आयुक्त (अपील) का कार्यालय
Office of the Commissioner (Appeals)
केंद्रीय जीएसटी अपील आयुक्तालय - अहमदाबाद
Central GST Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 26305065-079 : टेलेफैक्स26305136 - 079 :

DIN-20210164SW000000B826

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST) 4/Ahd-South/2020-21

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-65/2020-21**
दिनाँक Date : 29.12.2020 जारी करने की तारीख Date of Issue : 28.01.2021

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

ग Arising out of Order-in-Original No. 22/CX-I/Ahmd/ADC/MA/2019 dated 28.02.2020 passed by the Additional Commissioner, Central GST, Ahmedabad South.

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

M/s Metro Telworks Private Limited,
A/4 & A/5, Safal Profitaire,
Prahladnagar Corporate Road,
Satellite, Ahmedabad-380015.

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 एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गतः–

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 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.

(2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of 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 adjudicating authority shall bear 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 contained 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 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 Metro Telworks Private Limited, A/4 & A/5, Safal Profitaire, Prahladnagar Corporate Road, Satellite, Ahmedabad-380015 (hereinafter referred to as the *'appellant'*), against Order-In-Original No.22/CX-I/Ahmd/ADC/MA/2019 dated 28.02.2020 (hereinafter referred as "*impugned order*") passed by the Additional Commissioner, CGST, Ahmedabad South Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant were engaged in providing taxable service viz. Consulting Engineering Services and held Service Tax Registration No.AAICM4500GSD001 for the same. They were also discharging service tax liability under Reverse Charge Mechanism under the categories of Rent-a-Cab Scheme Operator and Manpower recruitment/supply agency. During the course of audit of records of the appellant by the departmental officers, it was observed that they had paid rent amounting to Rs.56,15,808/- to their Directors viz. Shri Asit B. Shah and Shri Bharat B. Shah for the period from April-2013 to June-2017 and the same was shown under the expenditure Head "Rent Expenses". The audit observed that the Directors of the company have rented out their immovable property, viz. their land along with building, to the appellant company and the same is used for commercial purpose and thus it appeared that the activity of renting of immovable property in the case is covered within the ambit of "service" and liable to service tax. It was further observed that since the service was provided by a Director of a Company to the said company which is a body corporate, it appeared to be liable to service tax under reverse charge mechanism under Notification No. 30/2012-ST dated 20.06.2012, as amended, and the appellant was liable to pay 100% of the service tax payable on the said services received by them.

2.1 It was also observed by the Audit that during the period from 2013-14 to 2017-18 (upto June, 2017), the appellant is found to have availed cenvat credit of service tax paid on services like Rent-a-Cab service, insurance services related to building, Workmen's Compensation, Directors & Officers, received by them which were not admissible for such services being not qualified as 'input services' as defined under the Cenvat Credit Rules, 2004. The total amount of cenvat credit so availed by the appellant wrongly on the said ineligible input services during the said period was quantified at Rs.1,14,34,739/-.

2.2 On the basis of the above audit objections, a Show Cause Notice dated 02.04.2019 was issued to the appellant proposing demand of service tax amounting Rs.7,64,720/- on the amount of rent paid to their Directors under proviso to Section 73(1) along with interest under Section 75 of the Finance Act, 1994 and for disallowing and recovery of the wrongly availed and utilized cenvat credit of Rs.1,14,34,739/- along with interest under Rule 14(1)

(ii) of the Cenvat Credit Rules, 2004 read with proviso Section 73(1) of the Finance Act, 1994. Penalty upon the appellant was also proposed under Section 78 of the Finance Act, 1994 and under Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Act ibid.

2.3 The adjudicating authority vide the impugned order confirmed the proposals of demand of service tax and cenvat credit in the SCN and ordered for recovery of the demand confirmed along with interest and also imposed penalties on the appellant as proposed in the Notice.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

(a) The appellant has been providing the services of telecom engineering service and has been availing services of Rent-a-Cab for providing facility to the employees for moving to site/work places. Hence, it has been used during the working hour for the activities purpose which is the part & parcel of the output service and is eligible as input service as defined under the Cenvat Credit Rules, 2004. Without going to the object and usages of the service, the denial of the cenvat was not sustainable and tenable in law;

(b) Services such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession are excluded from the definition of input service when such services are used primarily for personal use or consumption of any employee. Whereas in their case, service has been availed during the office hour for the carrying out job of service i.e. pick & drop facility for the running 24*7 service centre, which is part & parcel of our output service;

(c) As per Circular No.943/4/2011-CX dated 29.04.2011 issued from F.No.354/73/2011-TRU, input service listed in definition has been disallowed if the service has been availed and utilized for the primarily for personal use or consumption of employees, which is not in their case. So, the denial of cenvat credit on the basis of the above ratio was not justifiable. It is not for the personal use just like use of cabs other than business purpose but for the employees during business hours only.

(d) The appellant availed the service of rent-a-cab for their employees as a part of the other act which has a direct bearing on the output service provided by them. In fact the employees are also entitled to conveyance allowance and it also would form part of a condition of service and the amounts spent on the conveyance of the employees is also a factor which will be taken into consideration by the employees in fixing the value of service provided. By no stretch of imagination can it be construed as a welfare measure. It is a basic necessity. At any rate, it is an activity relating to business;

(e) They rely on the case laws in the case of (i) Hindustan Coca Cola Beverages Pvt. Ltd. Vs. Commissioner of Central Excise, Nashik [2015 (38) STR 129 (Tri.-Mumbai)], (ii) Commissioner of Central Excise, Bangalore-III Vs. Stanzen Toyotetsu India (P) Ltd. [2011 (23) STR 444 (Kar.)]; (iii) Commissioner of Central Excise, Bangalore-I Vs. Bell Ceramics Ltd. [2012 (25) STR 428 (Kar.)] and (iv) Paramount Communication Ltd. Vs. Commissioner of Central Excise, Jaipur [2013 (287) ELT 70 (Tri.-Del.)] in support of their above contention;

(f) The fact that the TDS is deducted under Section 194-I of Income Tax Act, 1961 on the rent paid to the director for giving property on rent/lease and is conclusive evidence that the amount paid as rent is nothing but consideration paid for services received of renting of immovable property rendered by such directors in the capacity of property holder;

(g) Furthermore, the fact that the rent received by the whole time directors, managing directors, etc. is shown in their Income Tax Returns under the head 'Income from house property' also fortifies the fact that the amount received is in lieu of their owner of property rented to the company. As such, when CBDT, being one of the wing of the government department is accepting the amount paid to the managing directors, whole time directors, etc. as rent for the property usages, the other wing of the government department, i.e., CBEC cannot take a contrary stand to levy service tax on the same. Therefore, the consideration received by the directors as a property holder/owner from the company is in fact in the capacity of owner of property and cannot be considered as 'service' as per the definition of service given under section 65B(44) of the Finance Act. When the activity of renting of immovable property service has been separately classified in the service tax, the said activity is outside the purview of the definition of service and consequently no service tax is leviable on the same. Furthermore, when an activity is not within the ambit of 'service', the question of reverse charge mechanism dos not arise;

(h) The serial No.5A of the notification No.30/2012-ST does not make distinction between different types of directors. Therefore, service tax demands are being raised on payments made to all directors by the company. However, service tax should be demanded on the amount paid to non-executive directors only and other amounts paid to executive directors such as sitting fees, commissions, etc.

(i) General Circular No.24/2012 dated 09.08.2012 issued by the Ministry of Corporate Affairs confirms the fact that service tax is payable on the commission/sitting fees payable to the Non-Whole Time Directors of the company and the increase in the quantum of remuneration paid to them on account of service tax will not be considered for the purpose of approval of Central Government under section 309 and 310 of the Companies Act even if it exceeds the limit of 1% or 3% of the profit. This indicates that even the MCA, which is a part of government, believes that service tax is payable only on the sitting fees/commission payable to the directors and not on the renting charges paid to them as a owner of property;

(j) On the basis of the supra, it has been concluded that the service tax is payable only on the amounts paid to the directors other than in lieu of their capacity as employee of the company & owner of property;

(k) The extended period of limitation cannot be invoked in the present case since there is no suppression, wilful mis-statement on the part of the appellant. The show cause notice has entirely failed to make out any case of suppression, wilful statement on the part of the appellant;

(l) Penalty under Section 78 of the Finance Act, 1994 is not imposable in the present case as the appellant has not suppressed any information from the department and there was no wilful mis-statement on the part of the appellant. No case has been made out on the ground of suppression of facts or wilful mis-statement of facts with the intention to evade the payment of service tax. The appellant is entitled to entertain the belief that their acitivities were not taxable. That cannot be treated as suppression from the department. They rely on Hon'ble Gujarat High Court decision in case of Steel Cast Ltd.[2011 (21) STR 500 (Guj).]; and

(m) The issue involved in the present case is of interpretation of statutory provisions. For that reason also, penalties cannot be imposed. They relied on three case laws in this regard.

4. Personal hearing in the matter was held on 11.11.2020 through virtual mode. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant for hearing. He reiterated the submissions made in the appeal memorandum.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Appeal Memorandum and oral submissions made at the time of personal hearing. The issues to be decided in the case are (i) whether the appellant, as a service recipient, is liable to pay service tax under reverse charge mechanism on the rent amount paid to their Directors in respect of immovable property given on rent to the company in the light of provisions of Rule 2(1)(d)(EE) inserted w.e.f 07.08.2012 read with the provisions of Notification No. 30/2012-ST dated 20.06.2012 as amended, or not; (ii) whether the services like Rent-a-Cab service, insurance services related to building, Workmen's Compensation as well as Directors & Officers, received by the appellant in the case were eligible to be qualified as 'input services' as defined under the Cenvat Credit Rules, 2004 and whether the cenvat credit availed by the appellant in respect of service tax paid on such services is legally admissible as per provisions of Cenvat Credit Rules, 2004 or not; and (iii) whether extended period of limitation can be invoked in the facts and circumstances of the case.

6. On the first issue, it is observed from case records that the appellant has paid an amount of Rs.56,15,808/- during the period Financial Year 2013-14 to Financial Year 2017-18 (upto June, 2017) as rent to the Directors of their firm for renting to company the property owned by the Directors. The department has sought to charge these expenditures as services under Section 65B(44) of the Finance Act, 1994 by contending that the Directors, being owners of property, has become service provider and the appellant has become service recipient. As the appellant firm is a body corporate, it has been contended that they become liable to pay 100% of the service tax payable in respect of such services under reverse charge mechanism under Rule 2(1)(d) (EE) of the Service Tax Rules, 1994 read with Notification No.30/2012-ST dated 20.06.2012 as amended by Notification No.45/2012-ST dated 07.08.2012 .

6.1 The legal provisions contained under Section 65B(44) of the Finance Act, 1994 are reproduced below:

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
> *(a) an activity which constitutes merely,— (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the*

meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Section 66E of the Act specifies declared services, which reads as under:

SECTION 66E. Declared services. *— The following shall constitute declared services, namely :—*

(a) ***renting of immovable property***

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation. *— For the purposes of this clause,—*

(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.]

[(j) assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof.]

Further, the legal provisions contained under Rules 2(1)(d)(EE) of the Service Tax Rules, 1994 are reproduced below:

(d) "person liable for paying service tax", - (i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means,-

.....

(EE) in relation to service provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate, the recipient of such service;

6.2 It is observed from the legal provisions discussed above that the term 'service' as defined under Section 65B(44) of the Finance Act, 1994 specifically includes 'declared service' and 'renting of immovable property' is a declared service as per clause (a) of Section 66E of the Act ibid. Hence, if the nature of the activity carried out being renting of immovable property, the same becomes a taxable service under legal provisions discussed above. It is not the case of the appellant that the nature of the impugned activity is not renting. It is also not their case that the said activity of renting of immovable property by the Directors is in lieu of their capacity as employee of the company. When that is so, the activity of renting of immovable property by the directors to the appellant company in the present case is a taxable service under the provisions of the Finance Act, 1994. Further, the reliance placed by the appellant on the provisions of Income Tax Act and the Circular issued by the Ministry of Corporate Affairs does not help their cause in the matter for reasons rightly pointed out the adjudicating authority. Therefore, I do not find any merit in the contentions of the appellant regarding taxability of the impugned service.

6.2 In fact, the taxability of the service provided or received in the case viz. the renting of immovable property is not in dispute. The dispute is regarding whether the said service, in the facts of the present case, is taxable at the hands of the service recipient or otherwise. The adjudicating authority has held that the language, employed in Rule 2(1)(d)(EE) of the Service Tax Rules, 1994 read with Notification No.30/2012-ST as amended by Notification No.45/2012-ST, is very clear to the effect that services rendered by a director of a company or the body corporate to the said company or the body corporate is chargeable to service tax under the reverse charge mechanism and that plain reading of the above provisions imply that any service rendered by the Directors to the company is taxable service attracting service under the reverse charge mechanism. It is further held that the said statutes nowhere stipulate that the service ought to have been provided in the capacity of a director

and that also no distinction has been made in the provisions regarding services provided in personal capacity or services provided in the capacity of a director.

6.3 It is observed in this regard that the said view of the adjudicating authority does not seem to be a fair and correct interpretation as it is not supported by the language used in the Notification. The words used in the Notification are 'by a director of a company to the said company' and not 'by a person who is director of a company'. Therefore, if the director of the company provides a service in some other capacity, the tax liability would be of the director as an individual service provider and it will not be correct to consider the same as a service provided in the capacity of a director of the company to said company. The notification intends to cover the services provided by a Director of the company to said company in the capacity of the director post held by him. Other services performed beyond the function of Director are not covered by the above Notification. Such a view can fairly be inferred on analysis of other similar kind of entries in the Notification like entries pertaining to taxable services provided or agreed to be provided by an insurance agent to any person carrying on the insurance business and taxable services provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company. In these entries, taxable services provided as insurance agent or as recovery agent are what are intended to be covered. The said entries can only be said to be referring to taxable services provided in the capacity in which services sought from such person by the recipient. By no stretch of imagination, it can be assumed that all taxable services provided by such persons are covered under the said notification. The intention of the legislation is to cover only those services provided by the person for which it was necessary to be in that capacity and not all services which can also be provided without being in that capacity. Therefore, I do not find any merit on the contention of the adjudicating authority that any service provided by the Director would be attracting service tax under reverse charge mechanism.

6.4 It is pertinent to mention that the owner of the property has given his property on rent to the appellant and is getting the rent from the appellant being the owner of the property and not being the Director of the appellant. Appellant is also paying the rent to the owner being the owner of the property (who has provided service to the appellant) and not being the Director of the appellant. It is not the case of the department that the Directors have rented their immovable properties to the company as they were obliged to do so for being appointed as directors of the company or that the renting services were provided by them as a part of their function as director of the company. Further, it is a fact that for providing renting services one need not be a director of the company. The department has not brought on record anything which suggest that the impugned renting services received by the appellant from their Directors were received by them in the capacity of Directors of the company. Whereas the appellant has contended that the said services were received by

them from their directors as owner of the property and not as a director of the company. They are paying the rent to the person being the owner of the property and not being the Director of the appellant and the Director is receiving the amount not as remuneration for his services as a director but in his individual capacity of an owner of the property. Such a case, in my view, is not intended to be covered under the reverse charge mechanism in terms of Notification No.30/2012-ST but rather the director, as a service provider, would be liable to discharge the applicable service tax liability, if any.

6.5 Further, it is observed that had the Director of the appellant given his property on rent to some other company, the Director of the appellant would have been held liable to pay the service tax being the owner of the property and being in his individual capacity as service provider. Similarly, if such a renting service is received by the appellant from an individual other than Director, then liability to pay tax, if any, on such service is not on the appellant but on the service provider. This logic makes it clear that if the Director of a company is providing any sort of service in the capacity of Director to the said company, then only the service becomes liable to service tax at the end of that company being service recipient. This is the intention of law and therefore such words have been incorporated in the said rules and in the Notification. Further, I find that the CBEC, in their Circular No.115/9/2009-ST dated 31.07.2009 issued on the subject of Service tax on commission paid to Managing Director / Directors by the company has clarified that *"the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax"*. In other words, the service provided by the Director in the personal capacity to the Company, would be payable by the person who rendered such service and not by the company under Reverse Charge Mechanism.

6.6 Under the circumstances, the fair conclusion which can be drawn is that just because the owner of the property is Director of the appellant, the renting service received by the appellant does not become taxable at their end being the service recipient. The rent paid by the appellant company in the present matter, therefore, cannot be charged to service tax under Notification No.30/2012-ST. The liability to pay service tax in the case would lie on the service provider. Hence, the order of adjudicating authority to charge service tax amounting to Rs.7,64,720/- under reverse charge mechanism under Rule 2(1)(d)(EE) of the Service Tax Rules, 1994 and Notification No.30/2012-ST, as amended, is not legally correct and fails to sustain on merits and requires to be set aside. When the demand fails to survive, there does not arise any question of interest or penalty in the matter.

6.7 It is further observed that similar view has been taken by the Commissioner (Appeals), Ahmedabad earlier also in Order-in-Appeal No.AHM-EXCUS-003-APP-0257-17-18 dated 23.03.2018 in the case of M/s. Jay Pumps Pvt. Ltd. and in Order-In-Appeal No. AHM-CXCUS-003-APP-003-18-18 dated 27.04.2018 in the case of M/s Advance Addmine Pvt. Ltd.

6.8 However, the adjudicating authority, after considering the above decisions of the appellate authority, has observed that the said decisions cannot be relied upon, on merit as the issue is not yet settled in view of the decision of the same appellate authority vide Order-in-Appeal No.AHM-EXCUS-001-APP-034 to 037-2019-20 dated 08.07.2019 in the case of Shri Bipinbhai C. Chauhan & Others, Directors of M/s Jade Blue Lifestyle India Ltd., on identical issue wherein he had taken contradictory view that the appellant Directors have paid service tax on rent received by them from the company by mistake. This view of the adjudicating authority does not seem to be correct appreciation of facts where the appellate authority has taken a different stand. The said decision of the appellate authority was in the context of denial of refund claim preferred by the appellants on limitation aspect and it did not decide on the taxability of the activity of renting rendered by the directors to the company under reverse charge mechanism. The refund of service tax paid was claimed by the appellants in the event of Show Cause Notice issued by the department to the company to charge service tax under reverse charge mechanism on the same activity of renting on which they have already paid service tax. Since the department contended that service tax on the impugned activity is taxable at the hands of the service recipient, the natural corollary emerge out in such situation is that the tax in question was not liable to be paid by the appellant directors and that being so, what is already paid by them as tax cannot be a considered a tax and the same is to be treated to be paid by the appellants under a mistaken notion. It is in this background that the appellate authority has observed that service tax paid by the appellants were paid by mistake. The decision of the appellate authority in the said case was in fact on the limited aspect of applicability of provision of Section 11B of the Central Excise Act, 1944 on limitation of the refund claimed by the appellants. The taxability of the impugned service either on forward charge basis or under reverse charge mechanism was not a point of contention or dispute either in the SCN or OIO or appeal under consideration in the said case. Therefore, the said decision of the appellate authority does not in any way affect the decisions in the case of M/s. Jay Pumps Pvt. Ltd. and M/s Advance Addmine Pvt. Ltd. supra for being passed on different facts and issues. In view of the said facts, the observation of the adjudicating authority on the applicability of the decisions of the appellate authority in the above two cases to the present case is not tenable in the eyes of law. The adjudicating authority should have appreciated the above facts in its right perspective and followed the ratio of the appellate authority's decisions in the case of M/s. Jay Pumps Pvt. Ltd. and M/s Advance Addmine Pvt. Ltd.

supra as per principles of judicial discipline. He is bound to follow the decisions of higher appellate authority and non-attainment of finality of any issue cannot be a reason for breach of judicial discipline which require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. This view has been consistently emphasized by the various judicial forums including the apex court in catena of decisions. The CBEC has also issued an Instruction F.No.201/01/2014-CX.6 dated 26.06.2014 in this regard directing the all adjudicating authorities to follow judicial discipline scrupulously. For the reason that there was a settled view in the matter by the Commissioner (Appeals), the impugned order passed by the adjudicating authority on the issue by not following the principles of judicial principles is bad in law.

7. Coming to the second issue of admissibility of cenvat credit on services like Rent-a-Cab service, insurance services related to building, Workmen's Compensation, Directors & Officers, received by the appellant in the case, it is observed that the department sought to disallow the credit of service tax paid on such services on the ground that the said services does not qualify as 'input services' as defined under the Cenvat Credit Rules, 2004. The eligibility of such services as input services for the purpose of availing cenvat credit would be determinable as per definition of 'input services' at the relevant point of time. The period of dispute in the present case is from financial year 2013-14 to 2017-18 (upto June 2017). The definition of input service during this period reads as under:

> *""input service" means any service, -*
>
> *(i) used by a provider of output service for providing an output service; or*
>
> *(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,*
>
> *and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;*
>
> *but excludes, -*
>
> *(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for -*

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods,

except for the provision of one or more of the specified services; or

*(B) **services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods**; or*

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by -

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

*(C) **such as those provided in relation** to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, **life insurance, health insurance** and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, **when such services are used primarily for personal use or consumption of any employee**;"*

[emphasis applied]

From the above definition, it is amply clear that the definition of input service clearly excludes services of Rent-a-Cab and insurance services from its ambit. It is the contention of the appellant that Rent-a-Cab services is excluded from the purview of input services only when they are used primarily for personal use or consumption of any employee. They have relied on the clarification issued by the CBEC at Sr.No.2 of the Circular No. No.943/4/2011-CX dated 29.04.2011 issued from F.No.354/73/2011-TRU in support of their said contention. However, I find that the said contention of the appellant is devoid of merits as there is no such restriction for exclusion of services provided by way of renting of a motor vehicle from the purview of input services in the definition and the said restriction is specifically with reference to services mentioned at clause (C) in the definition which pertains to services provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession. The clarification issued by the CBEC at Sr.No.2 of the Circular No. No.943/4/2011-CX dated 29.04.2011 relied upon by the appellant is in fact in the context of clause (C) of the definition and the same in not applicable to services provided by way of renting of a motor vehicle. On the contrary, the same Circular at Sr.No.12 clarifies that cenvat credit on Rent-a-Cab services is not allowable with effect from 01.04.2011.

7.1 It is further contended by the appellant that they availed the service of rent-a-cab for their employees as a part of the other act which has a direct bearing on the output service provided by them and it would form part of a condition of service and the amounts spent on the conveyance of the employees is a factor which will be taken into consideration in fixing the value of service provided and that it is a basic necessity and at any rate it is an activity relating to business and hence would be qualified as input services in view of the judgements in the case of (i) Hindustan Coca Cola Beverages Pvt. Ltd. Vs. Commissioner of Central Excise, Nashik [2015 (38) STR 129 (Tri.-Mumbai)], (ii) Commissioner of Central Excise, Bangalore-III Vs. Stanzen Toyotetsu India (P) Ltd. [2011 (23) STR 444 (Kar.)]; (iii) Commissioner of Central Excise, Bangalore-I Vs. Bell Ceramics Ltd. [2012 (25) STR 428 (Kar.)] and (iv) Paramount Communication Ltd. Vs. Commissioner of Central Excise, Jaipur [2013 (287) ELT 70 (Tri.-Del.)]. It is observed that the above contention of the appellant is based on the premise that the said services received would fall under the purview of activities relating to business which in turn is based on the definition of input services as it existed prior to 01.04.2011 which included *activities relating to business* in it's purview. The case laws relied upon by the appellant were also in the context of input services as it defined prior to 01.04.2011 wherein it was held that the said services would qualify as input services for being activities related to business. The definition of input services under the Cenvat Credit Rules, 2004 has undergone a substantial change with effect from 01.04.2011 wherein the old definition of the said term was replaced by a new definition and the substituted definition of input services from the said date has brought in an exclusion clause in the definition and it inter alia omitted the words '*activities relating to business, such as*', from the definition with effect from 01.04.2011, which was there in the definition prior to 01.04.2011. Therefore, the appellant's above contention does not hold good for the definition of input services which is in force with effect from 01.04.2011, according to which the eligibility of services in question as input services is to be determined in the present case. I find that with the insertion of specific exclusion in the definition of input services, there is no scope for any dispute on the eligibility of Rent-a-Cab services as input service and it clearly stand excluded from the purview of input services for the purpose of availing cenvat credit under the provisions of Cenvat Credit Rules, 2004.

7.2 On the eligibility of insurance services availed by the appellant relating to building, Workmen's Compensation, Directors & Officers, as input services, it is observed that the said services also did not qualify as input services as defined under the Cenvat Credit Rules, 2004 for reasons recorded by the adjudicating authority to which I fully agree. Even otherwise, the appellant has not raised any contention challenging the decision of the adjudicating authority in this regard.

7.3 In view of the above discussions, it is held that services like Rent-a-Cab service, insurance services related to building, Workmen's Compensation, Directors & Officers, Rent-a-Cab service, received by the appellant in the case were not eligible to be qualified as 'input services' as defined under the Cenvat Credit Rules, 2004 being specifically excluded therein and hence the cenvat credit availed by the appellant in respect of service tax paid on such services was legally not admissible as per provisions of Cenvat Credit Rules, 2004 and the same were rightly disallowed by the adjudicating authority.

7.4 Further, I find that the credit in question was availed by the appellant in spite of the clear bar on availing the same under the statutory provisions and therefore was in gross violation of the provisions of law in this regard. The act of availing credit on such ineligible input services contending the same to be legal relying on definition pertaining to earlier period and ignoring prevalent legal definition in the case does not show any bona fide intention on the part of the appellant on the issue. It is more so in the context of availing cenvat credit as the onus to prove the admissibility of the credit availed is on the person taking the credit as per the said Rules. Therefore, the act of taking and utilizing ineligible cenvat credit by the appellant only points to a deliberate attempt on their part to evade payment of service tax in a untruthful manner. The contention of the appellant that there was no suppression of facts also does not hold goods for the fact that the appellant was availing cenvat credit on ineligible input services came to be detected only when audit of the records of the appellant was conducted. Further, the issue also does not involve of any interpretation of law as claimed by the appellant on the face of the clear cut exclusion clause in the definition of input services during the material time. In view thereof, it is observed that there existed sufficient essential ingredients in the matter to invoke the extended period of limitation for recovery of the wrongly availed credit. Therefore, the contentions of the appellant on the limitation aspect in this regard is not tenable in law and is rejected being devoid of merits.

7.5 When the credit under dispute is held as wrongly availed, the same is liable to be reversed or paid back and naturally interest chargeable as per Section 75 of the Act also would be payable on the amount so held as payable, in terms of Rule 14 of the Cenvat Credit Rules, 2004. Similarly, when it is found that there existed sufficient essential ingredients in the matter to invoke the extended period of limitation for recovery of the wrongly availed credit, the penalty imposed under Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 also stand justified for the same reasons.

8. In view of my above discussions, the impugned order passed by the adjudicating authority is set aside to the extent it relates to demand of service tax under reverse charge mechanism on rent paid to the Directors of the appellant and is upheld to the extent it relates to recovery of cenvat credit wrongly availed by the appellant on services which did not qualify as input services. Accordingly, the appeal filed by the appellant is partly allowed and partly rejected to the same extent.

9. 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.

(Akhilesh Kumar) 29th December, 2020.
Commissioner (Appeals)
Date: 29.12.2020.

Attested

(Anilkumar P.)
Superintendent (Appeals),
CGST, Ahmedabad.

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4. The Assistant/Deputy Commissioner, CGST & Central Excise, Division-VIII, Ahmedabad South.
5. The Assistant Commissioner (System), CGST HQ, Ahmedabad South. (for uploading the OIA)
6. Guard file
7. P.A. File