आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065 - टेलेफैक्स07926305136

DIN : 20230364SW0000510878

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/3069,3070/2022/9825-80

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-190 to 191/2022-23**
दिनाँक Date : **24-03-2023** जारी करने की तारीख Date of Issue 27.03.2023

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

ग Arising out of OIO No. **07/CGST/Ahmd-South/JC/NB/2022-23** दिनाँक: **27.06.2022** passed by Joint Commissioner, CGST, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Arth I Soft**
   B-201, Safal Pegasus,
   Anandnagar Road, Vejalpur,
   Ahmedabad – 380015

2. **Shri Siddharth M. Panchal**
   Proprietor, M/s Arth I Soft
   B-201, Safal Pegasus,
   Anandnagar Road, Vejalpur,
   Ahmedabad – 380015

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

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

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

(ii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे हो माल की प्रकिया के दौरान हुई हो।

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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

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

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

1ण सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट), के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

a. *(Section)* खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:

(xciv) amount determined under Section 11 D;
(xcv) amount of erroneous Cenvat Credit taken;
(xcvi) 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

Two appeals have been filed by the below mentioned appellants (hereinafter referred to as Appellant Nos.1 and 2 respectively, as per details given in table below) against the Order in Original No. 07/CGST/Ahmd-South/JC/NB/2022-23 dated 27-06-2022 [hereinafter referred to as "*impugned order*"] passed by the Joint Commissioner, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

S.No.	Name and address of the appellant	Appeal No.
1	M/s. Arth I Soft, B-201, Safal Pegasus, Anandnagar Road, Vejalpur, Ahmedabad – 380015. **Appellant No. 1**	GAPPL/COM/STP/3070/2022
2	Shri Siddharth M. Panchal, Proprietor, M/s. Arth I Soft, B-201, Safal Pegasus, Anandnagar Road, Vejalpur, Ahmedabad – 380015. **Appellant No. 2**	GAPPL/COM/STP/3069/2022

2. Briefly stated, the facts of the case are that the Appellant No. 1 had obtained Service Tax Registration No. ABBFA0128RSD001 on 16.12.2015 for providing Online Information and Database Access and/or Retrieval Service (OIDAR) through Computer Network and Information Technology Service. Intelligence gathered by the officers of Directorate General of Goods and Service Tax Intelligence, Ahmedabad (hereinafter referred to as "DGGI") indicated that Appellant No.1 had evaded payment of service tax during the period from 01.10.2014 to 30.11.2016 by declaring the value of taxable service, i.e. OIDAR, under the category of Export of Service. In terms of Rule 6A(1) of the Service Tax Rules, 1994, the provision of any service shall be treated as export of service, when the place of provision of service is outside India. During the said period, as per Rule 9(b) of the Place of Provision of Service Rules, 2012, the place of provision in respect of OIDAR was the location of the service provider. It, therefore, appeared that the claim of the Appellants regarding export of service was not admissible.

2.1 On the basis of the said intelligence, investigation was initiated against the Appellants. It was found that the Appellants had classified the service provided by them as Information Technology Software service during the period from October, 2015 to March, 2016. Thereafter, the Appellants classified the service provided by them under OIDAR services. The investigation revealed that Appellants were providing service by way of developing games and uploading the same on the portal/cloud of Google Play and Apple so as to enable any user to download the game, which cannot be considered as export of service. Hence, they were taxable in terms of Rule 9(b) of the Place of Provision of Service Rules, 2012 (hereinafter referred to as POPS). Therefore, it appeared that no exemption from payment of service tax was available on the said services provided by the Appellants, as their location was in India. Therefore, the Appellants were liable to pay service tax on such services provided by them.

2.2 It appeared that the Appellants had furnished their ST-3 returns for the period from June, 2013 to March, 2017 under Service Tax Registration No. ASXPP1794MSD001 (Proprietorship firm), while the returns for the period from October, 2015 to June, 2017 were filed under Service Tax Registration No.AABFA0128RSD001 (Partnership firm).

2.3 On conclusion of the investigation, the Appellants were issued Show Cause Notice bearing No. DGGI/AZU/Gr.D/36-19/2020-21 dated 26.06.2020, wherein it was proposed to :

a) Consider the amount of Rs.11,66,29,955/- charged and received under Registration No. AABFA0128RSD001 and Rs.28,15,197/- under Registration No. ASXPP1794MSD001 as taxable value for providing taxable service in terms of Section 66B of the Finance Act, 1994 read with Rule 9(b) of the POPS, 2012.

b) Demand and recover Service Tax amounting to 1,58,32,445/- in respect of Registration No. AABFA0128RSD001 and Rs.4,05,459/- in respect of Registration No. ASXPP1794MSD001 under the proviso to Section 73 (1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994.

c) Impose penalty under Section 77(1)(b) of the Finance Act, 1994.

d) Impose penalty under Section 76 and/or 78 of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned order wherein,

A. The amount of Rs.11,66,29,955/- charged and received under Registration No. AABFA0128RSD001 and Rs.28,15,197/- under Registration No. ASXPP1794MSD001 were held to be taxable value for providing taxable service in terms of Section 66B of the Finance Act, 1994 read with Rule 9(b) of the POPS, 2012.

B. The demand of service tax amounting to Rs.1,58,32,445/- in respect of Registration No. AABFA0128RSD001 and Rs.4,05,459/- in respect of Registration No. ASXPP1794MSD001 were confirmed along with Interest.

C. Penalty amounting to Rs.10,000/- each, was imposed on Registration No. AABFA0128RSD001 and ASXPP1794MSD001.

D. Penalty amounting to Rs.1,58,32,445/- and Rs. 4,05,459/- was imposed on Registration No. AABFA0128RSD001 and Registration No. ASXPP1794MSD001, respectively.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the Appellants have filed the present appeal on the following grounds :

i. The entire finding of the adjudicating authority at Para 24 of the impugned order is far from truth. The adjudicating authority has stated that the SCN has quantified the demand separately for proprietorship and partnership concerns in a single SCN, the said act is *per se* void. According to Section 65B read with Section 73 of the Finance Act, 1994, two separate notices are required to be issued as both entities are different.

ii. No separate notice has been issued for the partnership firm and, hence, the allegations on the partnership firm are void *ab inito* and proceedings against the partnership firm should not be carried forward.

iii. Reliance is placed upon the judgment in the case of Brindavan Beverages (P) Ltd. – 2007 (213) ELT 487 (SC).

iv. Section 73 of the Finance Act, 1994 makes it clear that every person who is liable to pay tax has to obtain a service tax registration and as separate registrations are made, separate SCNs must be issued. Reliance is placed upon the judgment in the case of Punjab Vs. Jullundur Vegetables Syndicate – (1966) 2 SCN 457.

v. The major income earned by them is nothing but revenue earned from Google Ads. The income is not earned from selling online games or otherwise. They provide developed game to Google Play of Apple Store free of cost and do not earn any income when the game is uploaded on the international server as no payment or consideration is made by Google or Apple.

vi. Google places ads on the games shared by them along with permission to monetize the game by placing ads. For this revenue sharing arrangement, they are paid a portion of the revenue from ads. It is Google and Apple who decide which ad needs to be placed in which game and all the terms are decided by them. Their server is not in India.

vii. They received the income in USD and, therefore, all the conditions for the transaction to be considered as export are fulfilled.

viii. As they receive revenue from the ads and these ads are played by Google/Apple while playing the games, the service cannot be considered to be OIDAR and as the same is exported outside India, it is not liable for service tax.

ix. In simple words, they are selling offline games but without any consideration and do not earn any income. However, they are given revenue sharing for giving the right to use the game for ad purpose to Google whose server is outside India.

x. All the conditions of Rule 6A of the Service Tax Rules, 1994 are fulfilled.

xi. The revenue earned from Ad Sense is not an online game and it is nothing but export of service as none of the ingredients of OIDAR are fulfilled. Therefore, the same is exempt from the whole of service tax.

xii. The demand is confirmed without considering that the new definition of OIDAR, which was brought in to effect from 01.12.2016, whereas the demand has been raised upto November, 2016 i.e. the period prior to the amendment.

xiii. The SCN has referred to the definition of OIDAR applicable from 01.12.2016. Hence, the SCN is wholly erroneous and is liable to be quashed.

xiv. Reliance is placed upon the judgment in the case of Asstt. Collector of C.Ex., Vs. National Tobacco of India Ltd. – 1978 (2) ELT J416; Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corporation (1948) 1 KB 223; Abhirup Exports (P) Ltd. Vs. UOI – (2014) 46 GST 1 (Bombay).

xv. The service provided by them is Information Technology Service and not OIDAR. It is clear from the definition of OIDAR as per sub rule 2 of the POPS, 2012 and Section 67(75) of the Finance Act, 1994, that there must be access or retrieval by the person providing the service to another person for the same to fall under OIDAR.

xvi. In the present case, they upload the game on platform of Google/Apple, who in turn provide the service to the users. This has been accepted in the outcome of the investigation at Para 6.3 of the SCN. The platform from where the game is downloaded is not theirs.

xvii. Reliance is placed upon the judgment in the case of Photolibrary India (P) Ltd. V. Commissioner of Service Tax, Mumbai-I – 2017 (7) GSTL 386 (Bombay) wherein it was held that provision of access to the data or allowing retrieval of data from the website is necessary for the same to fall under OIDAR service.

xviii. In the present case, the access/retrieval is controlled by Google/Apple. A user must have account generated by Google/Apple to download the game. They nowhere control the access or retrieval of the game.

xix. It is clear from the definition of Information Technology Software (ITS) that the same is representation of instructions of data allowing interactivity to as user. In a game, all of the essentials of ITS are present. Hence, it squarely falls within that category. Also, the ST-3 returns are filed under the category of ITS.

xx. The service provided by them does not fall under the purview of OIDAR services but under ITS.

xxi. They quote the category of service in the ST-3 return only for statistic reference. Reliance is placed upon Circular No.165/16/2012-ST dated 20.11.2012. The wrong classification of ITS under OIDAR would not result in liability to pay service tax.

xxii. They have sold the source code for which they had received convertible foreign exchange. Where the same is sold, it is not a service but sale of goods. The adjudicating authority mis-understood the facts and demanded service tax under OIDAR by just referring to their ITR.

xxiii. The income received from Google Ad Sense is not liable to be taxed as OIDAR as it is sale of goods and not provision of service. Reliance is placed upon the judgment in the case of Kasturi & Sons Ltd. Vs. CCE, Chennai North – 2019 (25) GSTL 449 (Tri.-Chennai).

xxiv. Where a SCN is issued by DGGI, only DGGI can adjudicate the matter and they cannot direct the Commissioner to adjudicate the matter.

xxv. None of the administrative Notifications issued in the pre-GST era can be said to survive unless it is expressly spelt out in the repealing statute.

xxvi. Reliance is placed upon the judgment in the case of Air India Vs. UOI-(1995) 4 SCC 734; Naresh Sukhwant Vs. Commissioner of Customs (Adj.) – 2003 (156) ELT 214; Auto Ignition Ltd. Vs. Commissioner of Customs – 2002 (144) ELT 631; National Transport Co. Vs. Commissioner of Customs –2003 (152) ELT 373; Consolidated Enterprises Vs. Commissioner of Customs – 2001 (137) ELT 1223; C.M. Textile Vs. Commissioner of Customs – 2004 (168) ELT 132.

xxvii. The SCN is issued for the period from 01.04.2014 to 30.11.2016 and the impugned order has confirmed the demand by invoking the extended period of limitation.

xxviii. Extended period of limitation is not invokable as there is no suppression of facts with an intention to evade payment of tax. In the SCN, nowhere it is specifically established that they had suppressed the facts or indulged in wilful misstatement or fraud or collusion with intent to evade payment of tax.

xxix. Reliance is placed upon the judgment in the case of Oriental Insurance Company Limited – 2021(5) TMI 869; Gannon Dunkerly & Co. Ltd. – 2020 (12) TMI 1096; Rolex Logistic Private Limited Vs. CST – 2009 (13) STR-147 (Tri.-Bang.); Om Sai Professional Detectives and Securities Service Pvt. Ltd. Vs. CCE – 2008 (12) STR-79 (Tri.-Bang.); Continental Foundation Jt. Venture Vs. CCE, Chandigarh-I – 2007 (216) ELT 177 (SC).

xxx. The non payment of service tax was on account of bona fide belief and involved interpretation of law.

xxxi. Reliance is placed upon the judgment in the case of CCE, Bangalore Vs. ITC Limited – 2010 (257) ELT 514 (Kar.); Concept Motors Pvt. Ltd. Vs. CST, Ahmedabad – Final Order No. A/11717/2018 dtd. 07.08.2018; CCE, Jaipur Vs. Rajasthan Renewable Energy Corporation Limited – 2018 (15) GSTL 661 (Raj.); Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur – 2013 (288) ELT 161 (SC).

xxxii. As service tax is not required to be paid, no interest under Section 75 can be demanded from them.

xxxiii. Reliance is placed upon the judgment in the case of Jain Kalar Samaj – 2015 (38) STR 995 (Tri.-Mumbai.); Sundaram Textiles Ltd. – 2014 (36) STR 30 (Mad.)

xxxiv. Without prejudice to the above, the benefit of cum-duty valuation is available to them. Reliance is placed upon the catena of judgments in this regard.

xxxv. Penalty cannot be imposed mechanically since the essential ingredients for levy of penalty are missing.

xxxvi. Reliance is placed upon the judgment in the case of Hindustan Steel Vs. State of Orissa – 1978 (2) ELT (J159); Mahadev Logistics Vs. Cus. & C.Ex. Settlement Commission, New Delhi – 2017 (3) GSTL 56 (Chhattisgarh); UOI Vs. Rajasthan Spinning and Weaving Mills – 2009 (238) ELT 3 (SC).

xxxvii. Penalty under Section 77 is not applicable in the current case. The non payment of service tax was on account of genuine belief of non levy of tax and involves interpretation issue.

xxxviii. Penalty under Section 78 is not imposable as there is no suppression of facts. Reliance is placed upon the judgment in the case of YCH Logistics (India) Pvt. Ltd. Vs. CCE and CST, Bangalore – 2020 (3) TMI-809; Bumi

Geo Engineering Ltd. Vs. CST, Chennai-III – 2018 (7) TMI-616; Satish Kumar Contractor Ltd. Vs. CCE, Panchkula – 2018 (3) TMI 1429; Ishvarya Publicities Pvt. Ltd. Vs. CST, Chennai-II – 2016-TIOL-1409-CESTAT-MAD.

xxxix. Penalty cannot be imposed where there is interpretation of law. Reliance is placed upon the judgment in the case of Hindustan Steel Ltd. Vs. State or Orissa – 1978 (2) ELT J159 (SC); Gujarat Guardian Limited – 2016 (46) STR 737 (Tri.-Ahmd.) and Fascel Limited – 2017 (52) STR 434 (Tri.-Ahmd.)

5. Personal Hearing in the case was held on 12.01.2023. Shri Bishan Shah, Chartered Accountant, appeared on behalf of Appellants for the hearing. He reiterated the submissions made in appeal memorandum.

6. The Appellants have subsequently filed additional written submission on 01.02.2023, wherein it was submitted that :

- The law referred to in the SCN is not the law that was in force during the period of demand.
- The CBIC vide Circular No.202/16/2016-ST had itself accepted that there has been a change in law for which the circular has been issued and therefore, reliance placed by the adjudicating authority on the judgment in the case of Ratan Melting – 2008 (231) ELT 22 (SC) is misplaced.
- The service provided by them is ITS and not OIDAR. Reliance is placed upon the judgment in the case of Phillips Electronics India Vs. Commissioner of Service Tax, Chennai – 2019 (21) GSTL 450 (Tri.-Chennai) and PVR Limited Vs. Commissioner of Service Tax, Delhi – 2021 (55) GSTL 435 (Tri.-Del.).

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions as well as submissions made at the time of personal hearing and the material available on records. The issue before me for decision is whether the service provided by the Appellants are covered under Information Technology Service, in short ITS, as claimed by the appellant, or Online Information

Access and Data Retrieval Services, in short OIDAR as contended by the department in the SCN. The demand pertains to the period October, 2014 to November, 2016.

8. It is observed that the demand of service tax has been raised against the Appellants in the capacity of a Proprietary firm (Registration No. ASXPP1794MSD001) and Partnership firm (Registration No. ABBFA0128RSD001). The appeal filed by Appellant No. 1 is in respect of the Partnership firm while the appeal filed by Appellant No. 2 is in respect of the Proprietorship firm. However, as the issue involved in both the appeals are the same, they are being taken up together for decision.

9. Before dealing with the merits of the appeals, I proceed to deal with the primary contention of the Appellants regarding issuance of a single SCN to two separate entities. In this regard, it is observed from Para 18 of the impugned SCN that both the Proprietary Firm as well as the Partnership Firm, with details of their Service Tax Registration Number, have been called upon to show cause against the action proposed to be taken in terms of the impugned SCN. Since the Appellants, in their individual capacities, have been put to notice, and asked to show cause in respect of the action proposed to be taken against them, it cannot be said that a single SCN has been issued to two different legal entities. Accordingly, I do not find any merit in this contention of the Appellants, and, hence, the same is rejected as being devoid of merit.

10. As the dispute pertains to whether the services provided by the Appellants are covered under OIDAR service, as contended by the department, it would be pertinent to refer to the definition of OIDAR services, as it existed during the period of dispute i.e. October, 2014 to November, 2016, as per Rule 2(l) of the POPS, 2012 and the same is reproduced below :

> " "online information and database access or retrieval services" means providing data or information retrievable or otherwise, to any person, in electronic form through a computer network".

10.1 From the above definition of OIDAR services, it is observed that it covers within its ambit the providing of data or information in electronic form through a computer network. In the instant case, it is observed that the Appellants are developing games and making them available to the users through Google Play/Apple Store online platform. At the outset it needs to be stated that uploading or downloading of games from an online portal can under no stretch of imagination be equated with activities of providing data or information, retrievable or otherwise. On this very count the services provided by the Appellants stand excluded from the purview of OIDAR services.

11. It is further observed that the department has, in the impugned SCN, and the adjudicating authority has, in the impugned order, relied upon the definition of OIDAR services as per Rule 2(1)(ccd) of the Service Tax Rules, 1994. In this regard, I find that the Government had, vide Notification No.46/2016-ST dated 09.11.2016, amended the POPS, 2012 as well as the Service Tax Rules, 1994. The text of the said Notification is reproduced below :

> "1. (1) These rules may be called the Place of Provision of Services (Amendment) Rules, 2016.
>
> (2) They shall come into force on the 1st day of December, 2016.
>
> 2. In the Place of Provision of Services Rules, 2012,-
>
> (i) in rule 2, for clause (l), following clause shall be substituted, namely:-
> '(1) "online information and database access or retrieval services" has the same meaning as assigned to it in clause (ccd) of sub-rule 1 of rule 2 of the Service Tax Rules, 1994;
>
> (ii) in rule 3, in the proviso, after the words "in case", the words "of services other than online information and database access or retrieval services, where" shall be inserted;
>
> (iii) in rule 9, clause (b) shall be omitted."

11.1 Consequent to the amendment of Rule 2(l) of the POPS, 2012, the OIDAR services has the same meaning as in clause (ccd) of sub-rule (1) of Rule 2 of the Service Tax Rules, 1994, which is reproduced below :

" '(ccd) "online information and database access or retrieval services" means services whose delivery is mediated by information technology over the internet

or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology and includes electronic services such as, -

(i) advertising on the internet;
(ii) providing cloud services;
(iii) provision of e-books, movie, music, software and other intangibles via telecommunication networks or internet;
(iv) providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;
(v) online supplies of digital content (movies, television shows, music, etc.);
(vi) digital data storage; and
(vii) online gaming;';"

11.2 The above definition of OIDAR in terms of Rule 2(1) (ccd) was introduced vide Service Tax (Fourth Amendment) Rules, 2016 by way of Notification No. 48/2016-ST dated 09.11.2016. From a plain reading of the definition of OIDAR service as per the amended provisions of Rule 2(1)(ccd) of the Service Tax Rules, 1994, it is observed that it is a comprehensive definition encompassing a large number of services provided online. Further, it specifically includes online gaming as well as supply of online digital content viz. movies, television shows, music etc. Also e-books, software and other intangibles are covered. Further, it has significantly expanded the scope of OIDAR inasmuch as the earlier definition of OIDAR has been only a small part of the amendment. The games developed by the Appellants and hosted by Google Play/Apple Store would be covered by the ambit of OIDAR services as per the amended definition only.

11.3 However, as specifically stated in Notification No. 46/2016-ST dated 09.11.2016 and Notification No. 48/2016-ST dated 09.11.2016, the amendments come into force from 01.12.2016. In view of the Notifications specifying 01.12.2016 as the date on which the amended provisions come into force, these amended provision are not applicable to the period up to 30.11.2016. I find that the dispute in the instant case pertains to the period from October, 2014 to November, 2016. Therefore, the amended provisions of the POPS, 2012 as well as of the Service Tax Rules, 1994 are not applicable to the dispute on hand and these have to be decided in terms of the provisions as they stood prior to 01.12.2016. The adjudicating authority has clearly erred in adjudicating the impugned SCN by applying the

amended legal provisions, which were not in force during the period of dispute.

12. It is further observed that the Appellants have claimed that the income earned by them is not from the persons downloading the games developed by them and hosted on Google Play/Apple Store. The downloading of the games is free and the income earned by them is from the revenue generated by the ads placed by Google Play/Apple Store on the games hosted on their platform. The adjudicating authority has, at Para 27.1 of the impugned order, recorded his finding that "*I find that, it is an admitted fact that the assessee is getting revenue. The revenue is given by Google or Apple under whose platform the games are uploaded. Thus, it is as clear as day light that the revenue earned by the assessee is in reward to the games uploaded in the platform of Google or Apple*". The adjudicating authority has, thereafter, proceeded to hold at Para 27.2 of the impugned order that "*Thus, the revenue earned from Google and Apple is towards supply of games which is definitely Online Information and Database Access or Retrieval service and hence the assessee is liable to pay service tax on the same*".

12.1 In my considered view the above findings and conclusion arrived at by the adjudicating authority are erroneous and not supported by facts. The income earned by the Appellants are from the revenue generated by placing ads in the games developed by the Appellants, which is shared between Google/Apple and the Appellants. There is no material on record which indicates that the Appellants are being paid by Google/Apple for supply of the games. Neither is there any material which establishes that Google/Apple are generating revenue from merely allowing customers to download the games. While there may be games or certain features of games which are available to customers upon payment only, no evidence has been brought on record to indicate that in the case of the Appellants, income has been earned by them from customers downloading the games or some of its features upon payment. In the absence of any such evidence, I am inclined to agree with the contention of the Appellants that the income earned by

them is from the revenue generated by the ads placed in their games by Google/Apple. As the games, *per se* do not generate any revenue on their own, it cannot be said that the Appellants are getting consideration towards the games developed by them and hosted on the platform of Google/Apple.

12.2 It is also pertinent to note that the revenue generated by Google/Apple is not from the customers downloading the games from their platform. The revenue is generated from the advertisers who, through Google/Apple, place their advertisement in the games downloaded by the customers. To be a taxable service there has to be an element of service provided by one person to another for a consideration. In the instant case, it is seen that neither the SCN nor the impugned order has specified as to who is the service recipient. From the facts of the case, it is evident that neither Google nor Apple are the service recipient as they are merely providing a platform for hosting the games developed by the Appellants. Further, the ultimate end-user who downloads the games, pays neither Google/Apple nor the Appellants for downloading the games. Consequently, it cannot be alleged that any consideration has been received by the Appellants towards the games developed and hosted by them on the online platforms. Therefore, the allegation that the Appellants are providing OIDAR services and getting consideration for the same is totally mis-conceived.

12.3 In view of the above findings and discussions, I am of the considered view that the services provided by the Appellants cannot be considered as OIDAR services in terms of the definition of OIDAR services as it existed during the period under dispute i.e. October, 2014 to November, 2016.

13. As the services provided by the Appellants are not covered under OIDAR services during the relevant time, the provisions of Rule 9 (b) of the POPS, 2012 have no applicability to the facts of this case. Accordingly, the finding of the adjudicating authority that the services provided by the Appellants does not satisfy condition No. (d) of Rule 6A of the Service Tax Rules, 1994 and thus, does not qualify as export of services, is entirely devoid of merit.

14. In view of the above discussions, I am of the considered view that the adjudicating authority has erred in holding that the services provided by the Appellants are covered under OIDAR services and that the services provided by the Appellants do not qualify as export of services. The adjudicating authority has, therefore, erred in confirming the demand of service tax, vide the impugned order, against the Appellants. Accordingly, the demand of service tax confirmed against the Appellants is set aside as not being legally sustainable.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeals filed by the Appellants stands disposed of in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 24.03.2023.

Attested:

(N.Suryanarayanan. Iyer)
Assistant Commissioner (In situ),
CGST Appeals, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Arth I Soft,
B-201, Safal Pegasus,
Anandnagar Road,
Vejalpur, Ahmedabad – 380015. — Appellant No.1

Shri Siddharth M. Panchal,
M/s. Arth I Soft,
B-201, Safal Pegasus,
Anandnagar Road,
Vejalpur, Ahmedabad – 380015. — Appellant No.2

The Joint Commissioner,
CGST,
Commissionerate : Ahmedabad South. — Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.

3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South. (for uploading the OIA)
4. Guard File.
5. P.A. File.