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

सत्यमेव जयते

NATION TAX MARKET

☎ 26305065-079 : टेलेफैक्स26305136 - 079 :

DIN-20220664SW000000CE4B

स्पीड पोस्ट

क फाइल संख्या : File No :GAPPL/COM/STP/1384/2021/1730 - 1734

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-004/2022-23**
दिनाँक Date : 26.04.2022 जारी करने की तारीख Date of Issue : 16.06.2022.

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

ग Arising out of Order-in-Original No.CGST-VI/Dem-13/Dutron/DC/NS/2020-21 dated 29.01.2021 (issued on 10.02.2021) passed by the Joint Commissioner (In-situ), Central GST Division-VI, Ahmedabad South Commissionerate.

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

M/s Dutron Plastics Ltd.,
Plot No.A-1/2 & A-1/3,
GIDC Estate, Phase-I,
Vatva, Ahmedabad-382445.

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

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

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(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.

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(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

M/s Dutron Plastics Ltd., Plot No.A-1/2 & A-1/3, GIDC Estate, Phase-I, Vatva, Ahmedabad-382445 (hereinafter referred to as "*appellant*") has filed the present appeal against the Order-in-Original No.CGST-VI/Dem-13/Dutron/DC/NS/2020-21 dated 29.01.2021 issued on 10.02.2021 (hereinafter referred to as "*impugned order*") passed by the Joint Commissioner (In-situ), CGST Division-VI, Ahmedabad South (hereinafter referred to as "*adjudicating authority*").

2. The facts of the case, in brief, are that based on an audit objection, Show Cause Notices (hereinafter referred to as "*SCN*") dated 09.06.2017 and 16.03.2018 were issued to the appellant, alleging non-payment of service tax on Director's remuneration and commission under reverse charge mechanism, as stipulated under Notification No.30/2012-ST dated 20.06.2012 read with Notification No.45/2012-ST dated 07.08.2012 for the period from Financial Year (F.Y.) 2012-13 to F.Y. 2015-16 and from April-May 2016 to June-March 2017 respectively. The said SCNs were decided against the appellants and the appellants carried the matter before the Commissioner (Appeals), Ahmedabad who vide Order-in-Appeal No.AHM-EXCUS-001-APP-070-2019-20 dated 29.11.2019 set aside the demand of service tax on the remuneration paid to the Directors and remanded the matter in respect of commission / incentive/bonus to the adjudicating authority. Thereafter, another periodical SCN dated 28.03.2019 was issued to the appellant for the period from April, 2017 to June, 2017 demanding a service tax of Rs.2,02,500/- along with interest and penalty on the similar issue. The said SCN dated 28.03.2019 was decided by the adjudicating authority vide the impugned order wherein she had confirmed the demand of service tax along with interest and imposed a penalty equivalent to service tax confirmed under Section 78(1) of the Finance Act, 1994 (hereinafter referred to as "*the Act*") with an option of reduced penalty.

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

- The order is passed in routine and superfluous manner without taking into consideration the facts and legal aspect of the issue;
- The order has been passed against the principles of judicial discipline as the decision of the Commissioner (Appeals), Ahmedabad passed on the similar issue in their own case was not followed;
- The order has been passed without proper examination and verification of the facts and without taking into consideration the evidences furnished by the appellants. The Joint Commissioner has adjudicated the matter without fairly discussing the submissions of the appellant and without rebutting the contentions

substantiated with the support of precedent decisions. As such, order impugned is ex-facia illegal and needs to be quashed and set aside;

- As per Section 65B(44) (b) of the Finance Act, 1994, the activity or function undertaken by an employee for the employer is not covered under the meaning of 'service'. The Directors were under contractual employment with the appellant and were paid salary and as such the relationship between appellant and the Directors is of employer and employee;
- The certificate issued by the appellant to Directors under Form No.16 under the provisions of Section 203 of the Income Tax Act, 1961 for tax deduction on salary, clearly establishes the relationship between the appellant and its Directors is of employer and employee. In light of the direct evidence of Directors being employed with the appellant, the demand needs to be quashed and set aside;
- The Joint Commissioner has passed a cryptic order in disregard to the facts and the order of Hon'ble Commissioner (Appeals). She has adjudicated the matter by reproducing the findings recorded in earlier OIO No.CGST/DN-VI/04 to 05/Dem/SKC/Dutron/19-20 dated 30.04.2019 for the past period;
- In the SCN dated 09.06.2017, the two Directors stated to have been paid commission in addition to the salary and in the Extract of Annual Report under Form No.MGT-9 for the financial year 2012-13 to 2015-16, salary and commission were separately shown. Accordingly, the amount of commission paid to the Directors was not considered as salary by Hon'ble Commissioner (Appeals). However, in the present case, Directors were paid only salary;
- Copy of Form No.MGT-9 Extract of Annual Report for the financial year 2017-18 is submitted on perusal of which it would be seen that in the particulars of remuneration to Managing Director, Whole-time Directors and / or Manager, the Directors were paid salary only. In the column of commission as % of profit, zero amount has been shown. Similarly, the particulars of special remuneration the amount has been shown zero. In the light of the evidence in Form No.MGT-9, the order passed by the adjudicating authority is against the facts and merely a copy-paste of earlier order;
- with regard to the contention of the adjudicating authority that the remuneration paid to the directors were shown under remuneration and commission heading instead of the head 'Salary' it was submitted that as per Company Law, remuneration paid to Directors are required to be shown separately in Balance Sheet under the heading of remuneration even if the same is salary in as much as salary paid to Directors is required to be published for share holders;
- As per Section 17(1)(iv) of Income Tax Act, "salary" includes wages, fees, commissions, profits in lieu of, or in addition to salary, advance of salary, annuity or pension, gratuity, payments in respect of encashment of leave, etc. However,

merely because salary has been shown under the head of remuneration and commission, the nomenclature of salary under the law does not change. Further, from Extract of Annual Report filed under Form-MGT-9 for the financial year 2017-18, it clearly establishes that Directors were paid only salary. The adjudicating authority has passed the order on the basis of findings in the earlier order without verifying the facts pertaining to SCN before her;

- The Joint Commissioner while accepting the fact Directors are employees in light of the certificate issued under Income Tax Act, however, discarded Form No.16 without any basis leave apart legal basis. Form No.16 is a certificate issued in compliance to provisions of Section 203 of the Income Tax Act, 1961. As such the importance of the legal document cannot be discarded arbitrarily, more specifically when learned adjudicating authority has failed to substantiate her contention with any provision of law;
- The Joint Commissioner while discarding Form No.16 has held that "but merely issuing Form No.16 is not enough to say that the said Directors were their employees". However, as per Hon'ble Tribunal decision in the case of PCM Cement Concreate Pvt. Ltd. Vs. CCE&ST, Siliguri [2018(9) GSTL-391 (Tri.-Kolkata)] which was followed in the case of Maithan Alloys Ltd. Vs. CCE&ST, Bolpur [2020 (33) GSTL – 228 (Tri.-Kolkata)], Form-16 is vital evidence to prove relationship of Director and Company as employee and employer;
- Though the adjudicating authority has reproduced Para 7(ii) and 8 of the OIA No.AHM-EXCUS-001-APP-070-2019-20 dated 19.11.2019, she has not discussed the applicability or non applicability of such order. In light of the order of the Commissioner (Appeals), SCN ought to have been dropped in as much as Hon'ble Commissioner (Appeals) in Par 7(ii) of his order has held that service tax would leviable on commission/incentive/bonus/special remuneration paid to the Directors. However, in Para 7(i) of the OIA, the Hon'ble Commissioner (Appeals) set aside the demand of service tax on the remuneration paid to the Directors as salary. It is submitted that for the period 2012-13 to 2104-15, two Directors were paid commission in addition to the remuneration and accordingly, the Hon'ble Commissioner (Appeals) in Para 7(ii) has held that service tax would be leviable on such commission paid to the Directors. However, for the period April 2016 to March 2017, the Directors were paid only salary and no commission was paid and accordingly demand was set aside. In the present case also, the Directors of the appellants were paid salary only. Therefore, following the order of Hon'ble Commissioner (Appeals) demand ought not to have been confirmed;
- The adjudicating authority in Para 21 of the order has made a bald statement that as per Section 2(94) of the Companies Act, 2013 whole-time Directors can be

termed as employees and non-whole-time Directors are not employees. However, learned Joint Commissioner not given any finding in respect of appellant's case. In fact, Hon'ble Commissioner (Appeals) in his OIA No.AHM-EXCUS-001-APP-070-2019-20 dated 29.11.2019 at Para 7(i) has held that he had perused the extract of Resolutions, produced before him in the identical issue, and found that all the three Directors namely Shri Rasesh H. Patel, Shri Alpesh B. Patel and Shri Sudeep B. Patel were appointed as whole-time Directors of the company. However, the adjudicating authority has ignored the order of the Hon'ble Commissioner (Appeals) and confirmed the demand;

- In the SCN dated 09.06.2017 for the period 2012-13 to 2015-16, remuneration and commission were separately shown in the SCN in as much as two Directors were paid salary as well as commission. However, in the SCN adjudicated by the learned Joint Commissioner, only remuneration was shown in the worksheet (Para 7 of the SCN). Therefore, there was no question of payment of commission to the Directors in the SCN. However, without verifying the facts of the case, the Joint Commissioner has passed the order;
- The appellants in their reply dated 24.12.2020 taken the ground of revenue neutrality in as much as service tax paid by the appellant would have been immediately available as cenvat credt to them. The adjudicating authority has grossly failed to comprehend the principle of revenue neutrality in as much as she has equated the same with actual availment of cenvat credit. The claim of revenue neutrality was rejected on the ground that cenvat credit was not availed by the appellants; and
- The adjudicating authority has imposed the penalty under Section 78 of the Act without discussing and giving any finding on the submissions of the appellant in this regard. As such penalty has been imposed merely by invoking extender period without discussing the reasons for imposition of penalty.

The appellant has relied on some case laws in support of their above contentions.

4. Personal hearing in the matter was held on 18.11.2021 through virtual mode. Shri P.G. Mehta, Advocate, appeared on behalf of the appellant for hearing. He 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 as well as at the time of personal hearing. The issue to be decided in the case is whether the appellant is liable to pay service tax under reverse charge mechanism on the amount paid as remuneration and commission to their Directors

in the light of provisions of Rule 2(1)(d)(EE) inserted w.e.f 07.08.2012 read with the provisions of Notification No. 30/2012-ST dated 20.06.2012 as amended, or not.

6. I find that demands on similar issue on appellant's own case for earlier period from Financial Year (F.Y.) 2012-13 to F.Y. 2015-16 and from April, 2016 to May, 2016 and from June, 2016 to March, 2017 has been already decided in appellate proceedings in the said cases vide Order-in-Appeal No.AHM-EXCUS-001-APP-070-2019-20 dated 29.11.2019 issued by the Commissioner (Appeals), Ahmedabad. Further, it is observed that there is nothing on records in the case to suggest that the said Order of the Appellate Authority has been challenged by the department. That being the case, the above order of the Appellate Authority on the issue attains finality and becomes precedent in nature. The adjudicating authority is, therefore, bound to follow the said decision of the higher authority in terms of principles of judicial discipline, more particularly when it is in the case of the same appellant.

6.1 Relevant part of the decision of the appellate authority discussed in the previous para is reproduced hereunder for better appreciation of the facts:

> *"6. I find that the adjudicating authority confirmed the demand on the ground that the directors were not whole time directors; that non-whole-time directors were not employees and such remuneration would not fall under the purview of salary; that non-whole-time directors usually take away their remuneration in the form of 'fee for professional or technical services' or 'commission'. The adjudicating authority also rejected the claim of revenue neutrality on the ground that the cenvat credit of the same is hit by limitation as the cenvat credit was required to be taken within one year. Before moving ahead, let us look at some of the facts involved in the present case :*
>
> *(i) Section 65B(44) reads as under :*
>
> *65B : In this chapter, unless the context otherwise requires, -*
> *(44) "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) .....*
> *(ii) .....*
> *(iii) .....*
> ***(b) a provision of service by an employee to the employer in the course of or in relation to his employment;***
> *(c) .....*
>
> *(ii) By virtue of Notification No.30/2012-ST as amended by Notification No.45/2012-ST, in respect of services provided or agreed to be provided by a*

director of a company to the said company, the recipient of the service (i.e. the said company) is made liable to pay the 100% service tax.

(iii) Section 2(94) of the Company Act, 2013 reads as under :
"whole time director" includes a director in the whole-time employment of the company."

(iv) Since the Extract of Resolution dated 30.06.1993 and 01.04.1996 have the same wordings with regard to the appointment of the Directors and their remuneration, the words used in the extract of resolution dated 30.06.1993 is shown below :

"Resolved that Shri Rasesh H. Patel & Shri Alpesh B. Patel are hereby appointed as whole time directors of the company in place of late Shri H.T.Patel, who is expired on 30.06.1993.

Further resolved that the newly appointed director Shri Rasesh H.Patel is being employed with the company with the remuneration to be fixed from time to time; normally at beginning of the financial year. This remuneration in relation to his employment with the company will be in form of salary consisting of 1. Regular monthly pay; and 2. Commission/incentive bonus/special remuneration based on sales or performance of the company.

Resolved that the appointment of Shri Rasesh H. Patel & Shri Alpesh B. Patel in place of late H.T.Patel who is expired on 30.06.1993 be intimated to the bankers of the company."

[Emphasis Supplied]

7(i). I find that by virtue of Section 65B(44)(b) the service provided by the employees to their employer are kept out of the purview of service tax because in this situation service rendered by the employee is in relation to his employment. Therefore, first I would like to decide in the instant case is whether the service rendered by the Directors were in the capacity of their employment or otherwise. I find that the appellant has produced the extract of resolutions passed in the meeting held on 30.06.1993 and on 01.04.1996 which shows that Shri Rasesh H. Patel, Shri Alpesh B. Patel and Shri Sudip B. Patel were appointed as whole-time Directors of the company i.e. the appellant. In these extract of resolution, it has also been mentioned that the Directors would get the remuneration in the form of Salary consisting of (a) regular monthly pay and (b) commission/incentive bonus/special remuneration based on sale or performance of the company. These extract of resolution show that the Directors were employed in the appellant company as whole-time Director and were getting Salary in the form of monthly Pay and the said monthly pay is not effected with the performance of the company. Monthly pay in the form of remuneration are paid to the Directors for being employed in the company as an employee. Moreover, Form-16 is issued to the employees of a company/firm and not to the others with whom

the company/firm has business relations. In the present case, the Form-16 have been issued by the appellant to the Directors which goes on to show that the Directors are employee of the appellant and getting salary in the form of monthly pay for that. All these show that the services rendered by the Directors were in relation to their employment and there were employer-employee relationship between the appellant and the said Directors to the extent of receipt of Salary in the form of monthly pay from the appellant company. Once the services of the Directors to the appellant are considered in the capacity of their employment, the levy of service tax on the remuneration paid to the Directors as monthly pay is out of the purview of service tax in view of Section 65B(44)(b) of the Finance Act, 1994. I therefore set aside the demand of service tax on the remuneration paid to the directors as monthly pay as defined under extract of resolution.

7(ii). Now I come to the payment of commission/ incentive/ bonus/ special remuneration which has been shown by the appellant as part of salary under the said extract of resolutions. The extract of resolution shows that over and above the regular monthly pay, the Directors would also get Commission/ incentive/ bonus/ special remuneration based on sales or performance of the company. While perusing the table shown under para-5 of the SCN dated 09.06.2017, I found that the two Directors Shri Rasesh Patel and Shri Sudip Patel were given Commission during the year 2012-13 to 2014-15 however no commission was given to the other Director Shri Alpesh Patel during this period. From this, it is clear that the commission/ incentive/ bonus/ special remuneration is something which is apart from the monthly pay and is based on the performance of the company and which is given to the Directors on the basis of their special activity or special service to the company which ultimately effect the performance of the company. Therefore, such commission/ incentive/ bonus/ special remuneration can not be considered to be an amount paid to the Directors under employer-employee relationship and can not be considered as a part of the Salary exempted from levy of service tax. If the appellant include some other heads under part of salary in the resolution, can the same be considered as Salary just because the appellant has incorporated the same in the resolution as Salary. The answer would definitely be in negative. Just including or showing the commission/ incentive/ bonus/ special remuneration as part of salary in the resolution does not make it to be considered as Salary. Therefore I am not inclined to accept the contention of the appellant that the commission/ incentive/ bonus/ special remuneration apart from the monthly

pay should be treated as Salary and therefore reject the same. The appellant has contended that the commission paid to the Directors has been reflected in Form-16 and therefore the commission should be considered as salary. Just because the appellant has incorporated the commission under Form-16 does not make the payment of commission to be treated as payment of salary in the Service Tax law. It is pertinent to mention here that the tax events are independent to one another and can not be co-related or inter dependent to one another. Thus the provisions of Income-Tax law cannot be always referred for deciding the levy of tax where a separate law is already available for deciding such levy. Therefore service tax would be leviable on such commission/ incentive/ bonus/ special remuneration paid to the Directors and the appellant is liable to pay the service tax on the commission paid to its Directors in view of the Notification No.30/2012-ST as amended by Notification No.45/2012-ST."

6.2 It is categorically held in the above OIA that the three Directors of the appellant are whole-time Directors of the appellant and there were employer-employee relationship between the appellant and the said Directors to the extent of receipt of Salary in the form of monthly pay from the appellant company and, therefore, the remuneration paid to them as salary or monthly pay is out of the purview of service tax in view of Section 65B(44)(b) of the Finance Act, 1994. Accordingly, the demand of service tax on the remuneration paid to the Directors was set aside. As regards, commission/ incentive/ bonus/ special remuneration paid over and above the monthly pay to some Directors, it was held that the same cannot be considered to be an amount paid to the Directors under employer-employee relationship and, hence, cannot be considered as a part of the Salary exempted from levy of service tax and would be taxable accordingly.

6.3 In the present case, it is the case of the appellant that there was no payment of any commission, incentive, bonus or special remuneration to any Directors during the period under dispute and whatever amount paid was in the account of salary only. The adjudicating authority, however, observed that as per Note 19.1 of the Annual Report 2017-18, the particulars for the head "Director Remuneration" were described as 'Salaries, Wages, Allowances, Commission" from which it is inferred that the Directors have not only received the salaries, but also received the allowances and Commission and that since the said expenditure was not shown in the Head of "Salary", it proved that all the three Directors are not their whole time Directors but they were giving their services as and when required by the company and getting the allowances and commission. I find that the adjudicating authority has not appreciated the facts of the case in its right perspective. The mere fact of showing the salary paid, under the head of "Director Remuneration" in the Annual Audit Report of the appellant does not in any

manner indicate that the said Directors are not whole-time Directors and thereby not employees of the appellant. Nor such a conclusion can be drawn by any stretch of imagination in the given situation without any further supporting evidence or facts. The appellant has submitted a copy of Extract of Annual Report filed under Form No.MGT-9 for the Financial Year 2017-18 and Certificate in Form No.16 issued under Section 203 of the Income Tax Act, 1961 in support of their contention of having paid their Directors only the salary. Further, when the appellate authority in his above referred OIA dated 29.11.2019 had already given a comprehensive finding that the three Directors of the appellants in the case are whole-time Directors of the Company and are their employees, there is no reason for the adjudicating authority to hold a different view especially when there is no change in facts of the case or in the legal provisions. Nor is there any fresh evidence or material brought on records to entertain such a belief. The appellant in their present appeal has amply demonstrated that the adjudicating authority has simply reproduced the findings in the earlier Order-in-Original issued for the past period which was set aside by the appellate authority vide the OIA dated 29.11.2019. The act of the adjudicating authority to confirm the demand again on the grounds which were set aside by the appellate authority clearly shows the casual approach on her part in deciding the issue. It is clearly evident that the adjudicating authority has passed the order without proper examination and verification of the facts of the case.

6.4 I find that in the facts of the present case, there is no evidence of any kind on records to suggest/prove that the Directors were paid commission/ incentive/bonus/special remuneration during the period under dispute apart from what is paid as salary. On the contrary, after going through the copy of Extract of Annual Report filed under Form No.MGT-9 for the Financial Year 2017-18 submitted by the appellant along with the appeal, I find that as per the details given thereunder, the Directors were paid only salary during the period under dispute and no amount seems to have paid as any commission to them. Certificates in Form No.16 issued by the appellant also confirm the fact that the amount on which the demand is raised in the case is the amount of salary paid to the Directors, which is clearly out of the purview of service tax as per provisions of the Act. Apparently, the adjudicating authority has relied on Para 7(ii) of the OIA dated 29.11.2019 to confirm the demand without fairly examining as to whether there was any payment of commission to Directors in the facts of the case in first place. The adjudicating authority has failed to take note of the fact that the view of the appellate authority in Para 7(ii) of the OIA above was with reference to the commission paid to two Directors of the company during the period from F.Y. 2012-13 to F.Y. 2015-16 which were shown separately in the relevant SCN for the said period and that such kind of payments of any commission to Directors does not exist in the facts of the present case.

6.5 It is further observed that the Central Board of Indirect Taxes and Customs, vide their Circular No. 140/10/2020-GST dated 10.06.2020 issued on the subject of 'Clarification in respect of levy of GST on Director's remuneration' has clarified the taxability issue as under in respect on remuneration paid by companies to the whole-time directors including managing director who are employees of the said company.

> *" 5.2 It is also pertinent to note that similar identification (to that in Para 5.1 above) and treatment of the Director"s remuneration is also present in the Income Tax Act, 1961 wherein the salaries paid to directors are subject to Tax Deducted at Source ('TDS') under Section 192 of the Income Tax Act, 1961 ('IT Act'). However, in cases where the remuneration is in the nature of professional fees and not salary, the same is liable for deduction under Section 194J of the IT Act.*
>
> *5.3. Accordingly,* ***it is clarified that the part of Director"s remuneration which are declared as "Salaries" in the books of a company and subjected to TDS under Section 192 of the IT Act, are not taxable being consideration for services by an employee to the employer in the course of or in relation to his employment in terms of Schedule III of the CGST Act, 2017.***
>
> *5.4 It is further clarified that the part of employee Director"s remuneration which is declared separately other than „salaries" in the Company"s accounts and subjected to TDS under Section 194J of the IT Act as Fees for professional or Technical Services shall be treated as consideration for providing services which are outside the scope of Schedule III of the CGST Act, and is therefore, taxable. Further, in terms of notification No. 13/2017 – Central Tax (Rate) dated 28.06.2017, the recipient of the said services i.e. the Company, is liable to discharge the applicable GST on it on reverse charge basis."*

I find that the above clarification has put to rest the confusion which prevailed regarding the taxability issue of remuneration paid to Directors of the company by a company. Though the said circular and clarification thereof is issued in the context of GST Law, it is applicable for the erstwhile service tax regime for the nature of transaction under reference being similar in both the tax regimes. Needless to say that the certificate in Form No.16 is issued by the companies in respect of tax deducted at source from the salary of their employees under Section 192 of the Income Act, 1961. In the facts of the present case, the appellant has indisputably issued Certificates in Form No.16 for the amount under dispute paid to the Directors evidencing the nature of payment as 'Salary' which cannot be subjected to levy of service tax as per above clarification.

6.6 In view of the above discussions, it is clearly evident that the issue under dispute stands settled in favour of the appellant both in terms of the appellate authority's decision dated 29.11.2019 which has attained finality and the Board's clarification issued in the case discussed in the previous para. The impugned order passed by the adjudicating

authority is, therefore, not legally sustainable both on facts and merits as well as for being against the principles of judicial discipline.

6.7 Since the demand of service tax is not sustainable on merits, I am not delving into the aspect of revenue neutrality and limitation raised by the appellant. When the demand fails to survive, there does not arise any question of interest or penalty in the matter.

7. Accordingly, in view of my foregoing discussions, I set aside the impugned order passed by the adjudicating authority for being not legal and proper and allow the appeal filed by the appellant.

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

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

26th April, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 26.04.2022.

Attested

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

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

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Plot No.A-1/2 & A-1/3,
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1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, CGST & Central Excise, Ahmedabad-South.
3. The Deputy Commissioner, CGST & Central Excise, Division-VI, Ahmedabad-South.
4. The Assistant Commissioner (System), CGST HQ, Ahmedabad South. (for uploading the OIA)
5. Guard file
6. P.A. File