of service was paid under IGST.

- In terms of 2nd proviso to Section 13 (3) of the CGST Act, 2017, determination of royalty amount could be done only in the month of November, 2017 i.e. after finalization of the books of accounts and that such payment was also not made to the parent Company, who is an associated enterprise, the tax under IGST becomes payable only afterwards and more appropriately under GST law. Therefore IGST was paid @12% rate, whereas the cumulative payments made, as indicated in the impugned order is more than 12%, hence demand is not legally correct.

- The credit of tax paid under IGST was utilized as input services for further manufacture of taxable goods therefore ITC is legitimate. When law permits the CGST (ITC) credit for payment of IGST dues, the payment of arrears of service tax made under wrong head in IGST, instead of CGST, cannot be a ground for denying the ITC. Moreover, there is no denial of ITC credit of the differential tax of Rs.3,87,126/- paid under CGST, which is also appropriated in the impugned order, therefore, the department cannot take a dual stand in this regard for the same

transaction. Since the cross utilization of ITC credit between IGST & CGST is permitted in law, the entire issue is revenue neutral, demanding dues of service tax as CGST, when the same stand paid under IGST, needs to be set-aside

- Levy on import of service under Service tax regime and under GST law is one and the same therefore they were under the bonafide belief that IGST needs to be paid for such arrears of service tax paid during GST regime, as the said booking was done post GST.

- Board's Circular No.42/16/2018-GST dated 13.04.2018, shall not be applicable as the IGST was paid on import of services for the past period and before issuance of said circular.

- Once the IGST of Rs.15,48,505/- stands paid, it is inappropriate to demand the tax on the same transaction again under CGST, which will tantamount to double taxation, on the very same transaction.

- On the aspect of penalty levied on audit point **raised in Audit Para-6,** they are seeking refund of excess penalty of Rs.1,75,829/- paid. They argued that the impugned order imposed penalty of Rs.2,77,174/- whereas they have paid penalty of Rs.4,53,003/- which is more than the imposed amount. They also argued that substantial benefit should be granted in terms of Section 77 of the CGST Act, which provides refund of the tax paid mistakenly under one head instead of another. However, in terms of Rule 4, amount of above refund can be adjusted against the outstanding demand under the Act.

- They relied on following case laws:-
  - Saji S vs Commr. Of SGST, Trivandrum- 2008 (19) GSTL 385 (Ker)
  - Mangalore Chemicals & Fertilizers -1991 (55) ELT 437 (SC)
  - Govt. of Kerala and Anr Vs Mother Superior Adoration Convent – 2021-TIOL-156-SC-Misc

4. Personal hearing in the matter was held on 21.04.2022, through virtual mode. Mr. S. Narayanan, Advocate, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

5. 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 issues to be decided in the present appeal are as under:

a) Whether the payment of Rs.19,35,630/- made, in respect of the royalty charges to their parent company for technical knowhow services received during the period October,2016 to June, 2017, under IGST head is allowed?

b) Whether excess penalty amount of Rs.1,75,829/- paid in respect of Audit Para-6, qualifies for refund?

6. On the first issue, regarding the applicability of service tax or IGST on the royalty charges paid by the appellant, to their parent company for import of technical knowhow services received during the period October, 2016 to June, 2017, it is observed that the appellant in the pre GST era i.e. from April, 2016 to September, 2016, for the said services was paying service tax. However, for the period from October, 2016 to June, 2017, they paid service tax arrears of Rs.11,79,145/- alongwith interest of Rs.1,18,625/-, under IGST head. The appellant, to support their payment under IGST, has contended that the tax liability was determined in November, 2017 after finalization of the books of accounts and the payment to the parent Company, which is an 'Associated Enterprise' was done in post GST period, therefore, in terms of the provisions of Section 21 of the IGST Act and in terms of 2nd proviso to Section 13 (3) of the CGST Act, 2017, they were under the bonafide belief that taxes are to be paid under IGST and not under CGST. Revenue on the other hand is arguing that the services received prior to GST era attracts service tax and payment of such tax made in post GST period shall be considered as arrears of service tax, which the appellant were required to pay under CGST head, and on such payment ITC is also not admissible.

6.1 In the present case, 'Technical Know How' services were received by the appellant in pre-GST period from their parent company situated in a non-taxable territory, therefore, in terms of Section 68(2) if the Finance Act, 1994 i.e. under Reverse Charge Mechanism, the liability to pay tax has been shifted to the appellant who is the recipient of service. However, considering the appellant's claim that determination of royalty charges was done in post GST period, (in November, 2017 i.e after finalization of the books of accounts) and that such payment was made to the parent company which is an associated enterprise, I find that to determine the rate of tax and due date for payment of service tax, Point of Taxation Rule, 2011, shall come into picture which decides the point in time when a service is deemed to have been provided. To appreciate the matter in proper perspective, it would be necessary to examine the provisions of Rule 7 of the Point of Taxation (Second Amendment) Rules, 2016, notified vide Notification No. 21/2016-S.T., dated 30-3-2016. The amended Rule 7 is as under:-

*Rule 7: "**Determination of point of taxation in case of specified services or persons.** — Notwithstanding anything contained in these rules, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made :*

***Provided** that, where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist :*

***Provided further** that in case of "**associated enterprises**", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.*

***Provided** also that where there is change in the liability or extent of liability of a person required to pay tax as recipient of service notified under sub-section (2) of section 68 of the Act, in case service has been provided and the invoice issued before the date of such change, but payment has not been made as on such date, the point of taxation shall be the date of issuance of invoice."*

In terms of above provisions, under reverse charge mechanism, the liability to pay tax shall be the date on which payment is made and where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be the date immediately following the period of 6 months. Further, in case of "**associated enterprises**", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

6.2 The appellant had received services from a 'associated enterprise', therefore, in terms of Rule 7 ibid, in case of "associated enterprises" providing the service, is located outside India, then the tax liability shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier. The appellant have claimed that their parent company is associated enterprise and, therefore, the liability to pay tax shall be the debit entry in their books of accounts or the payment made to their parent company which in both the cases was done after implementation of GST, hence they are liable to pay IGST. On going through the demand notice and the impugned order, I find that this argument was never placed either during audit or before the adjudicating authority, hence, was not examined at the time of adjudication. I find that the entire demand was raised purely on the basis of the date of receipt of the services, without considering the fact that the royalty charges and tax determination was done in November, 2017, which, I find is not sustainable, in light of Rule 7 of the POT Rules, 2011. Likewise, I also find that the above claim made by the appellant cannot be accepted as such, as the same are not supported by any documentary evidences. So to determine the point of taxation, it would be imperative to ascertain the date of payment of royalty charges made or date of the debit entry made in the books of account, whichever is earlier, which shall decide the point of taxation and the nature of tax to be paid.

6.3 I have gone through Section 21 of the IGST Act, 2017, which deals with import of services and Section 13 of CGST Act, 2017, which deals with time of supply. Relevant text of Section 21 of IGST Act, 2017 and Section 13(3) of the CGST Act, 2017 are reproduced below;

***SECTION 21. Import of services made on or after the appointed day.** — Import of services made on or after the appointed day shall be liable to tax under the provisions of this Act regardless of whether the transactions for such import of services had been initiated before the appointed day:*

***Provided** that if the tax on such import of services had been paid in full under the existing law, no tax shall be payable on such import under this Act:*

***Provided** further that if the tax on such import of services had been paid in part under the existing law, the balance amount of tax shall be payable on such import under this Act.*

Explanation. *- For the purposes of this section, a transaction shall be deemed to have been initiated before the appointed day if either the invoice relating to such supply or payment, either in full or in part, has been received or made before the appointed day.*

Relevant text of Section 13

Section 13 - Time of supply of services

(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely :—

(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or

(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier :

Provided *that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply :*

Provided *further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier.*

6.4 Section 21 of the IGST Act, 2017, deals with import of services and is applicable only in cases where import of services were made on or after the appointed day regardless whether the transactions for such import of services had been initiated before the appointed day. In the instant case, "Technical Know How" services were received / imported during October, 2016 to June, 2017 (i.e. in the pre GST era) and not on or after the appointed day, therefore, I find that the above provision of Section 21 of IGST Act, 2017, shall not attract, in the facts of the case in hand.

6.5 Similarly, Section 13 deals with time of supply, to determine the date when the tax liability arises on supply of services, under CGST regime. In terms of sub-section (3) of the said section, the liability to CGST under RCM is prescribed, wherein, in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account. C.B.E. & C. vide Flyer No. 23, dated 1-1-2018, on imports in GST regime clarified that; time of supply of services when tax is to be paid on reverse charge basis, earliest of the following dates shall be considered;

- Date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier,
- Date immediately following 60 days from the date of issue of invoice or any other legal document in lieu of invoice by the supplier.

However, if it is not possible to determine the time of supply in aforesaid manner, then the time of supply is the date of entry of the transaction in the books of accounts of the recipient of supply. Time of supply of services in case of supply by Associated Enterprises located outside India, the time of supply is the date of entry in the books of account of the recipient or the date of payment, whichever is earlier. Thus, to determine the nature of levy, it would be imperative to ascertain the time of supply.

7. I, therefore, find that nature of demand on the first issue cannot be adjudged unless the point of taxation is determined. The nature of tax levied depends on date of payment made or the date of the debit entry made in the books of accounts, as the services were received from associated enterprises located outside India. Whether the appellant are liability to pay service tax arrears or CGST depends on the above factors which, I find needs to be examined in light of Rule 7 of the Point of Taxation (Second Amendment) Rules, 2016 and Section 13(3) of the CGST Act, 2017. Further, I also find that the present demand notice is issued for recovery of CGST and not for recovery of ITC availed on the IGST paid, I will therefore, not discuss the admissibility of ITC.

8. In light of discussion held in the foregoing paras, I, therefore, remand the matter relating to Audit Para-8, to the adjudicating authority to re-examine the issue considering the point of taxation and also verify the claim made by the appellant regarding the determination of royalty charges, debit entry made in the books of accounts and also the date of payment, so as decide the nature of tax to be levied. The adjudicating authority may decide the matter afresh considering the aspects discussed above, and pass a speaking order after ascertaining correct factual position in the case and merits in the contentions of the appellant. The appellant is directed to submit all the relevant documents and details to the adjudicating authority, in support of their contentions. Needless to say, the authenticity and correctness of facts and figures furnished by the appellant may be verified and confirmed with the records of the appellant.

9. Coming to the second issue relating to Audit Para-6, mentioned above, I find that the appellant have claimed refund of Rs.1,75,829/- paid as penalty, which is in excess of the penalty actually imposed and appropriated.

9.1 The adjudicating authority in Para 41.1 of the impugned order has recorded that the appellant has agreed with the audit objection and paid central excise duty alongwith interest. He also recorded that the appellant has also paid penalty of Rs.4,53,003/- @25% of duty, vide challan dated 17.08.2020. However, in the order portion, he confirmed the demand and ordered recovery of duty of Rs.18,12,010/, alongwith interest of Rs.5,29,768/- and imposed penalty of Rs.2,77,174/- u/s 11AC and ordered appropriation of amount already paid by the appellant. I find that though the penalty imposed was Rs.2,77,174/-, the amount actually paid by the appellant was Rs.4,53,003/-, which is more than the penalty imposed.

9.2 In the present appeal, I find that the appellant are seeking refund of differential amount of the penalty paid in excess, arising in consequence to the penalty actually imposed in the impugned order. In terms of Section 11B, any claim seeking refund is to be filed before proper jurisdictional authority. I, therefore, direct the appellant to seek

refund of Rs.1,75,829/- excess paid, by filing a refund claim before the proper jurisdictional authority, in terms of the provisions laid down under Section 11B of the Central Excise Act, 1944.

10. In view of the above discussions and findings, I, set aside the impugned order relating to Audit Para-8 and remand the matter to the adjudicating authority for fresh examination of the issue and accordingly pass a reasoned order, following the principles of natural justice. Further, I reject appellant's appeal relating to Audit Para-6 and direct the appellant to file the refund claim before proper jurisdictional authority.

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

(अखिलेश कुमार)
आयुक्त (अपील्स)

Date: 6.2022

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

By RPAD/SPEED POST

To,
M/s. Adient India Pvt Ltd. - **Appellant**
Plot No.A-1, Tata Motor Vendor Park,
North Kothpura, Virochnagar, Sanand,
Ahmedabad-382170

The Joint Commissioner (in-situ) - **Respondent**
CGST, Division-III
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.