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-20210464SW00004984C8

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/586/2020 / 1238 TO 1242

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-87/2020-21**
दिनाँक Date : 30.03.2021 जारी करने की तारीख Date of Issue : 28.04.2021

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

ग Arising out of Orders-in-Original No. 11/CGST/Ahmd-South/ADC/MA/2020 dated 17.09.2020 passed by the Additional Commissioner, Central GST, Ahmedabad South Commissionerate.

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

M/s M.S. Khurana Engineering Ltd.,
2nd Floor, MSK House,
Panjrapole Road, Ambawadi,
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.

(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 M.S. Khurana Engineering Ltd., 2nd Floor, MSK House, Panjrapole Road, Ambawadi, Ahmedabad (hereinafter referred to as the *'appellant'*), against Order-In-Original No.11/CGST/Ahmd-South/ADC/MA/2020 dated 17.09.2020 (hereinafter referred as "*impugned order*") passed by the Additional Commissioner, Central GST, Ahmedabad South Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. Briefly stated, the facts of the case are that the appellant was engaged in providing taxable services viz. Commercial and Industrial Construction Services and was holding Service Tax Registration No.AABCM4514FST001 with the erstwhile Service Tax Commissionerate, Ahmedabad. An investigation conducted by the Directorate General of Central Excise Intelligence, Ahmedabad Zonal Unit against the appellant revealed that they had not paid Service Tax correctly on the Commercial and Industrial Construction services provided to M/s GPT Steel Industries Pvt. Ltd., Mumbai (hereinafter referred to as '*GPT*' for the sake of brevity) for the construction of their factory at Gandhidham (Kutch). It was observed that during the period from October, 2004 to September, 2005, the appellant had received an amount of Rs.3,30,43,354/- from GPT but paid only Rs.67,320/- against their tax liability of Rs.11,12,239/- resulting into short payment of service tax to the tune of Rs.10,44,919/-. Further, it also appeared that the appellant did not pay any service tax for the materials received free of cost valued at Rs.10,87,79,256/- from GPT which resulted into non-payment of service tax to the tune of Rs.36,61,510/-. Therefore, a Show Cause Notice dated 12.03.2007 was issued to the appellant for recovery of service tax short paid / not paid by them as discussed above.

2.1 The said Show Cause Notice dated 12.03.2007 was adjudicated vide Order-in-Original (OIO) No.STC/11/ADDL.COMM./2008 dated 21.04.2008 issued by the Additional Commissioner, Service Tax (O&A), Ahmedabad wherein he had confirmed the demand of Service Tax amounting to Rs.47,06,429/- and appropriated the same amount paid by the appellant during the course of investigation towards their total service tax liability and ordered recovery of interest under Section 75 of the Finance Act, 1994 (hereinafter referred to as '*the Act*') at appropriate rate on the said demand confirmed and imposed penalties under Section 76 and 78 of the Act ibid.

2.2 Being aggrieved with the said OIO dated 21.04.2008, the appellant had preferred an appeal before the Commissioner (Appeals), Ahmedabad who vide Order-in-Appeal (OIA) No.149/ 2009(STC)/LMR/Commr.(A)/Ahd. dated 05.05.2009, issued on 14.05.2009, had

upheld the impugned order passed by the adjudicating authority and rejected the appeal filed by the appellant.

2.3 The appellant had carried the matter further before the Hon'ble CESTAT, Ahmedabad by filing an appeal against the above said OIA dated 05.05.2009. The Hon'ble CESTAT vide their Order No.A/10246/2020 dated 24.01.2020 has allowed the appeal by way of remand to the adjudicating authority. The Hon'ble Tribunal observed that though there were two separate issues involved in the case viz. (i) service tax demand on the value of Free Supply Material supplied to them by the recipient of service for the provision of Commercial and Industrial Construction Services rendered by the appellant and (ii) demand relates to the pure service provided by them on which they had failed to pay service tax at the material time, Order-in-Original as well as Order-in-Appeal shows no segregation on these lines in the findings as the findings were solely in respect of non-inclusion of the value of Free Supply Materials and therefore the matter is remanded to the Adjudicating Authority to deal specifically with the charge of Free Supply Materials and the charge relating to value of service which escaped assessment separately.

2.5 The adjudicating authority has decided the matter in remand proceedings as directed by the Hon'ble Tribunal vide the impugned order wherein he had again confirmed the demand of service tax on both the issues along with interest and imposed penalties under Section 76 and 78 of the Act,

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

(a) As per Hon'ble Apex Court decision in the case of M/s Bhayana Builders, the value of free supply material is not includible in the gross amount charged by the service provider. The adjudication officer has ignored the above decision of the apex court and stated that it is not applicable in their case on the reason being that various amendment in the provision & law, but as such no such reference has been discussed by the adjudicating officer;

(b) Once the department has accepted the apex court decision, adjudicating officer is bound to follow the same;

(c) The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. They rely on the Supreme Court decision in the case of UOI Vs. Kamalakshi Finance Corporation AIR 1992 SC 711 and various other cases laws in support of their contention in this regard;

(d) Appellant during the investigation, on drawing attention by the investigating officer, has deposited service tax with interest prior to SCN. So on that amount, no penalty is imposable as the proceedings under Section 73 of the Act get concluded in such

cases in terms of provisions of sub-section (1A) and (3) of Section 73 ibid. They rely on CBE&C Letter F.No.137/167/2006-CX-4 dated 31.10.2007 and decision of Tribunal in the case of Nokia India Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi [2017 (52) STR 74 (Tri.-Del.)], Commissioner of Service Tax, Delhi Vs. Pentagon Financial Consultants (P) Ltd. [2016 (46) STR 198 (Tri.-Del.)], Sunita Tools Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai-II [2015 (37) STR 644 (Tri.-Mumbai)], Mount Housing & Infrastructure Ltd. Vs. CCE & ST, Coimbatore [2014 (35) STR 399 (Tri.-Chennai)] and Santhi Casting Works Vs. Commissioner of C.Ex., Coimbatore [2009 (15) STR 219 (Tri.-Chennai)] in this regard;

(e) The appellant is filing income tax returns and service tax returns regularly from time to time. 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;

(f) 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).];

(g) Penalty under Section 76 is not imposable since there is no short payment of service tax. As per the merits of the case, the appellant is not liable for payment of service tax. They intend to rely on the case laws in the cases of Hindustan Steel Ltd. Vs. The State of Orissa [1970 (SC) 253]; Kellner Pharmaceuticals Ltd. Vs. CCE [1985 (20) ELT 80] and Pushpam Pharmaceuticals Company Vs. CCE [1995 (78) ELT 401 (SC)] in support of their contention; and

(h) 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 20.01.2021 through virtual mode. S/Shri Vipul Khandhar, Chartered Accountant, and Pawan K. Maheshwari, appeared on behalf of the appellant for hearing. Shri Vipul Khandhar, Chartered Accountant 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 issues to be decided in the case are (i) as to whether, the value of materials viz. Steel and Cement supplied free of cost by GPT, the service recipient, and used by the

appellant for providing the taxable service viz. Commercial and Industrial Construction Services for construction of factory for GPT at Kutch, is to be included in the gross amount (charged by the service provider), for valuation of the taxable service provided, under Section 67 of the Act and for availing the benefits under Notification No. 15/2004-S.T., dated September 10, 2004 as amended or not; and (ii) whether the penalties imposed by the adjudicating authority under Section 76 and 78 of the Act are legally sustainable in the facts and circumstances of the case.

6. After going through the facts on records, it is observed that out of the total demand of service tax of Rs.47,06,429/- on the two issues confirmed vide the impugned order, the appellant is not contesting the demand of service tax of Rs.10,44,919/- on the value of service which escaped assessment during the period from April, 2005 to September, 2005. They are contesting the demand of service tax on the value of materials viz. Steel and Cement supplied free of cost by GPT, the service recipient to them for provision of service, along with imposition of penalties on them under Section 76 and 78 of the Act.

7. It is observed that the adjudicating authority has confirmed the demand of service tax on the issue under dispute on the ground that since the appellant was availing abatement/exemption under Notification No.15/2004-ST dated 10.09.2004, the gross amount charged for the purpose of the said Notification shall include the value of goods and materials supplied or provided or **used by the service provider** of the construction service for providing such service and that the appellant had used materials such as Steel and Cement, supplied free of cost by the recipient of service, i.e. GPT, for construction service received by them from the appellant and so the value of such materials supplied free of cost by the recipient of service should form part of the gross amount charged for the purpose of availing abatement under Notification No.15/2004-St dated 10.09.2004.

7.1 I find that the issue as to whether, the value of goods/material supplied or provided free of cost by a service recipient and used for providing the taxable service of commercial or industrial construction, is to be included in computation of gross amount (charged by the service provider), for valuation of the taxable service, under Section 67 of the Act and for availing the benefits under Notification No. 15/2004-S.T., dated September 10, 2004 as amended, stand finally settled against the Revenue by the decision of Hon'ble Supreme Court in the case of Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd. [2018 (10) G.S.T.L. 118 (S.C.)]. The Hon'ble Apex Court in their said decision has held that :

> *" 13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the*

assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14. We may note at this stage that Explanation (c) to sub-section (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation hereinbelow in order to understand the contention :

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

15. It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount

charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.

17. Faced with the aforesaid situation, the argument of the Learned Counsel for the Revenue was that in case the assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 1, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67% : 33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessees to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.

18. In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or

provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

19. *Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170 = 2015 (39) S.T.R. 913 (S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under:*

> *"23. A close look at the Finance Act, 1994would show that the fixed taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines 'taxable service' as 'any service provided".*

Further, while referring to exemption notifications, it observed :

> *"42. ...Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."*

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added.

20. *It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.*

21. *For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue.*

7.2 The Larger Bench of the Hon'ble Tribunal in their decision dated 06.09.2013 in the same matter, which has been upheld by the Hon'ble Supreme Court vide their above discussed decision, had examined the legal aspect of the issue very comprehensively, the gist of which is as under:

> *Valuation (Service Tax) - Free supplies to construction service provider - They are outside taxable value or gross amount charged, within meaning of expression in Section 67 of Finance Act, 1994 - Section 67(1)(ii) ibid applies where taxable service is provided for consideration which is not either wholly or partly, for money - Hence, non-monetary consideration must still be a consideration accruing to benefit of service provider, from the service recipient and for service provided - Implicit in this legislative architecture is concept that any*

consideration whether monetary or otherwise should have flown or should flow from service recipient to service provider and should accrue to benefit of later - "Free supplies", incorporated into construction (cement or steel for instance), even on extravagant inference, would not constitute non-monetary consideration remitted by service recipient to service provider for providing service, particularly since no part of goods and materials so supplied accrues to or is retained by service provider - Wherever monetary consideration is charged for providing taxable service and no non-monetary consideration forms part of agreement between parties, it is clause (i) that applies and value of taxable service would in such case be gross amount charged by service provider and paid by service recipient - Value of "free supplies" by Construction services recipient, for incorporation in constructions would neither constitute non-monetary consideration to service provider nor form part of gross amount charged for services provided - Hence, contrary conclusion in Jaihind Projects Ltd. [2010 (18) S.T.R. 650 (Tribunal)] found to be incorrect, proceeding on flawed interpretation of Section 67 ibid. [2010 (17) S.T.R. 534 approved]. [paras 8(iii), (v), (vii), (ix), 16(a)]

Valuation (Service Tax) - Goods and materials - Supplied/provided/ used by service provider for incorporation in construction, which belong to provider and for which service recipient is charged and corresponding value whereof received by service provider, to accrue to his benefit, whether independently specified as attributable to specific material/goods incorporated or otherwise - HELD : This alone constitutes gross amount charged - However, exemption Notification cannot enjoin condition that value of free supplies must also go into gross amount charged for valuation of the taxable service - If such intention is to be effectuated, phraseology must be specific and denuded of ambiguity - Section 67 of Finance Act, 1994. [para 15]

Valuation (Service Tax) - Consideration for transfer of property in goods from seller to buyer - For levy of sales tax, consideration for transfer of property in goods from seller to buyer is relevant and tax must be levied on consideration for transfer of property - This is unlike in case of Excise duty where levy is event based and irrespective of whether goods are sold or captively consumed, liability inheres even where manufacturer is not owner of raw material or finished goods - This principle is equally applicable to levy of Service Tax under Finance Act, 1994 and in particular in context of specific language in Section 67 of Finance Act, 1994. [para 8(x)]

Exemption - "Free supplies" by service recipient - Explanation to Notification No. 15/2004-S.T. engrafted by Notification No. 4/2005-S.T. explained meaning of "gross amount charged" occurring in its preamble, to include value of goods and materials supplied or provided or used by provider of construction service for providing such service - On literal construction of expression used in this Explanation, considered in isolation, it is legitimate to infer that "gross amount charged" include value of goods and materials supplied or value of goods and materials provided or value of goods and materials used by provider of construction service, for providing said service - Literal construction of expression "used", in case goods and materials used in construction for providing service, "gross amount charged" would include value of goods and materials used, irrespective of whether goods and materials belong to or are procured by service provider at his own cost or are issued by service recipient free of cost - Abatement of 67% of tax, subject to enumerated exceptions, is in respect of "gross amount charged" by service provider and remitted to such provider by recipient, and this intention resonates with identical expression employed in Section 67(1)(i) of Finance Act, 1994 - C.B.E. & C. Circular No. 80/10/2004-S.T., dated 17-9-2004, Para 13.5 explaining reason for issuance of Notification No. 15/2004-S.T. accords with true and fair construction of un-

amended Notification No. 15/2004-S.T. - Inclusion of value of "free supplies" by service recipients in gross value charged for taxable service and above interpretation of 'Explanation' does not run foul of Section 67 ibid - Section 93 ibid empowers government to authorize exemption, generally or subject to conditions - Hence, government was at liberty to define, for example, what components should comprise gross value charged for providing a taxable service - Mere enlargement of contours of "gross amount charged" in condition incorporated in exemption Notification could not amount to bringing to tax net value which is not taxable under Section 67 ibid - Such a condition normally indicates that specified exemption is granted subject to condition which required wider incorporation into value of taxable service, for limited purpose of computing extent of exemption - Condition expanding scope of "gross taxable value" for limited purpose of granting exemption would therefore only mean that exemption provided is not so generous as facially appears - Any such condition in exemption Notification would not per se violate Section 67 ibid for that singular reason. [para 10(i), (ii), (iii), (iv), (vi)]

Exemption - Free supplies by service recipient - Their value do not comprise gross amount charged under Notification No. 15/2004-S.T., including Explanation thereto as introduced by Notification No. 4/2005-S.T. [para 16(b)]

Exemption - Notification No. 15/2004-S.T. - Interpretation of "used" in explanation - It is preceded by "supply" and "provided", and three expressions are interspersed by disjunctive "or" to define meaning of gross amount charged - It would bear particular meaning on its literal construction but becomes plurilisignative in society of two other expressions - Its variously means cause to act or serve for a purpose; avail oneself of; exploit for one's own ends; the right of power of using - It has multiple connotation and bears different meanings depending upon context - Hence, used is per se ambiguous or obscure - For this potential multiple meanings of 'used', noscitur principle has to be applied to identify its legal meaning from its several grammatical/literal meanings, by employing associational context - Etymologically supplied and provided are closely associated words - Provided also means to supply or furnish - Supply bears similar connotation - C.B.E. & C. Circular dated 16-2-2006, issued subsequent to introduction of Explanation in Notification No. 15/2004-S.T. and in context of identical Explanation introduced in Notification No. 18/2005-S.T. was contemporaneaexpositio of meaning of Explanation in Notification No. 18/2005-S.T. [paras 10(viii), 11, 12, 14]

Exemption - Notification No. 12/2003-S.T. - Scope of - Its benefits are only in respect of value of goods and materials sold by service provider to recipient of taxable service - In case of free supplies by recipient of service there is no sale or transfer of title in goods and materials in favour of service provider, at any point of time, and this notification is not applicable. [para 12]

Exemption - Notification No. 15/2004-S.T. - Explanation to - True meaning of "used" and other problematic expressions, have to be ascertained, independent of cost-benefit analysis. [para 13]

7.3 In view of the law declared by the above two judicial pronouncements in the case of Bhayana Builders (P) Ltd., it is clear that the value of goods/material supplied or provided free of cost by a service recipient and used for providing the taxable service of commercial or industrial construction, is not to be included in computation of gross amount (charged by the service provider), for valuation of the taxable service, under Section 67 of the Act and for availing the benefits under Notification No. 15/2004-S.T. dated September 10, 2004 as

amended. The findings given by the adjudicating authority in this regard, therefore, no longer sustain before law in the light of above two judicial pronouncements in the case of Bhayana Builders (P) Ltd. I find that the facts of the present case is squarely covered by the above referred decision of the Hon'ble Supreme Court. Therefore, it is held that the demand of service tax for the said issue in the present case is not sustainable in law in view of the Hon'ble Supreme Court's above decision and is liable to set aside. 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. Hence, I find merit in the contention of the appellant in this regard.

7.4 It is further observed that during the remand proceedings, the reliance placed by the appellant on the Hon'ble Supreme Court's decision in the case of Bhayana Builders (P) Ltd. supra has not been accepted by the adjudicating authority by observing that the appellant had accepted the valuation and taxation at the time of investigation and voluntarily paid the service tax amount and that no question was ever raised at the time of original adjudication or during subsequent appellate proceedings in respect of imposition of tax on the issue and that, therefore, the contention of the appellant is an afterthought which cannot be entertained at this stage. I do not agree with the above view of the adjudicating authority for the reason that the appellant during the appeal proceedings before the Hon'ble Tribunal has raised the issue of applicability of the Hon'ble Supreme Court's decision in the case of Bhayana Builders (P) Ltd. in their case which is clearly recorded by the Hon'ble Tribunal in their findings at Para 2 of their Order dated 07.01.2020. Thus, it is not the case that the said argument was put forth for the first time by the appellant during the denovo proceedings. Further, the Hon'ble Supreme Court's decision under reference in the present case was pronounced on 19.02.2018 whereas the original adjudication and subsequent appellate proceedings that followed were dated 21.04.2008 and 05.05.2009 i.e. prior to the date of the above said apex court decision or even the Tribunal's Larger Bench decision in the matter dated 06.09.2013. Therefore, the said judicial pronouncements cannot be relied upon during the original adjudication and subsequent appellate proceedings because of being pronounced at a later date. However, that does not *ipso facto* bar the appellant from relying upon the said decisions during remand proceedings. The Hon'ble Tribunal has remanded the matter to the adjudicating authority by observing that:

> *"4. In view of above, we find that the orders of the Lower Authorities are not dealing with all the issues. The impugned orders is therefore, set aside and the matter is remanded to the Adjudicating Authority to deal specifically with the charge of Free Supply Materials and the charge relating to value of service which escaped assessment separately. The appeal is allowed by way remand."*

From the above directions, it is clear that the matter is remanded to deal specifically with the charge of Free Supply Materials and the charge relating to value of service which escaped assessment separately and thus the entire issue/matter is required to be adjudicated afresh as if it was not decided earlier as the earlier Order-in-Original and Order-in-Appeal in the matter are set aside and hence no longer sustain and the findings therein would not have any bearing on the fresh adjudication to be done under remand/denovo proceedings. In other words, the matter has been sent back to the initial stage of adjudication for deciding the case afresh from the beginning. Since the matter is to be adjudicated afresh, the parties involved in the case are at liberty to raise fresh legal contentions/grounds, if any, to defend their side of case during the *denovo*/remand proceedings. Therefore, it is permissible for them to take support of any legal decisions which might have been pronounced in a subsequent period and found applicable to their case. It is more so, especially when the facts, legal position and period of the issue under dispute is the same in the said legal decisions. Further, the adjudicating authority's contention that since the appellant had accepted the valuation and taxation at the time of investigation and voluntarily paid the service tax amount, it is not open for them to raise the said issues in *denovo* proceedings is also devoid of any merits as the assessment of tax on the said issues has still not attained finality and the same was ordered to be adjudicated afresh by the Hon'ble Tribunal, whereby as stated earlier the demand of tax in the matter was again on the initial stage of adjudication for deciding the case afresh from the beginning. So when the matter is to be heard and decided afresh *ab initio*, the appellant is not prevented from raising any issue which they might not have disputed in original adjudication especially when a settled legal position on such issue is now available to them in their favour. Mere payment of tax/duty during investigation without any protest does not take away the right of the assesse to question/challenge the assessment of the said tax by the adjudicating authority under quasi-judicial proceedings. In view thereof, the adjudicating authority's act of rejection of appellant's reliance on the decision of Hon'ble Supreme Court in the case of Bhayana Builders supra, is not legally correct and justifiable.

8. When the demand of service tax on the value of goods/material supplied or provided free of cost by a service recipient and used for providing the taxable service of commercial or industrial construction in the case is held as not sustainable, there cannot be any question of interest or penalty relating to the said demand.

8.1 Coming to the issue of penalties imposed on the other issue of demand of service tax on the value of service which escaped assessment during the period from April, 2005 to September, 2005, it is observed that the appellant had accepted their said tax liability and had paid the service tax payable during the period on 01.12.2005. It is undisputed that they

had not filed ST-3 returns for the said period in time and the fact of receipts of payments from the service recipient and non-payment of service tax on the same came to light only upon initiation of enquiry by the DGCEI Officers. The appellant were fully aware that the services rendered by them to GPT was liable to be taxed. Their act of non-filing ST-3 return for the relevant period and not discharging their due tax liability in the case apparently amounts to suppression/concealment of material facts from the department and indicates an intention on their part to evade tax had it not been detected by the DGCEI. Therefore, the appellant is liable for penalty under Section 78 of the Act. Though the appellant has contended that they were not liable to said penalty as they have paid the service tax along with interest before issuance of SCN, it is observed that there is no evidence on records which suggest that they have paid interest on the said service tax amount. The amount of Rs.10,44,919/- paid by the appellant in the matter constitutes Rs.10,24,430/- as Service Tax and Rs.20,489/- as Education Cess, payable on the consideration of Rs.3,10,43,354/- received by them during the period from April 2005 to September 2005. There was no details of any other payment as interest in the said matter in the entire proceedings. Neither the appellant has brought on records any evidence showing payment of interest by them in the matter. In the absence of any such evidence confirming payment of interest, the contentions raised by the appellant in this regard are not acceptable. The case laws relied upon by the appellant in this regard does not help their cause as they are applicable only in cases where service tax is paid along with interest before issue of SCN. Mere payment of non-paid service tax amount only would not absolve the appellant from being liable for penalty under Section 78 of the Act. Also, no reasonable cause was shown by them for their failure to pay the said tax in the matter. Further, the benefit of conclusion of proceedings as envisaged under the Section 73(1A) and 73(3) of the Act, pleaded by the appellant, is not applicable in the case as it is available only when the service tax short paid or not paid is paid along with applicable interest and penalty equivalent of 25 per cent of the service tax, within 30 days of receipt of the notice, which is not the case here. Therefore, the penalty imposed under Section 78 of the Act vide the impugned order to the extent it relates to the demand of service tax on the value of service which escaped assessment during the period from April, 2005 to September, 2005 is correctly imposed and is upheld. Coming to the penalty imposed under Section 76 of the Act in the matter, it is observed that the same is not sustainable as simultaneous penalty under Section 76 and 78 cannot be imposed as held by Hon'ble Gujarat High Court in the case of Rawal Trading Company Vs. Commissioner of Service Tax [2016 (42) S.T.R. 210 (Guj.)] and in the case of Commissioner of CGST & C.Ex. Vs. Sai Consulting Engineering Pvt. Ltd. [2018 (15) G.S.T.L. 708 (Guj.)]. Therefore, following the ratio of the said High Court judgments, the penalty imposed under Section 76 is set aside.

9. In view of the above discussions, the impugned order passed by the adjudicating authority is set aside to the extent it relates to the demand of service on the value of materials viz. Steel and Cement supplied free of cost by GPT, the service recipient, and used by the appellant for providing the taxable service, along with levy of interest and imposition of penalty thereon. The impugned order is upheld to the extent it relates to the demand of service tax on the value of service which escaped assessment during the period from April, 2005 to September, 2005 along with interest and penalty imposed under Section 78 of the Act but the penalty imposed under Section 76 of the Act in this regard is set aside. Consequently, the appeal of the appellant is allowed to the same extent, with consequential relief, if any.

10. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्ततरीकेसेकियाजाताहै।

The appeal filed by the appellant stands disposed off in above terms.

30th March, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 30.03.2021.

Attested

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

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

To

M/s M.S. Khurana Engineering Ltd.,
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Panjrapole Road, Ambawadi,
Ahmedabad.

Copy To:-

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