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

सत्यमेव जयते

टेलेफैक्स26305136 - 079 : 26305065-079 :

NATION TAX MARKET

DIN-20210364SW0000888FEF

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1/2021

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-78-79/2020-21**
दिनाँक Date : 25.02.2021 जारी करने की तारीख Date of Issue : 26.03.2021

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

ग Arising out of Orders-in-Original No. 17-18/CGST/Ahmd-South/ADC/MA/2020 dated 02.11.2020 passed by the Additional Commissioner, Central GST, Ahmedabad South Commissionerate.

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

M/s Sequel Logistics Pvt. Ltd.,
29/B Shrimali Society,
Opp. Passport Seva Kendra,
Near Mithakali Six Roads,
Navrangpura, Ahmedabad.

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.

आयुक्त (अपील) केन्द्रीय वस्तु एवं सेवाकर अहमदाबाद OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

(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 order arises on account of an appeal filed by M/s Sequel Logistics Pvt. Ltd., 29/B Shrimali Society, Opposite Passport Seva Kendra, Near Mithakali Six Roads, Navrangpura, Ahmedabad(hereinafter referred to as the *'appellant'*), against Order-In-Original No.17-18/CGST/Ahmd-South/ADC/MA/2020 dated 02.11.2020 (hereinafter referred as "*impugned order*") passed by the Additional Commissioner, Central GST, Ahmedabad South Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant were holding Centralized Service Tax Registration No. AAHCS9813PST001 with the erstwhile Service Tax Commissionerate, Ahmedabad for providing services under the category of clearing and forwarding agent services, etc. During the course of audit of the records of the appellant by the audit officers, it was noticed that the appellant had entered into an agreement with M/s Titan Industries Ltd. (hereinafter referred to as '*TIL*' for the sake of brevity) for managing IMP watch packing unit and warehouse for accessories and sunglasses. As per the said contract, the appellant was required to provide different services such as custodian services, managerial services, manpower services, etc. Further, for the provision of the said services, in addition to the consideration as per the said contract, reimbursement of the expenses incurred towards security services, staff welfare, fuel, electricity, water, communication, housekeeping, pest control and administration, etc. are to be made by the service receiver viz. M/s Titan Industries Ltd., to them. The appellant was issuing separate invoices for the reimbursement of expenses and paying service tax on the entire amount recovered as reimbursement, excluding the amount of reimbursement on electricity charges. The audit officers observed that the electricity charges were for the electricity consumed for providing the services to TIL from the premises as mentioned in the agreement and that as the electricity is consumed by the employees of the appellant while providing the output service, the same is to be included in the value of service provided by the appellant. The appellant did not agree with the said objection and contended that expenses such as electricity charges are incurred as pure agent of TIL and it fulfils all the conditions of pure agent specified in Rule 5(2) of the Valuation Rules, 2006 and hence such charges are not required to be included in the taxable value. The audit observed that the contention of the appellant was not acceptable as the electricity is being used for providing the service and without electricity, basic amenities to the employees of the service provider cannot be provided and the nature of job which the service provider is required to do on SAP (i.e. on computer system which runs on electricity), cannot be accomplished and thus all the conditions prescribed under Rule 5(2) of Service Tax (Determination of Value) Rules, 2006 (hereinafter referred to as '*the Valuation Rules*') are not satisfied and that more specifically the transaction are squarely covered under Rule 5(1) of the Rules ibid and such charges would form a part of the taxable value.

2.1 It was further observed by Audit that the appellant also provided services to its clients for door delivery of the goods from one station to another and at some stations, on entry, octroi was charged. For the aforesaid service provided, the appellant had issued two sets of invoices, one for the service amount charged for clearing and forwarding charges and the other for reimbursement of the expenses incurred for providing the service, viz., for the reimbursement of octroi paid by the service provider in the course of providing the said services. While issuing the invoices for reimbursement of octroi charges, the service provider was also charging an amount in addition to the amount of octroi paid under the name of service charges and discharging service tax only on the amount shown as service charges. The audit contended that as per Rule 5(1) of the Valuation Rules, any expenditure or cost incurred by the service provider in course of providing taxable services shall be treated as consideration for the taxable services provided or to be provided and shall be included in the value for the purpose of charging service on the said service and hence, service tax on the total amount received, including the reimbursement claimed, is required to be paid by the appellant. The appellant did not agree with the said view of the audit and contended that they were required to pay octroi on behalf of their customers in the course of providing clearing and forwarding services and that such octroi is recovered from customers along with certain minimal services charges and recovery of octroi fulfils the condition of pure agent and hence service tax is not payable thereon. The Audit observed that the above contention of the appellant is not correct for the reasons that:

(a) from the nature of service provided, i.e., providing door to door delivery of goods for their clients, the service provided by the appellant is classifiable under 'Courier Agency Service' as defined under Section 65(33) and 65B(20) of the Act and not as 'clearing and forwarding services' as contended by the appellant and that the expenses on octroi charges are being incurred in the course of providing the main services i.e., Courier Services;

(b) The condition (i) of Rule 5(2) of the Valuation Rules provides that 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. In the present case, octroi charges are neither the goods nor the services but it's an entry fee on any goods in the specific stations. Thus, no goods or services are procured on behalf of the recipient of service and hence the appellant is not a pure agent of the service receiver;

(c) In the instant case, the appellant has not entered into any contractual agreement to act as a pure agent and is also recovering an amount over and above the actual amount of Octroi charges in the form of service charges and therefore also the condition that the pure agent receives only the actual amount of expenses incurred is not complied with;

(d) Octroi charges are neither the goods nor the services but it's a tax on entry of goods in the specific stations and therefore, the appellant cannot be said to have acted as a pure agent of the recipient of service, in which case he makes payment to third party for the goods and services procured;

न्यायालय, केन्द्रीय वस्तु एवं सेवाकर (अपील) अपीलार्थ OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

(e) As per Rule 2(2) and Rule 2(3) of the Municipal Corporation of Greater Mumbai Octroi Rules, 1965, the appellant was the person who conveyed article into Greater Mumbai and thus he was the importer of the goods and was also liable for octroi;

(f) Without payment of octroi, the service provider is not in a position to complete his service i.e. delivery of the goods at the consignee's address and thus, octroi charges were part of the cost of conveyance of goods for door delivery of the same. Therefore, the expenditure incurred is for providing the service and does not relate to either procurement of goods or service;

(g) In most cases, the appellant has recovered an amount over and above the amount of octroi and chose to pay service tax on only the extra amount so recovered. Therefore, the condition (vii) of the Valuation Rules which prescribes that the service provider recovers from the recipient of the service only such amount as has been paid by him to the third party is also not fulfilled. Further, explanation 1 in Rule 5(2), which explains the term 'pure agent' prescribes that the person does not use such goods or services so procured and receives only the actual amount incurred to procure such goods or services;

(h) Applying the ratio of Board's Circular No.943/4/2011-CX dated 29.04.2011, any tax which is not available as set off for credit are to be included in the value of the service and admittedly, no set off or credit of the octroi is available under any rule and hence the same is to be included in the value of service;

(i) Moreover, the income and expenditure in the name of octroi, form part of the income and expenditure in the appellant's Profit & Loss account and had it been for the third party, the same can neither be the income or expenditure for the appellant nor will it have any impact on their profit/loss;

(j) In the present case, octroi charges are neither the value of the goods procured nor the value of any service procured. Hence, it will be out of the purview of Rule 5(2) of the Valuation Rules; and

(k) Further, Rule 6(2) the Valuation Rules provides for the cost / expenditure which does not form part of taxable value for the purpose of levy of service tax. The exclusion nowhere includes octroi or any amount charged by any local body.

In view thereof, the audit concluded that the appellant was required to pay service tax on the amount of octroi charges recovered either with service charge or without service charge.

2.2 Based on the above audit objections, a Show Cause Notice dated 16.03.2016 was issued to the appellant calling upon them to show cause as to why : (i) the services provides by them to TIL should not be classified under Business Auxiliary Service and the service provided for door to door delivery of goods to their clients should not be classified under Courier Agency Service; (ii) the value of service determined by them vide their ST-3 returns should not be rejected in terms of Rule 4 of the Valuation Rules and the same should not be re-determined by adding the value of reimbursement of Rs.8,97,51,051/- (Rs.2,99,741/- towards electricity charges and Rs.8,94,51,310/- towards octroi payment); (iii) the differential service tax amounting to Rs.1,10,93,234/- for the period from January, 2013 to September, 2014 should not be demanded and recovered from them under the proviso to

Section 73(1) of the Act along with interest under Section 75 of the Act; and (iv) penalty should not be imposed upon by them under Section 76, 77 and 78 of the Act. Since the appellant continued the same practice for the subsequent period, another Show Cause Notice dated 23.12.2016 was issued to them under Section 73(1A) of the Act demanding service tax amounting to Rs.1,66,24,003/- for the period from October, 2014 to March, 2016 along with interest and proposing penalty under Section 76 and 77 of the Act.

2.3 The said two Show Cause Notices dated 16.03.2016 and 23.12.2016 were adjudicated vide the impugned orders by the adjudicating authority wherein he had confirmed the proposals of reclassification of services, re-determination of taxable value of service and demand of service tax in the SCNs and ordered for recovery of the demand confirmed alongwith interest and also imposed penalties on the appellant as proposed in the Notices.

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

- In the absence of establishing a malafide intention or mensrea, the extended period of limitation cannot be invoked. It is submitted that there is nothing in the SCN which will even remotely indicate that an element of fraud or collusion or willful misstatement or suppression of facts or evasion of tax was found. Not only has the appellant made full disclosures at the time of filing returns, revealed all the documents and details but has also provided valid justification supported by provisions of law and/or legal precedents. Therefore, assuming whilst denying that tax is short paid, the present proceedings cannot be maintained in the absence of the conclusion that the short payment was on account of fraud or collusion or wilful misstatement or suppression of facts or contravention of provisions or rules with the intent to evade payment of tax. In the absence of the same, the present proceedings could not have been initiated or entertained on the ground of bar of limitation alone. They rely on the judgement of the Hon'ble High Court of Gujarat in the case of The Ankaleshwar Taluka ONGC Land Losers Travellers Co.op. Vs. Commissioner of Central Excise, Surat-II [2013 (29) STR 352 (Guj.)] in support of their contention;
- As per agreement, the appellant has agreed to bear certain expenditures on behalf of Titan which shall be reimbursed by Titan on actual basis. One such expense were electricity charges for running the unit of Titan, which were payable by Titan but have been paid by the appellant on behalf of Titan, and thereafter appellant has received reimbursement for the same. Charges re-imbursed to pure agent are not to be added to the taxable value of service as per the settled provision of law;
- Appellant has entered into a contractual agreement with Titan to incur expenditure on his behalf, while providing services of clearing and forwarding service. Appellant has recovered only actual amount of expense which was incurred towards electricity charges. They fulfill all the eight conditions mentioned in Rule 5(2) of the Valuation Rules and acts as 'Pure Agent' and hence such value is not required to be added in the value of total consideration received by appellant;
- The arrangement of Pure Agent is duly recorded at Clause 3(e) of the Agreement, which has also been executed and acted upon. Even otherwise, to determine whether the appellant is

pure agent or not, interpretation of an agreement is not required. What is required to be seen is whether the arrangement between the parties reveals a transaction of pure agent or not. In the present case, the Appellant has incurred expenditure of electricity charges on behalf of Titan and the same has been reimbursed to the Appellant on actual basis upon the Appellant raising an invoice for the same which is not denied by the adjudicating authority as well. This in itself is incontrovertible proof that the Appellant has acted as Pure Agent of Titan;

- The conclusion that since the appellant has used the electricity, the appellant holds title to it and is consequently not a pure agent, is completely incorrect. The electricity has been used solely and exclusively by Titan to ensure that the Unit of Titan is up and running. If the electricity connection would not be provided to Titan, it would be Titan that would suffer the consequences of it and not the appellant. Indisputably, the ultimate liability to pay electricity charges is that of Titan alone. It is clear from the agreement that electricity charges shall be reimbursed by Titan to the appellant which also makes it abundantly clear that electricity is not one of the services being provided to Titan by the appellant. When the parties have agreed that electricity charges are a reimbursable expense and not part of the service being provided by the appellant, the electricity could not in any case form part of the taxable value of service;
- The service provider acts as a pure agent of the recipient of service when he makes payment to third party for the services procured. Service tax can be charged on any payment received by the appellant if and only if the adjudicating authority could have come to the unquestionable determination that payments received by the appellant were against provision of such service i.e., the actual service to be provided by virtue of the agreement which is of a Clearing and Forwarding Agent. Through no stretch of imagination can it be concluded that electricity charges were paid to the appellant and not reimbursed to the appellant;
- They rely on case laws in the case of Union of India and Anr. Vs. Inter Continental Consultants and Technocrafts Pvt. Ltd. [(2018) 4 SCC 299] and M/s Rolex Logistics Pvt. Ltd. Vs. CST, Bangalore [2008 (9) TMI 123];
- The view of the adjudicating authority that since the electricity bill is in the name of Hosur Mattress India Pvt. Ltd., they are obligated to make payment to the electricity supplier and therefore recipient of service is not liable to make payment to the third party, is also erroneous. It is not in dispute that the Hosur Unit is a Unit used exclusively and solely for Titan and therefore Titan is responsible to make payment of the charges pertaining to Hosur Unit, including electricity charges. During a commercial transaction like this, the name on the bill is not sufficient to conclude as to who is required to make the payment. What is material is to be determined as to who will be the ultimate and actual person who has accepted the liability of making the payment. Admittedly, Titan has accepted and admitted to bear the electricity charges for Hosur Unit and therefore, Titan being the service recipient is liable to make payment to the third party;
- The scope of services provided by the appellant are clearly indicated in the agreement and the taxable value of service can only and only be the consideration received by the appellant towards such scope of service. The agreement further clarifies that charges such as electricity charges or security charges and other shall be reimbursed to the appellant as such services do not fall within the scope of service agreed to be provided by the appellant. It is therefore evident that payment of electricity charges are in addition to the services that the appellant

provides on its own account. It is also not in dispute that reimbursement for the electricity charges is claimed by the appellant separately and even in the Invoice the value of reimbursement towards electricity is separately mentioned and that the appellant has received reimbursement of the actual amount paid towards electricity charges. It is therefore unquestionable that while making payment of electricity charges, the appellant has acted as Pure Agent of Titan and received reimbursement of actual payment made;

- The adjudicating authority has materially erred by not considering the fact that Rule 5(1) of Valuation Rules has been declared as *ultra vires* by the Hon'ble Supreme Court in the case of Union of India and Anr. Vs. Inter Continental Consultants and Technocrafts Pvt. Ltd. [(2018) 4 SCC 299]. In the light of the aforementioned judgement of the Hon'ble Supreme Court, all conclusions of the adjudicating authority whereby support is taken of Rule 5(1) is required to be set aside;
- The objection of classification of service raised in the proceedings are of no relevance whatsoever when the issue raised is with respect to the chargeability of amounts received by the appellant as reimbursement and the role of the appellant as pure agent;
- Octroi is a statutory levy and no service tax can be charged on payment of the same;
- The adjudicating authority has disregarded the settled and cardinal principle of law that tax cannot be collected on tax;
- Octroi is a statutory duty collected by local authority on the entry of goods in the state. Such Octroi duty is recovered from only some of the customers along with certain minimal service charge. It is submitted that service tax is duly recovered and discharged on these service charges recovered. In most of the cases, octroi is collected without any service charge and where service charges are collected, amount of service charge and octroi are separately displayed on the face of invoice;
- The Hon'ble CESTAT, Mumbai in the case of Traffic Manager, Mumbai Port Trust Vs. Commissioner of Service Tax in Service Tax Appeal No.86265 of 2015 had the occasion of considering whether service tax can be levied on the Octroi collected by the Mumbai Port Trust under Mumbai Municipal Corporation (Levy of Octroi) Rules, 1965 and had concluded that collection of Octroi is a sovereign function and cannot be subjected to tax;
- Collection of Octroi and consequently payment of Octroi can in no form or manner be considered as "an activity carried out for consideration" and it is a mandatory payment to be made to a statutory authority under a legal obligation that falls upon the importer;
- As per Circular No.192/02/2016-Service Tax dated 13.04.2016, it is clarified that taxes, cesses or duties levied are not consideration for any particular service as such and hence not leviable to Service Tax and that these taxes, cesses or duties include excise duty, customs duty, service tax, state VAT, CST, income tax, wealth tax, stamp duty, taxes on professions, trades, callings or employment, octroi, entertainment tax, luxury tax and property tax.
- The Hon'ble CESTAT in the case of International Seaport Dredging Ltd. Vs. Commissioner of Service Tax, Chennai [2018 (12) GSTL 185] has held that statutory levies are not to be considered as part of taxable value;
- Goods that are transported does not belong to the appellant and as per Municipal Corporation of Greater Mumbai Octroi Rules, 1965, the person who is owner of the goods is responsible to pay octroi duty and such duty is to be recovered from the owner of the goods. Hence, as per the rules, appellant is mere transporter and can never be termed as importer; it is the

customer of the appellant (owner of goods) who is covered under definition of importer and such customer is liable to pay octroi duty as per Rule 2(2) and 2(3) of the Municipal Corporation of Greater Mumbai Octroi Rules, 1965. The term "person who imports" would not mean person who transports or carries the good, but would mean the person who intends to import the goods;

- There is a clear cut demarcation shown in the Form B Import Bill issued at the time of payment of Octroi between the person from whom Octroi is collected and the person from whom Octroi is received. The import Bill carries this pro-forma demarcation as it is a usual practice that the transporter pays the Octroi on behalf of the customer. Therefore, the transporter is the one from whom Octroi is actually received on spot, but it is the importer who has actually paid. This demarcation itself shows that the liability to pay Octroi is that of the customer and the appellant has made the payment in its capacity as a pure agent;
- There is a difference between the taxable value of service provided by the appellant and the transportation cost borne by the customer of the appellant. Octroi is a statutory duty levied by a statutory authority, that cannot from part of the service provided by the appellant as there is no element of service to it at all. It may amount to an addition of cost for the customer of the appellant, but that alone will not include it in the taxable value of service. Therefore, the conclusion of the adjudicating authority that cost of conveyance and the taxable value of service would be equivalent is absolutely incorrect and untrue;
- There is clear bifurcation provided to the customer regarding the amount of octroi and the service charge collected. The Customer is therefore fully aware as to what amount is reimbursed and what amount is service charge. Simply by collecting an ancillary charge, the Octroi cannot be forced in to the column of taxable value of service;
- The reliance placed on Rule 6(2) of the Valuation Rules is also completely misplaced as the said Rule has no application in the present circumstances;
- The allegation that the appellant has not revealed/declared at any point of time that the amounts of electricity charges and Octroi were being reimbursed back to the appellant from it customers, is *ex-facie* untrue. The appellant has declared all the amounts reimbursed (including electricity charges and Octroi) while filing the service tax returns. Therefore, there is no suppression or misstatement by the appellant in the returns filed by the appellant;
- The appellant squarely falls within the purview of a 'pure agent' whilst making payment of Octroi on behalf of its customers. They also have conformed to the preconditions of a pure agent as prescribed in Rule 5(2) of the Valuation Rules;
- The Hon'ble Supreme Court has in the case of Intercontinental Consultants and Technocrafts Pvt. Ltd. confirmed that reimbursable expenditures cannot be made part of the taxable service, and therefore the observations of the adjudicating authority are apparently bad in law;
- To invoke Section 75 to impose interest, the invocation of extended period of limitation is to be proved, which evidently the adjudicating authority has failed to do and secondly it will have to be concluded that the appellant has failed to credit of tax or any part thereof within the period prescribed. The appellant has duly discharged its service tax liability in full and within the prescribed time and in view thereof , there arises no question of imposing interest under Section 75 of the Act;

- After alleging suppression and misstatement, the act of imposing penalty under Section 76 of the Act by the adjudicating authority is contradictory as the penalty under the said section is not applicable in cases of suppression or misstatement, etc.
- It is no longer *res integra* that penalty cannot be imposed under both Section 76 and 78 of the Act as both sections apply in two different situations. They rely on the case law in the case of British Airways PLC India Branch Vs. Commissioner of Service Tax, Delhi [2014 (13) SCC 664] in support of their contention;
- Penalty is imposed under Section 77(2) of the Act without considering the fact that the said Section can be applied to situations for which no specific penalty is provided for i.e., if the case of an assessee neither falls under Section 76 nor under Section 78 nor under any other provision of penalty;
- Regarding penalty imposed under Section 78 of the Act, it is submitted that for invoking the said section, the element of fraud, collusion, willful misstatement, suppression of fact, or contravention of provisions with the intent to evade tax ought to be proved beyond reasonable doubt with supporting evidence, which the adjudicating authority has failed to do; and
- Assuming whilst denying that there is any lapse at the end of the appellant, even then the appellant would squarely fall within the purview of Section 80 of the Act. They rely on the Hon'ble CESTAT, Mumbai decision in the case of CCE, Aurangabad Vs. Tekcare India Pvt. Ltd. [Appeal No.ST/93/11 and ST/CO/14/11] in this regard.

4. Personal hearing in the matter was held on 20.01.2021 through virtual mode. S/Shri Amish Khandhar and Rashmin Vaja, Chartered Accountants, and Ms. Nisha Ojha, Advocate, appeared on behalf of the appellant for hearing. They reiterated the submissions made in the appeal memorandum for consideration.

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 issue to be decided in the case is whether the amount recovered by the appellant from TIL as reimbursement of electricity charges during the course of service provided to them and the amount recovered as reimbursement of octroi charges from their clients in respect of 'door to door delivery of goods' service provided by them, would form service tax. The demand under dispute pertains to the period from January, 2013 to March, 2016 under two show cause notices.

6. It is observed that the appellant has recovered as reimbursement of electricity charges an amount of Rs.2,99,741/- during the period from January, 2013 to September, 2014 and Rs.4,56,490/- during the period from October, 2014 to March, 2016 from TIL and recovered as reimbursement of Octroi Charges, an amount of Rs.8,94,51,310/- during the period from January, 2013 to September, 2014 and Rs.12,21,25,565/- during the period from October, 2014 to March, 2016 from customers to whom they have provided service of door to door delivery of goods. The adjudicating authority has confirmed the demand under dispute by

relying on the provisions of Rule 5 (1) of the Valuation Rules by rejecting the appellant's contention that they were acting as pure agent while incurring the said expenditures. I find that the issue, as to whether the reimbursable expenditures incurred by a service provider is includable in the taxable value of services provided by them in terms of Rule 5(1) ibid, has attained finality by the Hon'ble Supreme Court's decision in the case of Union of India and Anr. Vs. Inter Continental Consultants and Technocrafts Pvt. Ltd. [2018 (10) GSTL 401 (SC)] wherein provision of Rule 5(1) ibid was held as *ultra vires* Section 67 of the Act. The Hon'ble Apex Court, in their said decision, has held that:

> *"21. Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*
>
> *22. Section 66 of the Act is the charging Section which reads as under:*
>
> > *"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."*
>
> *23. Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*
>
> *24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*
>
> *25. This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be*

determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.

26. It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*

27. The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

28. It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel :

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature....."

From the above decision of the Hon'ble Supreme Court, it is clear that the reimbursable expenditure or cost incurred by the service provider and charged in the course of providing taxable service is not includable in the taxable value of service till the date of amendment in Section 67 of the Act vide Finance Act, 2015 and that only after amendment made in Section 67 ibid with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Therefore, it is to be held that the demand in the present case for the period upto the date of amendment effected in Section 67 of the Act i.e. 14.05.2015, is not sustainable in law in view of the Hon'ble Supreme Court's above decision. For that reason,

the adjudicating authority has erred in confirming the said demand by not considering the above referred judgment of the Apex Court which is relevant in the facts of the case and is having binding precedence.

7. After the amendment in Section 67 of the Act by the Finance Act, 2015, the term 'consideration' mentioned in the said Section included in its ambit *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.* The exception referred therein is prescribed under Rule 5(2) of the Valuation Rules which provides for exclusion of the expenditure or costs incurred by the service provider as pure agent of the recipient of service subject to satisfying the conditions specified therein. Thus, the issue of whether the reimbursable expenditure incurred by the appellant in the present case would form a part of the taxable value of service for the period after amendment in Section 67 ibid would depend on as to whether such reimbursable expenditure was incurred by the appellant as a pure agent or not. It is the case of appellant that such expenditure was incurred by them as pure agent whereas the Revenue contended that it was not so. Since the dispute in the present case involved the amounts recovered as reimbursement of electricity charges and octroi charges, I would like to take up the issue one by one.

8. It is observed from the case records that the reimbursement of electricity charges in the present case was made in respect of taxable services provided by the appellant to TIL for managing TIL's IMP watch packing unit at Hosur in terms of Work Order No.IL/SC&S/WBWH/03/12-13 dated 31.05.2012 awarded to them. The scope of work as per the said Work Order covered the entire activities carried out in IMP watch packing unit, Warehouse for Accessories & sunglasses and E-commerce, which included custodian services, managerial services, manpower services, etc. Further, for the provision of the said services, in addition to the consideration as per the said contract, reimbursement of the expenses incurred towards security services, staff welfare, fuel, electricity, water, communication, housekeeping, pest control and administration, etc. are to be made by the service receiver viz. M/s Titan Industries Ltd., to the appellant. The appellant was issuing separate invoices for the reimbursement of expenses and paying service tax on the entire amount recovered as reimbursement, excluding the amount of reimbursement on electricity charges contending that the said expenditure had incurred by them in the capacity of pure agent.

8.1 As per Explanation 1 of Rule 5(2) of the Valuation Rules, "pure agent" means a person who -

(a) 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;

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(b) 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;
(c) does not use such goods or services so procured; and
(d) receives only the actual amount incurred to procure such goods or services.

Thus, to qualify as 'pure agent', one has to satisfy all the above four conditions.

8.2 The appellant is relying on the payment terms of the Work Order dated 31.05.2012 and the invoices issued by them in this regard to canvass their argument that they acted as pure agent while recovering the expenditure incurred towards electricity charges. It is their contention that clause 3(e) of the said Work Order pertaining 'Reimbursement' very explicitly indicates this nature of transaction. The relied clause 3(e) above reads as under:

"e)Reimbursement: The expenses incurred towards Security Services, staff welfare, fuel, electricity, water, communications, Extra hours of working, housekeeping, pest control & Administration will be reimbursed in actual with the monthly limit of Rs.7.8 L but not exceeding the yearly cumulative amount of Rs.93.6 L. Sequel shall take the prior approval and provide necessary supporting for all expenditures. Details are as per Annexure-2 attached herewith."

The relevant entry, Sr.No.5, pertaining to Electricity Charges at Annexure-2 is reproduced below:

Sr. No.	Items	Period	Max. Limit	Remarks
5	Electricity Charges	Monthly	20000	Apr'12 E.B. was Rs.9800.00. Estimated considering no power/traffic increase.

From the above clause, it is evident that the expenditure of items specified therein are reimbursed in actual but with a monthly / yearly limit for the same. For electricity charges, the limit prescribed was Rs.20,000/- per month. It, therefore, clearly transpires that the electricity charges are only reimbursed to the extent of the maximum limit specified and in respect of such electricity charges over and above the said maximum limit the appellant have to bear the cost. Therefore, based on the terms of reimbursement referred above itself, it cannot be held that the electricity charges are reimbursed in actual always. There is nothing from the appellant side on record to suggest that the said maximum limit specified was revised later on. It is also not the case that the electricity charges were always below the maximum limit specified as is evident from the copy of the electricity bill submitted by the appellant in support of their contention itself which shows the amount of electricity charges as Rs.27,740/-. In view of the above, the appellant's contention that the electricity charges were reimbursed by the service receiver in actual does not hold water as it is contradicted by the evidences they have relied upon. When the appellant have to bear the cost of electricity charges over and above the maximum limit specified under the terms of agreement, it cannot be said that electricity charges are not part of cost of providing the service and it stand

established that such electricity was used by them and thereby they hold title to it. Since the appellant was not receiving the actual amount incurred towards electricity charges, the entire impugned transaction would fail to qualify as that of a pure agent as most of the conditions prescribed for being a pure agent would not get satisfied whereby the exclusion of such expenditure sought by them in terms of Rule 5(2) becomes inadmissible. Needless to say, the onus to prove the admissibility of exclusion of such expenditure from the taxable value of service purely lies on the appellant as such exclusion was allowed as an exception in certain circumstances, which I find that they failed to do. Further, it is observed that as per Work Order, there is provision for payment of service tax and TDS as applicable for items specified in sub-clause (a) to (g) of Clause (3) which also included 'Reimbursement' at sub-clause (e) and the appellant was paying service tax on all reimbursement expenses except Electricity Charges. The Work Order does not seem to specify anywhere that electricity charges reimbursable are not be considered for the purpose of payment of service tax. Therefore, there does not seem to be any specific exclusion for reimbursement of electricity charges as per agreement for the purpose of service tax on such charges. In view thereof, I am of the considered view that the consideration received by the appellant by way of reimbursement of electricity charges in the case would form part of the taxable value of service provided by them and the service tax would be payable accordingly for the period after 14.05.2015 covered in the demand. Since the appellant fails to qualify the test of being a pure agent so far as reimbursement of electricity charges, I do not find it relevant to consider the other contentions/arguments raised by them in the subject matter.

9. As regards the issue of reimbursement of Octroi charges, it is observed that the said expenditure was incurred by the appellant on behalf of their customers during the course of provision of door to door delivery service of goods and in the present case, Octroi was levied by Greater Mumbai Municipal Corporation on entry of goods into the station of Greater Mumbai. The Revenue intends to levy service tax on the same considering it as cost incurred by the appellant towards provision of service by them. But, it is the contention of the appellant that Octroi is a statutory levy and they have acted as 'pure agent', in case of Octroi reimbursement made by clients and they are authorized to pay octroi on behalf of the customers and in return get the reimbursement of such expenses with nominal service charge, on which they have already paid Service Tax as per the applicable rate. The appellant has submitted copies of the invoice and the Form B Import Bill issued at the time of payment of Octroi in support of their contention. From the said documents submitted, it is unambiguously evident that the liability to pay Octroi is on the customer of the appellant but the same is collected from the appellant who pays the same on behalf of the customer. The appellant was recovering from the customer, as reimbursement of octroi, the same amount they had paid as octroi on behalf of the customer and were also charging some service charge on which they were discharging service tax liability without any dispute.Thus, there is no doubt that the recovery of Octroi amount by the appellant from their customer in the case

was reimbursable in nature. Now, the moot question is whether the said transaction of the appellant was in the capacity of pure agent or not.

9.1 As discussed in para 8.1 above, to qualify as 'pure agent', one has to satisfy all the four conditions specified under Explanation 1 of Rule 5(2) of the Valuation Rules. The first condition is that the person should have entered 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. In this regard, I agree with the contention raised by the appellant that the intention of the term 'contractual agreement' is to be understood holistically to mean that there is an arrangement between the parties whereby the appellant would incur costs for the customer and the customer would reimburse the same. It cannot be insisted that such an agreement has to be in a written form. Even an oral mutual consent between the two parties would suffice to cover as a 'contractual agreement' in the given context. In the present case, the invoice issued by the appellant to their customers for reimbursement of charges paid towards Octroi by them by specifically mentioning the same amply indicates the presence of such a 'contractual agreement' between them to incur the said expenditure for the customer by the appellant. Therefore, I do not agree with the adjudicating authority's observation that there was no such contractual agreement in the case between the appellant and service recipient. Regarding the second condition that the person should 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, it is observed that such a condition is not applicable in the present case as it was not a case of procurement of any service or goods for the receiver of the service but was a mandatory payment to be made to a statutory authority under a legal obligation that falls upon the importer of goods while entering the specified station. Even otherwise, the facts that Octroi is a statutory levy collected on the goods and the title of such goods transported by the appellant being the customer of the appellant, who in fact was liable to pay the said levy of Octroi, clearly shows that the title if any in the matter would be that of the goods, on which the levy is collected, which rest with the customer of the appellant and the appellant at no point of time was holding any such tile nor did they intend to hold the same .The view of the adjudicating authority in this regard that the appellant was the person who conveyed article into Greater Mumbai and thus he was the importer of the goods as per Rule 2 of the Municipal Corporation of Greater Mumbai Octroi Rules, 1965 and was also liable to pay Octroi does not seem to be a correct inference in the context of the case. Copy of Form B Import Bill submitted by the appellant clearly shows the demarcation between the person from whom the Octroi was collected and the person from whom the same was received. Obviously, the person from whom the Octroi was received would be the importer who was actually liable to pay the said levy. The said levy was but collected from the transporter who pays the same on behalf of their customer viz. the importer and therefore the person who conveys the articles cannot be held as an importer. Neither can they be said to the owner of the goods. The third condition stipulates that the person does not use such goods or services so procured. As discussed earlier, payment of Octroi was not towards procurement of any

service or goods for the receiver of the service but was a mandatory payment to be made to a statutory authority under a legal obligation and hence there does not arise any question of use of service or goods by the appellant and the payment in this regard was made by the appellant on behalf of the owner/importer of goods. Therefore, the third condition stand satisfied. Coming to the fourth and last condition that the person receives only the actual amount incurred to procure such goods or services, though the said levy was not towards any procurement of service or goods for the service receiver it is not in dispute that the reimbursement of Octroi recovered/received by the appellant from their customer was exactly the same amount they had paid as Octori to the Municipal Authority on behalf of their customer. The fact of appellant charging some service charge in this regard does not ipso facto alters or affects the compliance of the above condition as the amount of reimbursement of Octroi and the service charge are separately mentioned in the Invoice issued by the appellant to their customer and it is not the case that they were recovering Octroi charges in excess of what they have actually paid. Therefore, the fourth condition also stand satisfied by the appellant. Having fulfilled all the conditions required as discussed above, the appellant qualifies as a pure agent while making payment of Octroi on behalf of the customers.

9.2 However, acting as pure agent simply does not allow the appellant to exclude the reimbursable expenditure from the purview of taxable value of service, but for that they also have to satisfy certain conditions stipulated under Rule 5(2) of the Valuation Rules which are discussed hereunder condition-wise:

(i) 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;

This condition actually does not apply in cases of reimbursable expenditure incurred towards payment of statutory levies. As discussed earlier, the payment of octroi in the case was not towards any procurement of services or goods for the recipient of service but was a mandatory payment to be made to a statutory authority under a legal obligation. It clearly stand established from records that the obligation to pay the said levy was on the customer of the appellant viz. importer and the said payment was made by the appellant to the third party, viz. Municipal Authority, on behalf of the customer/importer. When it stand established that the appellant qualifies as pure agent as discussed above, this condition automatically stand satisfied.

(ii) 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;

Observation at (i) above squarely holds good for this condition also. The payment of Octroi was made by the appellant for the recipient of service and when that is so, this condition was also satisfied.

(iii) the recipient of service is liable to make payment to the third party;

As discussed earlier, it is evident from the copy of the Form B Import Bill issued at the time of payment of Octroi that the liability to pay the Octroi was on the importer i.e. customer of the appellant, who was the recipient of service. Thus, this condition stand fulfilled.

(iv) the recipient of service authorises the service provider to make payment on his behalf;

The invoice issued by the appellant to their customers viz. service recipients for reimbursement of charges paid towards Octroi by them by specifically mentioning the same amply indicates the presence of a 'contractual agreement' between them to incur the said expenditure for the customer by the appellant and that is sufficient to qualify as the authorisation from the recipient of service to the appellant to make payment on their behalf.

(v) 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 in the case being towards levy of Octroi, the recipient of service was well aware of the fact that it was a statutory levy paid to Municipal Authority, the third party.

(vi) 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 payment made by the appellant on behalf of the recipient of service viz. their customer has been separately clearly indicated in the invoice issued by the appellant to their customer and there is no dispute to this fact.

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

The reimbursement of Octroi recovered/received by the appellant from their recipient of service viz. their customer was exactly the same amount they had paid as Octroi to the Municipal Authority on behalf of their customer.

(viii) 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;

It is an obvious fact that Octroi was a statutory levy payable by the importer of goods, in the present case the customer of the appellant. It , in no way, form the part of service being provided by the appellant. Therefore, making payment of Octroi to the Municipal Authority on behalf of the customers was in addition to the service the appellant provided on his own account.

9.3 Thus, in view of the above, it is observed that the appellant was acting as a pure agent of the service recipient viz. their customer while incurring expenditure on account of Octroi payments and since they have satisfied all the conditions specified under Rule 5(2) of the Valuation Rules, the said expenditure incurred by them as a pure agent of the recipient of

service, would be admissible for exclusion from the value of the taxable service provided by them. Consequently, no demand of service tax can survive against recovery of such reimbursable expenditure. Therefore, the demand confirmed by the adjudicating authority against reimbursement of Octroi charges is liable to be set aside for being not legal and proper.

9.4 Having found merit in the appellant's contention that they were acting as a pure agent in the case of payment of Octroi charges as discussed above, I am not going into the merits of their other contentions in the matter.

10. It is further observed that the classification angle raised by the department in the matter does not have any relevance in deciding the issue under dispute. Since the period of dispute being pertaining to Negative List regime, the taxability of service is not determined by the classification of service. Even while accepting this legal position, the adjudicating authority had confirmed the proposal of classification in the Notice which does not seem to be correct. However, I am not getting into that aspect as the taxability of service provided by the appellant is not in dispute in the present case.

11. Coming to the issue of penalties imposed, I find that since the demand pertaining to the period prior to date of amendment in Section 67 i.e.. 14.05.2015 and the demand pertaining to recovery of reimbursement of Octroi charges are held as not sustainable, the penalties imposed with reference to the said demands would also be not sustainable. Consequently, there cannot be any penalty under Section 78 of the Act for the demand in the case being pertaining to the period prior to 14.05.2015. It is observed that penalty under Section 76 of the Act is imposable since there is short levy of service of tax by way of not including electricity charges in the taxable value of service provided to TIL during the period after 14.05.2015 covered under the demand. Accordingly, the appellant is liable to penalty equivalent to 10 per cent of the demand confirmed in terms of Section 76 ibid in this regard . The appellant's contention that the said penalty is not imposable is devoid of merits as there is short levy of tax as discussed. Penalty under Section 77(2) of the Act is also liable to paid by the appellant for their failure to self-assess the correct taxable value and not reflecting the same in the periodical returns but I reduce the said penalty to Rs.5,000/- (Rupess Five thousand only) considering the fact that the major part of demand in the Notice being held as not sustainable. The reliance placed by the appellant on Section 80 of the Act for not imposing penalty in the case does not help their cause as the said Section stand omitted from the statute with effect from 14.05.2015 and the demand confirmed in the case pertains to the period thereafter.

12. In view of my foregoing discussions, the impugned order passed by the adjudicating authority in respect of (i) Show Cause Notice dated 16.03.2016 is set aside completely and

(ii) Show Cause Notice dated 23.12.2016 is set aside to the extent it relates to demand of service tax (a) on recovery of reimbursement of Octroi Charges for the entire period and (b) on recovery of reimbursement of electricity charges for period prior to date of amendment in Section 67 of the Act i.e. 14.05.2015. Consequently, the demand of service tax on recovery of reimbursement of electricity charges for period after 14.05.2015 covered in the demand is upheld. Accordingly, the appeal filed by the appellant is partly allowed and partly rejected to the same extent.

13. 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.

25th February, 2021.

(**Akhilesh Kumar**)
Commissioner (Appeals)
Date: 25.02.2021.

Attested

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

BY R.P.A.D. / SPEED POST TO :

To

M/s Sequel Logistics Pvt. Ltd.,
29/B Shrimali Society,
Opp. Passport Seva Kendra,
Near Mithakali Six Roads,
Navrangpura, Ahmedabad.

Copy To:-

1. The Chief Commissioner, CGST& Central Excise, Ahmedabad Zone .
2. The PrincipalCommissioner, CGST& Central Excise, Ahmedabad-South.
3. TheAdditional Commissioner, CGST& Central Excise, Ahmedabad-South.
4. The Assistant/Deputy Commissioner, CGST & Central Excise, Division-VI, Ahmedabad South.
5. The Assistant Commissioner (System), CGST HQ, Ahmedabad South. (for uploading the OIA)
6. Guard file
7. P.A. File