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-20220764SW0000999F7B

2482 – 2486

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2041/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-13/2022-23**
दिनाँक Date : **07.07.2022** जारी करने की तारीख Date of Issue : **11.07.2022**

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

ग Arising out of Order-in-Original Nos.**GST/D-VI/O&A/22/K AND D/JRS/2020-21 dated 15.02.2021**, passed by the Assistnat Commissioner, Central GST & Central Excise, Division-VI, Ahmedabad-North.

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

Appellant- M/s. K AND D Communications Ltd., 3rd Floor, Kailash A Sumangalam Society, Bodakdev, Ahmedabad.

Respondent- The Assistant Commissioner, Central GST & Central Excise, Division-VI, Ahmedabad-North.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित 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.

(8) 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:

(vii) amount determined under Section 11 D;
(viii) amount of erroneous Cenvat Credit taken;
(ix) 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. K AND D Communication Ltd., 3rd Floor, Kailash A Sumangalam Society, Bodakdev, Ahmedabad-380054 (hereinafter referred to as '*the appellant*') against the OIO No.GST/D-VI/O&A/22/K AND D/JRS/2020-21 dated 15.02.2021 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-VI, Ahmedabad North (in short '*the adjudicating authority*').

2. During the course of audit, conducted by the officers of CGST, Ahmedabad Audit Commissionerate, on scrutiny of the records maintained by the appellant, certain discrepancies were noticed during the F.Y. 2016-17 to F.Y. 2017-18 (upto June, 2017). The discrepancies noticed were mentioned in Revenue Paras of the FAR No.293/2018-19 (S.Tax) dated 31.10.2018, which are reproduced below;

Revenue Para-1: On comparison of income shown in the balance sheet/ financial statements vis-à-vis the taxable income declared in their ST-3 returns, it was observed that the appellant has short paid service tax to the tune of Rs.4,22,619/- for the F.Y. 2016-17. Further, for the period from April, 2017 to June, 2017, the appellant had filed their original ST-3 return on 28.11.2017 and showed their service tax liability on advance of Rs.1,52,76,559/-received from their customers (Gross receipts including service tax of Rs.1,76,72,209/-). However, after implementation of GST, they filed revised ST-3 return (on 25.12.2017), wherein the service tax liability on advance receipts of Rs.1,76,72,209/- was not shown. The appellant stated that as they could not take refund of service tax paid on advances received prior to GST regime, they, therefore, filed a revised ST-3 return. It appeared to have been done to evade the service tax payment as in terms of Rule 3 of POTR, 2011, they were required to pay service tax for the advances received from April, 2017 to June, 2017. Thus, total service tax short payment to the tune of **Rs.27,27,690/-** (Rs.4,22,619/- for F.Y. 2016-17 and Rs.23,05,071/- for the period from April, 2017 to June, 2017) was calculated.

Revenue Para-2: The appellant had incurred expenses of Rs.3,10,000/- on Manpower Supply Service received from M/s. Himalaya Dave during F.Y. 2016-17, on which service tax liability of **Rs.40,435/-** under RCM, was not discharged by them.

Revenue Para-3: The appellant had received income of Rs.13,48,320/- as reimbursement of expenses for providing 'Exhibition Services' during F.Y. 2016-2017, on which non-payment of service tax to the tune of **Rs.2,02,248/-** was noticed.

Revenue Para-4: The appellant, in their Original ST-3 return filed on 28.11.2017, for the period from April, 2017 to June, 2017, paid service tax liability on bills raised for amount of Rs.33,90,491/- as well as on the advance receipt of Rs.1,52,76,559/- from their customers. Thereafter, they filed revised ST-3 return for the same period on 25.12.2017, wherein the service tax liability on advance receipt of Rs.1,52,76,559/- was not shown and saved their Cenvat credit balance of Rs.7,62,011/- as well as took suo-moto Cenvat credit of **Rs.13,89,316/-** under the head *'any other credit taken'*, without any statutory documents, on account of service tax paid on advance receipt. As a result, they arrived at the closing balance of Cenvat credit of Rs.26,32,473/- and transferred the same in

TRAN-1. The Cenvat credit of **Rs.13,89,316/-** appeared to be inadmissible as they have not produced the invoice/ documents on the basis of which such credit was taken.

On being pointed out the appellant contended that for the supply of services made on or after 01.07.2017, in terms of Section 142(11)(b) of the CGST Act, 2017, no tax shall be payable on services under this act to the extent of tax leviable on the said services under Chapter V of the Finance Act, 1994. So if they do not pay GST, their service recipient will be deprived of the cenvat credit of service tax already paid prior to GST.

2.1 A Show Cause Notice No.25/2018-19/CGST/Audit dated 28.11.2018, was therefore issued proposing the total service tax demand of **Rs.29,70,373/-** alongwith interest and penalty. It was also proposed to disallow the Cenvat credit amount of **Rs.13,89,316/-** wrongly taken and to recover the same alongwith interest and penalty.

2.2 The said SCN was adjudicated vide the impugned order wherein the above demands were confirmed alongwith interest u/s 73 & 75 of the Finance Act, 1994 respectively and equivalent penalty u/s 78 was also imposed.

3. Being aggrieved, by the impugned order, the appellant has preferred the present appeal against the confirmed demands, primarily on following grounds:-

- The impugned order is a non-speaking order as the adjudicating authority has overlooked their submissions. They made the payment of differential amount of Rs.4,22,619/- vide Challan No. 51243 dated 31.10.2017. As the time of revised return was over, they could not show the same in their returns. Moreover, there is nothing on record to prove that the tax liability was discharged after being pointed out during by the audit. They claim that these documentary evidences & their oral submissions were neither considered and nor any substantial findings on them were given. They placed reliance on following citations.
  - Cyril Lasardo (Dead) V/s Juliana Maria Lasarado-2004(7) SCC 431
  - Shukla & Brother- 2010(254) ELT 6 (SC)

- On the advance of Rs.1,76,72,209/- , Rs.1,76,41,308 was received during Q1 of F.Y. 2017-18 and includes Rs.38,99,065/- already booked as income in Q1 of F.Y. 2017-18, which includes service tax paid of Rs.5,08,574/-. Balance amount of Rs.1,37,42,243/- is the advance for which services were provided after 01.07.2012. Therefore, service tax on such advances was paid by way of CENVAT of Rs.12,47,395/- and Rs.5,45,071/- vide Challan. This amount is shown alongwith total carried forward amount of Rs.26,32,473/- in the revised return filed on 25.12.2017, which also includes service tax paid on advances received before 31.03.2017.

- The contractual services provided alongwith staff as collective team cannot be classified as manpower services as the contractor has not supplied the staff but have provided supervisory services on contractual basis at exhibition site where control of such staff is not with the appellant hence service tax is not required to be discharged on 'Manpower Supply Services' under reverse charge.

- Reimbursement of expenses cannot be considered a consideration against providing services as these expenses were incurred on behalf of the parties to facilitate them and not for the parties participating in exhibition. They were not part of services and were received by them on actual basis and thus reimbursement of the same shall not be considered as part of total value of services provided by the appellant. Reliance has been placed on M/s. Text Hundred India Pvt. Ltd- 2018 (5) TMI 1233-CESTAT New Delhi and M/s. Grant Thornton – 2017 (3) TMI-1460.

- For the services provided after 01.07.2017, they had already received advances upto 30.06.2017 and discharged their service tax liability. But in terms of Section 142(11)(c) of the CGST, Act, 2017, the service provider is entitled to take credit of service tax paid under the existing law to the extent of supplies made after the appointed day. Therefore, they were desirous to pay GST on the services provided on or after 01.07.2017, and took such credit to the extent of service tax paid on advance received upto 30.06.2017. But in the TRAN-1, VAT registration number was mandatory, therefore, they were not able to proceed with TRAN-1 and file the same. The transitional credit of Rs.26,32,473/- was carried forward in TRAN-1 which was paid by challan/CENVAT on the advances received till 30.06.2017 and for which services were provided after 01.07.2017 in GST regime. The Input Tax Credit, which was forwarded in TRAN-1, is actually the tax which was paid erroneously before it became due and, therefore, they are eligible to claim the set-off of the same and adjust the same for future liability.

- The cum tax benefit should be given as the value of taxable service is inclusive of the amount of service tax, in terms of Section 67(2) of the Finance Act, 1994. Reliance placed on Advantage Media Consultants- 2009(14) STR J49 (SC).

- Demand is time barred as demand of service tax is based on the Balance Sheet which is a public document therefore suppression of facts cannot be alleged. Citation relied upon followed upon;

  - M/s. Swarn Cars Pvt. Ltd.-2020 (2) TMI 222
  - Anand Nishikawa Co. Ltd.-2005(188) ELT 149 (SC)

- Interest & Penalty not leviable when the tax itself is not payable. They relied on following case laws in support of their argument. They also argued that in terms of Section 80, no penalty shall be imposable if the reasonable cause for failure is proved.
  - Coolade Beverages Ltd- (2004) 172 ELT 451 (All)
  - DCW Ltd- 1996 (88) ELT 31 9Mad)
- The appellant also sought condonation of delay in filing of appeal as there was delay of 84 days due to prevailing pandemic situation of COVID-19. They relied on the Hon'ble Apex Court's decision passed vide order dated 27.04.2021.

4. Personal hearing in the matter was held on 07.06.2022, through virtual mode. Shri Ambarish Pandey, 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 period involved in the dispute is F.Y. 2016-17 to F.Y. 2017-18 (upto June, 2017).

6. Before going into the merit of the case, I first deal with the miscellaneous application filed by the appellant seeking condonation of delay in filing the present appeal. Appellant has claimed that there was delay in filing appeal due to prevailing pandemic situation of COVID-19 and have relied on the Hon'ble Apex Court's decision passed vide Order dated 27.04.2021. I find that in terms of Section 85 of the Finance Act, 1994 and Chapter V, Section 6 of Relaxation of Time Limit under Certain Indirect Tax Laws 2020, the appellant were required to file the present appeal on or before 5th May, 2021. The impugned order was received on 02.03.2021 and the appeal was filed on 26.07.2021, with a delay of 84 days. Hon'ble Supreme Court, keeping in view the difficulties faced by litigants due to restrictions on movement and in an attempt to reduce the transmission of the deadly virus, extended the limitation period under the general law of limitation or under any special laws (both Central and/or State) on the filing of all appeals, suits, petitions, applications and all other quasi proceedings vide its Order dated 23th March, 2020, from March 15, 2020 till further orders. Subsequently, vide orders dated March 08, 2021, April 27, 2021, September 23, 2021 and January 10, 2022, Hon'ble court held that the period from March 15, 2020 till February 28, 2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings. Accordingly, I find that the appeal filed in the present case, being falling within the above period, has to be treated as filed within the period of limitation prescribed. Therefore, there is no delay in filing the present appeal and consequently, there is no case of considering or condoning any delay in the matter.

7. As regards the issue covered under **Revenue Para-1** of FAR No.293/2018-19, it is observed that the demand notice alleges that firstly, there was short payment of service tax to the tune of Rs.4,22,619/- which was noticed on reconciliation of the ST-3 returns with the Balance Sheet/Financial records of the appellant for the F.Y. 2016-17. Auditors observed that though the appellant have claimed that the payment of said differential amount was made but they could not produce the evidence of such payment, hence such demand was made. The appellant, however, argued that they made the payment vide Challan No. 51243 dated 31.10.2017, but, as the time of revised return was over, they could not reflect such payments in their returns. On going through the documents submitted by the appellant, it is noticed that the Chartered Accountant, Shri Shilpang Karia, vide Certificate dated 6.07.2021, had certified that the differential tax of Rs.1,94,070/- alongwith interest of Rs.27,308/- was paid vide Challan No. 51243 dated 31.10.2017. I find that the short payment of service tax noticed by audit is to the tune of Rs.4,22,619/-, whereas the differential tax claimed to have been paid is Rs.1,94,070/-, thus there is no co-relationship which could be established with the payment made. Moreover, the audit was conducted in September, 2018 and if the payment was made before being pointed out by audit, then what stopped the appellant from producing the duty paid challan to them is not clear. Besides, the copy of the said challan is also not

produced before me, thus, their claim of duty having paid cannot be accepted on merits. I, therefore, find that the service tax demand of Rs.4,22,619/- alongwith interest, is sustainable on merits.

7.1 Further, in the same revenue para-1, for the period from April, 2017 to June, 2017, it was also noticed that in the original ST-3 return, appellant have showed service tax liability on advance receipt of Rs.1,52,76,559/- (including receipts of Rs.1,76,72,209/-) but after implementation of GST, they filed a revised ST-3 return on 25.12.2017, wherein it was found that the service tax liability of Rs.23,05,071/-on advance receipts of Rs.1,76,72,209/- was not shown.

7.2 The appellant has been claimed that out of the advance of Rs.1,76,72,209/- received, Rs.1,76,41,308 was received during Q1 of F.Y. 2017-18 and the balance amount of Rs.1,37,42,243/- (Rs.1,76,41,308/- **(less)** Rs.38,99,065/- i.e Total income of Q1 including Service tax) is the advance for which services were provided after 01.07.2017. Therefore, service tax on such advances was paid by way of CENVAT amount of Rs.12,47,395/- and Rs.5,45,071/ vide Challan. They claim that this amount of Rs.26,32,473/- was carried forward in the revised return filed on 25.12.2017, which also includes service tax paid on advances received before 31.03.2017. As service tax on advances received was required to be paid, was duly paid through CENVAT & Challan and this amount was carried forward as Cenvat credit in their TRAN 1, for set-off against the GST liability payable on such services which were actually supplied in GST regime. They have produced a copy of the said challan annexed as Annexure-6, to their appeal memorandum.

I have gone through the copy of challan dated 05.12.2014, submitted by the appellant. I find that the amount demanded in the SCN is Rs.23,05,071/- whereas the amount mentioned in challan is Rs.55,80,574/. Moreover, the demand is for the period April, 2017 to June, 2017 whereas the challan shows the payment date of 05.12.2014. I, could not find any co-relation of the exhaustive argument put forth by the appellant as they are not supported by concrete documentary evidence, hence cannot be entertained.

7.3 Point of Taxation Rules (POTR), 2011, was introduced to determine the event of taxation. Relevant Rule 3 is reproduced below:-

> ***RULE 3: <u>Determination of point of taxation</u>.*** *- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-*
>
> *(a) the time when the invoice for the service [provided or agreed to be provided] is issued :*
>
> *[**Provided** that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.]*
>
> *(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment :*
>
> *[**Provided** that for the purposes of clauses (a) and (b), -*

(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).]

***Explanation** - For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.].*

As per Rule 3(a), the point of taxation shall be: (i) the date of invoicing/billing, or (ii) the date of receipt of consideration or (iii) the date of completion of service, whichever is earlier. If part payment is received in advance in respect of a taxable service and the remaining part is received only after the invoice is issued, then the point of taxation for the first part (received in advance) will be the date on which such payment is received. So far as the second part of the payment, which is received after the invoice is issued, the date of issue of invoice will be the relevant date provided the invoice is issued within fourteen days of completion of service; in case the invoice is issued after fourteen days, then the relevant date will be the date of completion of service and not the date of issue of invoice.

7.4 Further, in terms of Section 142 (11) (b) of the CGST Act, 2017, *"notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994 (32 of 1994)."* So applying the principles of Rule-3 of the POT Rules, 2011 & Section 142 (11)(b) of the CGST Act, 2017, in the instant case, the advances were received in the pre-GST era, therefore, the appellant are liable to pay service tax considering the date of receipt of consideration irrespective of the fact that part of the service was rendered in the GST era also. I find that appellant could not produce any corroborative evidence of the service tax payment made to authenticate their claim of having discharged the tax liability through Cenvat /challan. Since such liability was also not reflected in their revised return, their above argument of payment made, appears to be false being not supported by documents/ evidences. Moreover, the credit of service tax paid on advances received in pre-GST era cannot be taken in TRAN-1, as such tax liability was discharged on output service hence not admissible as input credit. In the absence of any documentary evidence, I find that they were liable to make the service tax payment of Rs.23,05,071/- along with interest for the advances received during the period from April, 2017 to June, 2017, in terms of Rule 3 of the POT Rules, 2011, and should have reflected the same in their revised ST-3 return.

7.5 The appellant further argued that the adjudicating authority has not passed a speaking order as their submissions were overlooked. I have gone through the impugned order and I find that the adjudicating authority has recorded that there was nothing on record to prove that the service tax liability was discharged. He also pointed out that the service tax liability as pointed out by the audit does not tally with the justification and liability figures as accepted by the appellant. I agree with the findings of

the adjudicating authority, as in the absence of corresponding challan evidencing the disputed duty payment, the argument put forth by the appellant cannot be admitted.

7.6 They have placed reliance on catena of decisions, in support of their argument. It is observed that Hon'ble Apex Court in the case of ***Shukla & Brother- 2010(254) ELT 6 (SC)*** held that *"A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment."* However in the instant case, the issue was decided after examining all the records and submissions placed by the appellant, hence the order so passed by the adjudicating authority after giving reason for arriving at any conclusion shows proper application of mind and does not vitiate the order itself. In view of above discussion, I find, that the total service tax demand of **Rs.27,27,690/-** (Rs.4,22,619/- + Rs.23,05,071/-) alongwith interest, is sustainable on merits.

8. On the issue covered under **Revenue Para-2** of FAR No.293/2018-19**,** it was noticed that the appellant was liable to pay service tax of Rs.40,435/- under RCM, on the Manpower Supply Service provided by M/s. Himalaya Dave, during F.Y. 2016-17, which they did not pay. The appellant have claimed that the services provided were contractual services wherein the contractor has not supplied the staff but have provided supervisory services on contractual basis where control of such staff was not with the appellant.

8.1 The service tax regime, with effect from 01.07.2012, shifted from selective taxation to comprehensive taxation, thus the 'Manpower Recruitment or Supply Agency' services are taxable as 'services' without reference to the specific head of manpower recruitment or supply agency service. Therefore, under the new regime, in terms of Section 65B (44) of the Finance Act, 1994, the term '**service**' had been defined as any activity carried out by a person for another for consideration, and includes a declared service. Further, in terms of Notification No. 30/2012-S.T., dated 20-6-2012, as amended by Notification No.45/2012-ST, the supply of manpower supply for any purpose when provided by an individual, HUF, or partnership firm to a body corporate, under reverse charge mechanism, the liability to pay tax shall be on the recipient and the percentage of tax payable is 100% under RCM. The Finance Act, 2016, Section 65 (68) defines *"Manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, [to any other person].* Accordingly, any supply of manpower temporarily or otherwise shall be covered under the 'Manpower Recruitment or Supply Agency', hence the contention of the appellant that the service was supervisory services on contractual basis wherein the control of such staff was not with the appellant appears irrelevant. Also in absence of submission of any contract, supporting their above contention, the same cannot be admitted. I, therefore, have no option but to uphold the service tax demand of Rs.40,435/- alongwith interest.

9. Regarding the issue covered under **Revenue Para-3** of FAR No.293/2018-19, the SCN alleges that the appellant had received income of Rs.13,48,320/- as reimbursement of expenses for providing 'Exhibition Services' during F.Y. 2016-2017, on which non-payment of service tax to the tune of **Rs.2,02,248/-** was noticed. The appellant on the

other hand have claimed that the adjudicating authority has erroneously considered reimbursable expenses received from iNDEXTb as part of total value of services. They claim that these expenses were incurred on behalf of the parties to facilitate them and were received on actual basis hence shall not form part of taxable value. They placed reliance decision passed in the case of M/s, Text Hundred India Pvt. Ltd- 2018 (5) TMI 1233-CESTAT New Delhi, M/s. Grant Thornton – 2017 (3) TMI-1460.

9.1 It is observed that Section 67 prescribes for the valuation of taxable services. The Finance Act, 2015 w.e.f 14th May, 2015, amended Section 67, so as to include reimbursement of expenses in and as consideration. After the amendment, consideration for a taxable service shall include:

(a) ["consideration" includes —

(i) any amount that is payable for the taxable services provided or to be provided;

*(ii) **any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service**, except in such circumstances, and subject to such conditions, as may be prescribed;*

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'.]

*[(b) * * * *]*

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]]

9.2 Further, in terms of Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, the expenditure or cost incurred by the service provider as a pure agent of the recipient of the service shall be excluded from the value of taxable service if, all the following conditions are satisfied.

- *the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
- *the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
- *the recipient of service is liable to make payment to the third party;*
- *the recipient of service authorises the service provider to make payment on his behalf;*
- *the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
- *the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*
- *the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*
- *the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*

9.3 The term **'Pure Agent'** has been defined in Explanation to sub-rule 2 of Rule (5) of the Valuation Rules, as a person who-

- *enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
- *neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
- *does not use such goods or services so procured; and*
- *receives only the actual amount incurred to procure such goods or services.*

So the service provider who sought to claim exclusion of certain value from the taxable value was also required to fulfill the condition of Rule 5(2) of the Valuation Rules. In the instant case, the appellant have claimed exclusion of reimbursable expenses incurred on behalf of the service provider but they failed to produce any documentary evidence like contractual agreement entered with iNDEXTb, to establish that they acted as 'pure agent'. So, in terms of amended Section 67, reimbursement of expenses shall be included in consideration.

9.4 Rule 5 of the Service Tax Valuation Rules, 2006, provides that any expenditure incurred by a service provider in the course of providing taxable services, such costs or expenditure shall be treated as consideration of taxable services has been struck down by Hon'ble Delhi High Court in the case of *Intercontinental Consultants and Technocrats (P.) Ltd.* v. *Union of India* - MANU/DE/6376/ 2012 = 2013 (29) S.T.R. 9 (Del.) and affirmed by Hon'ble Supreme Court in 2018 (10) G.S.T.L. 401 (S.C.).

But the ratio of above decision of Hon'ble Supreme Court is applicable to the assessees who have been litigating levy of service tax on reimbursable expenditure before 14 May, 2015, as prior to this amendment, value of any taxable service was the gross amount charged by the service provider for service provided or to be provided by him. The period involved in the present case, is subsequent to amendment made in Section 67, wherein any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed shall be treated as consideration. I, therefore, find that the exclusion of reimbursable expenses claimed by the appellant cannot be granted, Accordingly, non-payment of service tax to the tune of **Rs.2,02,248/-** is recoverable alongwith interest.

10. On the issue covered under **Revenue Para-4** of FAR No.293/2018-19, it was noticed that the appellant, in their revised ST-3 Return filed on 28.11.2017, for the period from April, 2017 to June, 2017, had shown Cenvat credit of **Rs.13,89,316/-** under the head *'any other credit taken'*, which the department alleges was availed without any statutory documents, hence appeared to be inadmissible as they have not produced the invoice/ documents on the basis of which such credit was taken.

10.1 The appellant has claimed that for the services provided after 01.07.2017, they received advances during pre GST era and they paid service tax upto 30.06.2017, in terms of Rule 3 of Point of Taxation Rules, 2011, either through challan /Cenvat. However, in terms of Rule 3(1) of the CCR, 2004, their service recipient could avail credit of only such input services which were received by them. As the services were provided

in post GST era they could not pass on the credit of tax paid in advance to their clients. But in terms of Section 142(11) (c) of the CGST, Act, 2017, the service recipient is entitled to take credit of service tax paid under the existing law to the extent of supplies made after the appointed day. So they wish to pay GST and claim transitional credit under Section 142(11)(c) to the extent of service tax paid on advances received upto 30.06.2017. However, for filing TRAN-1, VAT registration number was also mandatory and being service providers they could not proceed with TRAN-1 and file the same. It is this credit of service tax which was shown in the revised ST-3 return of Q1 which is permissible in terms of Section 142(11)(c) to be claimed as transitional credit. The transitional credit of Rs.26,32,473/- was carried forward in TRAN-1. They claim that there is no evasion of tax as the Input Tax Credit which was forwarded in TRAN-1 is actually the tax which was paid erroneously before it became due and therefore, they are eligible to claim the set-off of the same and adjust the same for future liability.

10.2 The appellant are claiming that they paid the service tax on the advances received for the services, to be rendered after 01.07.2017 and carried forward this amount in their Cenvat credit account to set-off against their GST liability on those services which were to be rendered after 01.07.2017 i.e. they claimed transitional credit under GST regime of the service tax paid on advances during pre-GST era. In terms of Rule 3 of the CENVAT Credit Rules, 2014, a provider of output service is allowed to take CENVAT credit of any input service received by the manufacturer of final product or by the provider of output services. In the instant case, appellant have taken credit of tax paid on the advance receipts for the services to be rendered in the post GST period. The appellant is service provider and therefore is eligible to take credit of inputs or input services received for rendering their output service. The credit of service tax paid by them on their output service is not admissible. Further, in terms of Section 16 of the CGST Rules, 2017, a person is entitled to take ITC on any supply of goods or services or both which are used or intended to be used in the course of furtherance of his business and said amount shall be credited to the electronic ledger of such person. I therefore find that the Cenvat credit of **Rs.13,89,316/-** taken under the head *'any other credit taken'*, by the appellant is not admissible when the same is not paid towards their input service

11. The appellant have claim that in terms of Section 67(2) of the Finance Act, 1994, cum tax benefit should be given as the value of taxable service is inclusive of the amount of service tax. Appellant has placed reliance on decision passed in the case of Advantage Media Consultants-2009(14) STR J49 (SC). In this case, Hon'ble Apex Court dismissed department's appeal as the party therein was rendering Advertising Agency service and service tax was not collected for services rendered to government agencies. I find that where service tax is not charged separately on pretext that services are not taxable, consideration so received has to be regarded as cum-tax value and in event of demand and service tax must be worked out accordingly. In the instant case though the appellant are claiming that they have paid the taxes but they failed to produce the challans evidencing such payment nor did they produce any invoice reflecting the gross amount charged, so as to ascertain whether service tax was separately charged. I therefore, find that cum tax benefit cannot be extended to them in this case.

12. Appellant also claimed that the demand is time barred as demand is arrived based on the figures reflected in the Balance Sheet, which is a public document therefore suppression of facts cannot be alleged. I find that the ratio of decisions passed in the case of M/s. Swarn Cars Pvt. Ltd.-2020 (2) TMI 222 & Anand Nishikawa Co. Ltd.-2005(188) ELT 149 (SC) cannot be squarely applicable. As in the case of Swarn Cars Pvt. Ltd-Tribunal held that if the information is available in the balance sheet which is a public document then allegations of suppression cannot sustain, as the appellant had filed ST-3 Return and the allegation is on the basis of information available in the public document i.e. balance sheet. Similarly, the decision of Apex Court passed in the case of Anand Nishikawa C. Ltd- 2005 (188) E.L.T. 149 (S.C.) also cannot be made applicable to the instant case as there the factory of the appellants was inspected by the department and the correspondence and other materials on record, showed that the authorities were not aware of the facts as, samples were collected by the department and even after the samples were collected and inspected, classification as supplied by the appellant in respect of the products in question was approved by them, so it was held that suppression cannot be invoked. Whereas in the instant case the appellant have not reflected the correct taxable value in their original ST-3 returns as well as in the revised ST-3 return filed, which clearly establish the mis-declaration of their tax liability and intention to evade the tax. I therefore find that the suppression is rightly invoke and the demand is well within the time limit.

12.1 Further, Hon'ble Tribunal in the case of ICICI Econet Internet & Technology Fund-2021 (51) G.S.T.L. 36 (Tri. - Bang.) at para 46, held that;

> *"It cannot be argued that suppression cannot be alleged as the information is in the public domain. Information being in the public domain is not of any consequence. The information should be in the knowledge or made available to the authorities concerned who need to take a certain decision depending on such information. It is not the case of the appellants that they have been paying applicable service tax on getting registered and have been submitting regular returns to service tax authorities. It is not the case of the appellants that the material information available in the form of various contracts/agreements and balance sheets/ledgers have been submitted to the Department suo motu by the appellants. It is only after investigation has been initiated, the necessary documents were submitted. Thus, the information available in the public domain is of no avail."*

12.2 Also in the case of *Maruti Udyog Ltd.* v. *CCE, New Delhi,* 2001 (134) E.L.T. 269, Hon'ble Tribunal has upheld the invocation of the extended period of limitation and held that the theory of universal knowledge cannot be attributed to the department in the absence of any declaration.

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

14. 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'.* Hon'ble 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. Hon'ble Supreme Court in the case of *U.O.I Vs. Rajasthan Spinning & Weaving Mills* has clarified that when the conditions spelled out under Section 11AC of the Central Excise Act, 1944 are fulfilled, there is no discretion to reduce the mandatory penalty equal to duty even though the duty is paid before the issue of Show Cause Notice.

I find that the demand was raised based on the audit paras raised during scrutiny of their financial records. It is appellant's responsibility to correctly assess and discharge the tax liability. Suppression of taxable value resulting into non-payment and short payment of tax, availing inadmissible Cenvat credit clearly show they mislead the department by mis-declaring the taxable income in their revised return. Non-payment of tax under RCM, point towards the fraudulent practice followed with an intent to evade payment of service tax. If any of the circumstances referred in Section 73(1) are established, the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined.

15. They also argued that applying the provisions of Section 80, no penalty shall be imposed if the reasonable cause for failure is proved. Such argument is also not maintainable as the said provision was omitted vide Finance Act, 2015 w.e.f. 14.05.2015, hence not relevant in the present context.

16. In view of the above discussions and findings, the impugned O-I-O is upheld and the appeal filed by the appellant stand rejected in above terms.

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

25 July, 2022.

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 7.2022

Attested

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

By RPAD/SPEED POST

To,
M/s. K AND D Communication Ltd., - **Appellant**
3rd Floor, Kailash Asumangalam Society,
Bodakdev,Ahmedabad-380054.

The Assistant Commissioner,
Central GST, Division-VI,
Ahmedabad North

- **Respondent**

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.