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-20210664SW000000ADD3

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)48/Ahd-South/2020-21/1577 To 1582

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-03/2021-22**
दिनाँक Date : 29.04.2021 जारी करने की तारीख Date of Issue : 04.06.2021

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

ग Arising out of Orders-in-Original No. 02/CGST/Ahmd-South/ADC/MA/2020 dated 19.06.2020 passed by the Additional Commissioner, Central GST, Ahmedabad South Commissionerate.

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

M/s Jade Blue Lifestyle India Ltd.,
Pariseema Complex, UP-25 to 28,
Opposite IFC Bhavan,
Opposite Vaishali Complex,
C.G. Road,
Ahmedabad-380 006.

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

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

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

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

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गतः–

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contained in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

This appeal has been filed by M/s Jade Blue Lifestyle India Ltd., Pariseema Complex, UP-25 to 28, Opposite IFC Bhavan, Opposite Vaishali Complex, C.G. Road, Ahmedabad-380 006 (hereinafter referred to as the *'appellant'*), against Order-In-Original No.02/CGST/Ahmd-South/ADC/MA/2020 dated 19.06.2020 (hereinafter referred as "*impugned order*") passed by the Additional Commissioner, CGST, Ahmedabad South Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant were engaged in manufacturing of excisable goods i.e. Branded Readymade Garments falling under Chapter 62 of the First Schedule to the Central Excise Tariff Act, 1985. They were engaged in providing taxable services also viz. Renting of Immovable Property Services and Business Auxiliary Services and were holding Service Tax Registration No.AAFCS7398HSD001 for the same under the provisions of the Finance Act, 1994 (hereinafter referred to as '*the Act*').They were also discharging service tax liability under Reverse Charge Mechanism on various taxable services received by them. During the service tax audit of the records of the appellant for the period October, 2012 to March, 2017 by the departmental officers, it was observed that the appellant has short paid or not paid service tax on following cases/situations:

(i) Non-payment of service tax, on services provided by the directors of the appellant company to the appellant company, under reverse charge mechanism

During the course of audit, it was observed that the appellant had paid rent amounting to Rs.3,62,42,640/- to their Directors viz. S/Shri Jitendra C. Chauhan, Bipin C. Chauhan, Shambhav J. Chauhan and Siddesh B. Chauhan for the period from 2012-13 (October, 2012 to March, 2013) to 2016-17 and the same was shown under the expenditure Head "Rent Expenses". The audit observed that the Directors of the company have rented out their immovable property to the appellant company and the same is used for commercial purpose and thus it appeared that the activity of renting of immovable property in the case is covered within the ambit of "service" and was liable to service tax. It was further observed that since the service was provided by a Director of a Company to the said company, which is a body corporate, it appeared to be liable to service tax under reverse charge mechanism under Notification No.30/2012-ST dated 20.06.2012, as amended, and the appellant was liable to pay 100% of the service tax payable on the said services received by them. The audit pointed out a non-payment of service tax to the tune of Rs.48,63,216/- in this regard for the period from 01.10.2012 to 31.03.2017.

(ii) Non-payment of service tax on commission income

During the course of audit on verification of the Form 26AS of the appellant, it was noticed that they had received commission on which the payer who paid the consideration (recipient of service) deducted TDS under Section 194H of the Income Tax Act, 1961. As per Form 26AS, the commission received by the appellant amounted to Rs.24,81,202/- during the period from Financial Year 2012-13 to Financial Year 2016-17. The records furnished by the appellant show that the above said consideration received is in lieu of incentive for marketing or promotion of the products of the service recipient. The appellant contended that such amount was not towards commission but it is reimbursement of the employee incentive, which is in the nature of pure re-imbursement of expenses, and such amount was a part of trade discount. The audit observed that merchandise of another person's brand are displayed in the showrooms of the appellant and such merchandise is also sold from there and that display of merchandise of another person's brand and promotion of that particular brand by the sales executives of the appellant is an activity undertaken by them on their own accord through their own employees and thus, the incentive accorded by the brand owner is towards promotion of merchandise of the brand owner which squarely falls within the ambit of the term 'service' as defined under Section 65B(44) of the Act and that in other words, the appellant has undertaken the activity of promoting the merchandise of the brand owner and has received consideration against such activity and that such services provided by the appellant's employees amounts to services provided by the appellant himself because employees were not free agents. Accordingly, it was concluded that the appellant was liable to pay service tax on the consideration so received by them in the name of 'Sales Incentive on such services rendered by them to the brand owners. The service tax not paid on such services was pointed out to the tune of Rs.3,19,071/- for the period from Financial Year 2012-13 to Financial Year 2016-17.

(iii) Short-payment of service tax in Financial Year 2012-13 on renting of immovable property by wrongly availing the exemption available to Small Service Providers

It was observed that during the Financial Year 2012-13, the appellant had received consideration amounting to Rs.15,18,460/- towards Renting of Immovable Property Services provided by them on which they had paid service tax amounting to Rs.82,728/- only. The appellant contended that during the Financial Year 2012-13, they were eligible for exemption available to small service provider. The audit observed that the aggregate value of taxable services rendered by the appellant during the Financial Year 2011-12 has exceeded Rs.10 lakhs as the appellant had received commission income, which was taxable in their hands, in addition to the services of renting of immovable property and therefore, the exemption claimed by the appellant during the Financial Year 2012-13 is not admissible

to them. The short payment of service, on this count, was pointed to the tune of Rs.1,04,953/- for the Financial Year 2012-13.

(iv) Non payment of service tax on the services of Promotion of other's brand by way of Advertisement

It was observed that the appellant had issued Debit Notes to various merchandise brand owners. For the purpose of ascertaining the nature of work done/activity undertaken, towards which such consideration has been received, the appellant produced a copy of Debit Note No.1805, which shows the narration as 'Subject to Jaipur Launch Advertisement U.S. Polo' and the said debit note has been issued to M/s Arvind Lifestyle Brand. Thus, it appeared that the appellant has launched an advertisement for the 'U.S. Polo brand' owned by M/s Arvind Lifestyle on behalf of such brand owner.

The appellant contended that such amounts were reimbursement of advertisement expenses and that the said expenses were towards print media and as such the same was not liable to service tax. However, it was observed that there are no expense invoices against the debit notes amounting to Rs.22,50,000/- during the Financial Year 2014-15. The appellant has failed to produce any evidence in respect of such debit notes to establish that the income under the same are covered under the pure agent reimbursement charges. Further, the contention of the expenses towards print media is also devoid of merits in as much as the appellant is not an 'Advertisement Agency' but the amount has been recovered from the brand owners for advertising their merchandise. Thus, the instant case covers a situation wherein the brand name owner had accorded certain consideration to the appellant towards advertisement of their brands. In other words, the appellant had undertaken the activity of promotion of the merchandise of the brand name owner and had received a consideration against the same. Such an activity falls within the ambit of the term 'service' as defined under Section 65B(44) of the Act and the appellants are liable to pay service tax on the consideration received against such activity/service. Accordingly, the audit observed that there is a short levy of service tax to the tune of Rs.2,78,100/- in this regard on the value received against the debit notes amounting to Rs.22,50,000/- during the Financial Year 2014-15.

(v) Non-payment of service tax on the services under the head of 'write off income'

It was observed that the appellant had booked income under the head of 'write-off' amounting to Rs.34,72,221/- during the period from Financial Year 2012-13 to Financial Year 2016-17. On enquiry, it was informed that in the course of their trade, there occur certain instances where the customer returns some piece of merchandise bought from the showroom and in such cases, it is the policy of the appellant to issue a credit voucher to the

customer which can be redeemed on purchase of other merchandise. In cases where the customer does not come forward to redeem the credit voucher, the same is written-off and booked as income. However, no evidence in support of the explanation offered by the appellant verbally has been produced by them.

The audit observed that in the instant case, the appellant had agreed to the obligation to take back the purchased merchandise and issue a credit voucher in lieu of the same. Against the said act, the consideration received is in the form of returned merchandise which is subsequently converted to income since the credit voucher is written-off. Thus, the appellant had agreed to do an act against a consideration which is booked as income under the head 'Written-off income'. Such an activity of agreeing to the obligation to do an act against consideration is covered under the ambit of declared services as defined at Section 66E(e) of the Act and the appellant is required to pay service tax on such written-off income. The audit pointed out a short levy of service tax to the tune of Rs.4,80,838/- in this regard for the period from Financial Year 2012-13 to Financial Year 2016-17.

(vi) Short payment of service tax in the Financial Year 2015-16 noticed on reconciliation of financial accounts.

During the course of audit, it was noticed that the appellant was required to pay service tax of Rs.4,67,054/- for the year 2015-16 on the value of Rs.33,06,982/-. However, the appellant paid service tax of Rs.4,66,651/- only as per ST-3 returns filed for the said period. Thus, the appellant has short paid service tax to the tune of Rs.403/- for the financial year 2015-16.

2.1 On the basis of the above audit objections, a Show Cause Notice F.No.VI/1(b)/CTA/Tech-22/SCN/JB/2018-19 dated 28.08.2018 was issued to the appellant proposing demand of service tax totally amounting to Rs.60,46,581/-under proviso to Section 73(1) along with interest under Section 75 of the Act and imposition of penalty under Section 78 of the Act.

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

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

(a) The fact that the TDS is deducted under Section 194-I of Income Tax Act, 1961 on the rent paid to the director for giving property on rent/lease is conclusive evidence

that the amount paid as rent is nothing but consideration paid for services received of renting of immovable property rendered by such directors in the capacity of property holder;

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

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

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

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

(f) Regarding commission reflected in 26AS Form, they have submitted that it was not a commission income but it was reimbursement of the employee incentive for the sale of the particular brand. So it was pure reimbursement of expenses and was not consideration for providing any service. Further, it was part of the trade discount which can be verifiable from the supporting documents enclosed. Only due to interpretation difference the supplier has deducted TDS, the said amounts cannot be called as commission. They rely on the decision of the Hon'ble Tribunal, Mumbai in the case of Toyota Lakozy Auto Pvt. Ltd. Vs. C.S.T., C.Ex., Mumbai-II [2017 (52) S.T.R. 299 (Tri.-Mumbai)] in support of their said contention;

(g) Regarding the reimbursement of advertisement expenses, the appellant submits that they have taken recovery of expenses incurred for the advertisement on behalf of the franchisee. Secondly, they were in receipt of recovery of expenses for the print media. So, it is pure reimbursement/recovery and not liable for the service tax. Further, if the appellant were liable for tax, then they were eligible for the cenvat credit also and so it is revenue neutral situation;

(h) Regarding the write-off income, the appellant stated that over a period of time some of the customer returned goods they bought from the showroom and as per their policy, the customers were not given refund of money against returned goods but they were given credit vouchers for the value which can be set off against future buying and in cases where after a particular period if such credit vouchers are not utilized, they transfer the value of such non-redeemed credit vouchers to the income head. So such amount pertains to sale amount with due payment of tax during the relevant time. Hence, it cannot be treated as a service. Entry at Section 66E(e) of the Act covered the activities relating to the refrain from an act, tolerate an act or a situation and do an act. The situation in the present case does not fall under the ambit of the above entry as the write-off the debt of goods is not a result of any action or inaction on the part of the service provider;

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

(j) 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 willful mis-statement on the part of the appellant. No case has been made out on the ground of suppression of facts or willful mis-statement of facts

with the intention to evade the payment of service tax. The appellant is entitled to entertain the belief that their activities 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).];

(k) Penalty under Section 77 is not imposable since there is no short payment of service tax. As per merit of the case, the appellant is not liable for payment of service tax;

(l) No penalty is imposable in the case as there was neither any mala fide intention or any intention to evade payment of tax. They rely on the case laws in the case of Hindustan Steel Ltd. Vs. The State of Orissa [AIR 1970 (SC) 253] and Kellner Pharmaceuticals Ltd. Vs. CCE [1985 (20) ELT 80];

(m) Even if there is any contravention of the provisions, the same was solely on account of their bona-fide belief and were not with the intention to willfully evade payment of service tax. They have placed reliance on the judgment of the Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company Vs. CCE [1995 (78) ELT 401 (SC) and CCE Vs. Chemphar Drgus and Liniments [1989 (40) ELT 276 (SC)] in support of their contention;

(n) No case has been made out by the department that the present demand of service tax is on account of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Act or rules made thereunder with intention to evade payment of service tax. Hence, no interest or penalty under Section 77 and 78 of the Act can be imposed on this ground itself; and

(o) 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. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant for hearing. He reiterated the submissions made in the appeal memorandum. He subsequently submitted an additional submission vide letter dated 19.01.2021 wherein he had re-iterated the submissions made in the appeal memorandum.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Appeal Memorandum/additional submissions and oral submissions made at the time of personal hearing. The issue to be decided in the case is as to whether in the facts and circumstances of the case, the impugned order passed by the adjudicating

authority confirming demand of service tax raised on the basis of the six audit objections discussed in para 2 above and the charging of interest under Section 75 and imposition of penalty under Section 77 and 78 of the Act thereto, is legally correct and sustainable or not. Since there are six issues involved in the case, I would like to take up the issues one by one.

(i) Non-payment of service tax, on services provided by the directors of the appellant company to the appellant company, under reverse charge mechanism

6. On this issue, it is observed from case records that the appellant has paid an amount of Rs.3,62,42,640/- as rent to the Directors of their firm for renting to company the property owned by them during the period from 2012-13 (October, 2012 to March, 2013) to 2016-17. The department has sought to charge these expenditures as services under Section 65B(44) of the Finance Act, 1994 by contending that the Directors, being owners of property, has become service provider and the appellant has become service recipient. As the appellant firm is a body corporate, it has been contended that they become liable to pay 100% of the service tax payable in respect of such services under reverse charge mechanism under Rule 2(1)(d) (EE) of the Service Tax Rules, 1994 read with Notification No.30/2012-ST dated 20.06.2012 as amended by Notification No.45/2012-ST dated 07.08.2012 .

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

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
> *(a) an activity which constitutes merely,— (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim;*
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
> *(c) fees taken in any Court or tribunal established under any law for the time being in force.*

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

> ***SECTION 66E. Declared services.*** *— The following shall constitute declared services, namely :—*
>
> *(a)* ***renting of immovable property***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

.....

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

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

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

6.4 It is observed in this regard that the said view of the adjudicating authority does not seem to be a fair and correct interpretation as it is not supported by the language used in the Notification. The words used in the Notification are 'by a director of a company to the said company' and not 'by a person who is director of a company'. Therefore, if the director of the company provides a service in some other capacity, the tax liability would be of the director as an individual service provider and it will not be correct to consider the same as a

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

6.5 It is pertinent to mention that the owner of the property has given his property on rent to the appellant and is getting the rent from the appellant being the owner of the property and not being the Director of the appellant. Appellant is also paying the rent to the owner being the owner of the property (who has provided service to the appellant) and not being the Director of the appellant. It is not the case of the department that the Directors have rented their immovable properties to the company as they were obliged to do so for being appointed as directors of the company or that the renting services were provided by them as a part of their function as director of the company. Further, it is a fact that for providing renting services one need not be a director of the company. The department has not brought on record anything which suggest that the impugned renting services received by the appellant from their Directors were received by them in the capacity of Directors of the company. Whereas the appellant has contended that the said services were received by them from their directors as owner of the property and not as a director of the company. They are paying the rent to the person being the owner of the property and not being the Director of the appellant and the Director is receiving the amount not as remuneration for his services as a director but in his individual capacity of an owner of the property. Such a case, in my view, is not intended to be covered under the reverse charge mechanism in terms of Notification No.30/2012-ST but rather the director, as a service provider, would be liable to discharge the applicable service tax liability, if any.

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

6.7 Under the circumstances, the fair conclusion which can be drawn is that just because the owner of the property is Director of the appellant, the renting service received by the appellant does not become taxable at their end being the service recipient. The rent paid by the appellant company in the present matter, therefore, cannot be charged to service tax under Notification No.30/2012-ST. The liability to pay service tax in the case would lie on the service provider. Hence, the order of adjudicating authority to charge service tax amounting to Rs.48,63,216/- under reverse charge mechanism under Rule 2(1)(d)(EE) of the Service Tax Rules, 1994 and Notification No.30/2012-ST, as amended, is not legally correct and fails to sustain on merits and requires to be set aside.When the demand fails to survive, there does not arise any question of interest or penalty in the matter.

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

6.9 However, the adjudicating authority, after considering the above decisions of the appellate authority, has observed that the said decisions cannot be relied upon on merit as the issue is not yet settled in view of the decision of the same appellate authority vide

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

6.10 It is also observed that the claim of refund of service tax paid by the Directors in the matter and subsequent refund of the same by the competent authority does not *ipso facto* fasten or cast any liability on the appellant to pay service tax on the rent paid by them to Directors under Reverse Charge Mechanism. The liability to pay tax under Reverse Charge is to be determined or ascertained in accordance of the provisions of law laid down in this regard. Merely because the tax paid by the service providers, Directors in this case, was refunded, does not create or shift the burden of tax on the service providers to the service recipients under Reverse Charge Mechanism. The provisions of law for payment

of tax under Reverse Charge does not prescribe or authorize such a view and hence the said observation of the adjudicating authority is not legally sustainable.

6.11 In view thereof, I find that the order of adjudicating authority to charge service tax amounting to Rs.48,63,216/- under reverse charge mechanism under Rule 2(1)(d)(EE) of the Service Tax Rules, 1994 and Notification No.30/2012-ST, as amended, is not legally sustainable on merits and therefore, the same is set aside.

(ii) Non-payment of service tax on commission income as reflected in the Form 26AS statements, received as sales incentive

7. It is observed from the Show Cause Notice that the appellant had received consideration in the name of Commission, in the form of 'BA Incentive' or 'Floor Staff Incentive' based on quantity of sales, as an incentive for marketing or promotion of the products of the service recipients. The appellant has contended that such amount was not towards commission but it was reimbursement of the employee incentive, for the sale of the particular brand, which is in the nature of pure reimbursement of expenses and not as consideration for providing any service. Simultaneously, it was also their contention that such amount was a part of the trade discount, which has been offered by the trader to them against purchase made by them over a period of time. I find that the above contentions were raised by the appellant during audit proceedings and subsequent adjudication proceedings also which were rejected for being without any support of evidences. The facts revealed from records and the evidences relied upon by the audit in the case clearly indicates that the amounts received as incentives in the case is nothing but consideration received from the service recipients for promotion of their products by the employees of the appellant. It is not disputed by the appellant that they were displaying in their showrooms merchandise of another person's brand, and the sales executives employed by them put in their efforts to promote and sell the various products on display, as part of their employment. It is also not the case of the appellant that the sales executives were not their employees and were free agents working independently for the client. Thus, it is quite apparent that the activity under reference is rendered by the appellant in their capacity only. The incentives are accorded by the brand owner to the appellant based on quantity of sales for the act of promotion of their products. Therefore, the activity of promotion of merchandise of another person's brand by the appellant would qualify as a service within the meaning of Section 65B(44) of the Act and the consideration received against the same would be taxable. Further, the fact that the service recipients were deducting TDS under Section 194H of the Income Tax Act, 1961, while making the above payments to the appellant, fortifies the department contention that the said payments are towards provision of service, especially in the absence of the any evidences to prove contra from the appellant's side. The appellant also could not bring on records any evidence in support of

their contention that the said receipts were reimbursement of the employee incentive for the sale of particular brand, which is in the nature of pure reimbursement of expenses. I agree with the findings of the adjudicating authority that the incentives, on the first hand, are not reimbursements and secondly, even if such incentives are considered as reimbursements, such reimbursement could be excluded from consideration only if the service provider is acting as a pure agent of the service recipient, subject to fulfillment of conditions stipulated under Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, which the appellant could not prove in the present case.

7.1 It is observed that the appellant's simultaneous contention of the said income being in the nature of trade discount is also not supported any evidences so as to merit any discussion even on facts. The case law relied upon by the appellant in this regard does not help their cause for being distinguishable on facts of the case, as rightly observed by the adjudicating authority.

7.2 In view thereof, in absence of any supportive evidences, I do not find any merit in the contentions raised by the appellant in the matter and accordingly the same are rejected and the decision of the adjudicating authority in this regard is upheld.

(iii) Short-payment of service tax in Financial Year 2012-13 on renting of immovable property by wrongly availing the exemption available to Small Service Providers

8. The demand on this issue is based on the taxability of the service/activity provided by the appellant, the payments/considerations of which were received as reflected in their Form 26AS statements which was discussed in the previous point at (ii) above. Having held that the said payments as reflected in their Form 26AS statements is consideration against the activity of promotion of merchandise of another person's brand by the appellant which would qualify as a service within the meaning of Section 65B(44) of the Act and the consideration received against the same would be taxable, the value of the said service provided by the appellant was also to be included for calculating the aggregate value of taxable services provided by them for the Financial Year 2011-12 for determining the eligibility of exemption for small service provider for the Financial Year 2012-13. By adding the value of the said services, the aggregate value of taxable services provided by the appellant during the Financial Year 2011-12 would exceed the threshold limit of Rs.10 lakhs stipulated for availing the exemption meant for small service providers and thereby, they would not be eligible for the said exemption for the Financial Year 2012-13. Therefore, the appellant was required to pay service tax on the entire value of taxable services provided by them during Financial Year 2012-13 without any exemption. Further, there is no denial from the appellant's side that their aggregative value of taxable services would exceed the threshold limit of Rs.10 lakhs in view of the addition of the taxable

value of services referred above. Under the circumstances, the demand in this regard is sustainable and is upheld. It is also observed that the appellant has not raised any separate specific contention against this demand in the appeal.

(iv) Non payment of service tax on the services of Promotion of other's brand by way of Advertisement

9. In this issue under dispute, the appellant was found receiving certain payments from various merchandise brand owners against debit notes issued by them, which on verification was found to be for adverting the merchandise of such brand owners. The audit viewed that such payments were received by the appellant for promotion of brand of others by way of advertisement, which falls within the ambit of 'service' as defined under Section 65B(44) of the Act and hence is taxable. The appellant has contended that such amounts were reimbursement of advertisement expenses and that the said expenses were towards print media and as such the same was not liable to service tax and if at all taxable, then also the situation is revenue neutral, as they are eligible to avail cenvat credit of such service tax payable.

9.1 It is observed that the appellant themselves is not disputing the fact that the receipts under dispute were against advertisement undertaken for their clients. What they tried to impress upon is that the said advertisement expenses were incurred by them on behalf of their clients viz. various merchandise brand owners and these expenses were recovered as reimbursements. However, they could not produce any evidence in support of their said contention. There are no expense invoices against the debit notes amounting to Rs.22,50,000/- during the year Financial Year 2014-15. The appellant has failed to produce any evidence in respect of such debit notes to establish that the income under the same are covered under the pure agent reimbursement charges. Therefore, the appellant's contention in this regard is not tenable for want of proof in support of their contentions. Further, the exemption from the payment of service tax under the "reimbursement" concept is claimable only where the service provider fulfils all of the stipulations prescribed for the "pure agent" under Service Tax (Determination of Valuation) Rules, 2006. The other contention of the appellant that the said expenses were towards print media and hence not taxable is also not acceptable as what is not taxable is not the activity of advertisement per se but the activity of sale of space or time for advertisement in print media. In the instant case, the amount has been recovered from the brand owners for advertising their merchandise. It is also not in dispute that the advertisement was done for promotion of the merchandise of the brand name owner. Therefore, the considerations under dispute would have to be considered as received against the activity of promotion of the merchandise of the brand name owner and such activity falls within the ambit of the term 'service' as defined under Section 65B(44) of the Act as discussed at issue (i) above and hence is taxable at the hands of the appellant.

Consequently, the appellant is liable to pay service tax on such consideration received. Hence, I uphold the demand of service tax in this regard and reject the contentions of the appellant for being devoid of any merits.

(v) Non-payment of service tax on the services under the head of 'write off income'

10. It is observed that the appellant had booked income under the head of 'write-off' amounting to Rs.34,72,221/- during the period from Financial Year 2012-13 to Financial Year 2016-17. This income pertained to the liability written off by them against credit vouchers issued to their customers. It was observed by the audit that during the course of trade of the appellant, whenever a customer returns any products/goods purchased by them from the showrooms of the appellant for any reason, the appellant did not refund the price of goods which is returned but instead issues a credit voucher equivalent to the price/value of goods/products returned with a specific period of validity, which can be redeemed by the customer in their future purchase from the appellant within the validity period. This is the policy of the appellant company for return of goods purchased from them. In some cases where such credit vouchers were issued, the customers did not turn up to redeem the credit voucher and in such cases, such credit vouchers are written off and the value of such credit vouchers written off are booked as income in their books of accounts.

10.1 It is the allegation in the show cause notice that the appellant had agreed to the obligation to take back the purchased merchandise and issue a credit voucher in lieu of the same and against the said act, the consideration received is in the form of returned merchandise which is subsequently converted to income since the credit voucher is written-off and thus, the appellant had agreed to do an act against a consideration which is booked as income under the head 'Written-off income' and that such an activity of agreeing to the obligation to do an act against consideration is covered under the ambit of declared services as defined at Section 66E(e) of the Act.

10.2 I do not find any merit in the above contention of the audit as the credit vouchers in the case are issued by the appellant against the goods/products sold and returned subsequently. In the case, the obligation on the part of the appellant to take back the sold merchandise arises from the terms of sale of the products/goods. When the goods/products purchased by a customer from the appellant is returned, the appellant is under obligation to refund the amount they charged/collected from the customer for the said goods/products so returned, as the sale that took place in respect of such goods/products gets nullified/cancelled on account of return of goods. The credit vouchers issued are in lieu of the amount to be refunded to the customer towards the price of goods that are returned. The amount involved in the credit vouchers is the amount payable by the appellant to the

customer against the goods/products returned by the customer, which they are obliged to do in terms of the sale agreement. It is the amount owed to the customer and not due from the customer. In the case by issuing a credit voucher, a liability stand created on the appellant to pay the amount refundable to the customer, which would be settled upon redemption of the voucher. It is this liability which was written off and booked as income in cases where the credit vouchers issued by the appellant are not redeemed by the customer. Therefore, the income that got generated here is against sale/proposed sale of goods. Such income booked on account of writing off of the liability against goods can in no way be equated as a consideration against the obligation to take back the sold merchandise. The obligation on the part of the appellant to take back the sold products/goods gets completed once the credit voucher was issued against the returned goods. The interpretation by the audit in this regard is far stretched one beyond the legislative intention of the deemed taxability envisaged under declared services under Section 66E(e) of the Act. In the present case, in fact, the appellant do not or rather cannot charge any amount from the customer for their act of agreeing to take back the sold merchandise. Facts revealed from records in the case does not indicate any such transaction or intention. No element of service is visible in such transactions by any stretch of imagination. In absence of any element of service, no taxability arises in the matter and consequently no service tax is payable on the write-off income booked by the appellant in their books of accounts. Therefore, the demand raised in this regard is liable to be set aside for being devoid of any merits and not sustainable in law both on facts and merits.

10.3 Further, it is observed that the adjudicating authority has confirmed the demand by holding that the amount written-off is nothing but additional consideration kept by the appellant from his customers and that in the era of negative list based service tax regime, any receipt of income of the service provider, on account of any service, in whatever name, is subject to service tax till it is not explicitly excluded or exempted and that the appellant has failed to prove his point, so the income shown as written off liabilities is subject to addition in the value of taxable services provided by the appellant and would attract due service tax liability. The adjudicating authority's above finding is tenable only when it is proved that there existed an element of service in the impugned transaction. The adjudicating authority has not examined or discussed this crucial factor as to what is the service provided by the appellant in the case. Needless to say, service tax is leviable only when there exists a service which is taxable. It is settled law that the onus to prove the taxability of an activity is on the department and not on the assessee. In the instant case, it is clearly evident that the write-off income booked by the appellant is in relation to activities of sale of goods and not any service, as discussed in the previous para. In the absence of any element of service in the impugned transaction, the above observation of the

adjudicating authority does not sustain before law. Similarly, the reliance placed by him on Section 67 of the Act in the matter does not help his cause when there is no service.

10.4 In view thereof, it is held that the impugned order confirming demand of service tax on the write-off income booked by the appellant in the case is not sustainable in law and is therefore set aside. When the demand fails, there does not arise any question of interest or penalty in the matter.

(vi) Short payment of service tax in the Financial Year 2015-16 noticed on reconciliation of financial accounts.

11. The appellant has not challenged the demand of service tax of Rs.403/- confirmed on this point. Therefore, on the basis of facts available on record, the same is to be upheld and accordingly I do so.

12. Regarding the contention of the appellant on invocation of extended period for the demand, it is observed that the facts of the appellant providing taxable services by way of promotion of the merchandise of different brand name owner, receipt of consideration against the same and non-payment of service tax thereon came to be detected only during the course of the audit conducted by the department. The details of the said services provided were not disclosed by the appellant in their ST-3 Returns filed for the relevant period. Therefore, it appeared that all these material information has been concealed from the department by the appellant deliberately with an intent to evade payment of service tax . The judicial pronouncement referred in para 8 of the Show Cause Notice clearly uphold the right of the department to invoke extended period of limitation for demand in such cases. In view thereof, it is held that the extended period of limitation is rightly invoked in the case and the appellant's contention in this regard is not tenable and is, therefore, rejected.

13. In cases where the demand is upheld, it naturally follows that interest chargeable as per Section 75 of the Act also would be payable. Further, when it is found that there existed sufficient essential ingredients in the matter to invoke the extended period of limitation for recovery of the service tax not paid/short paid, the penalty imposed under Section 78 of the Finance Act, 1994 to the extent it relates to demand upheld also stand justified for the same reasons. The appellant having failed to properly assess the service tax liability and to reflect/disclose the Commission Income and Brand Promotion Income (Advertisement) in their ST-3 Returns, has rendered themselves liable to penalty under the provisions of Section 77(2) of the Act for their failure to file correct details in their ST-3 Returns. Therefore, the penalty imposed Section 77(2) of the Act vide the impugned order is upheld.

14. In view of my above discussions, the impugned order passed by the adjudicating authority is set aside to the extent it relates to demand of service tax under reverse charge mechanism on rent paid to the Directors of the appellant and demand of service tax on the write-off income booked by the appellant in the case. The impugned order is upheld with respect to the demand of service tax on the remaining four points along with interest and imposition of penalties. Accordingly, the appeal filed by the appellant is partly allowed and partly rejected to the same extent.

15. 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.

29th April, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 29.04.2021.

Attested

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

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

To

M/s Jade Blue Lifestyle India Ltd.,
Pariseema Complex, UP-25 to 28,
Opposite IFC Bhavan,
Opposite Vaishali Complex,
C.G. Road,
Ahmedabad-380 006.

Copy To:-

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