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 : **20220964SW0000555CCA**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2308/2021 /3500 – 05

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-001-APP-53/2022-23**
दिनाँक Date : **27-09-2022** जारी करने की तारीख Date of Issue 28.09.2022

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

ग Arising out of OIO No. **04 to 08/AC/JSB/O&A/Zenith/2021** दिनाँक: **29.06.2021** passed by Assistant Commissioner, CGST, Division-II, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Zenith Rubber Pvt Ltd**
   Plot No. K-8, Gallops Industrial Park-2,
   Sarkhej Bavla Road, Taluka-Sanand,
   Ahmedabad, Gujarat – 382110

2. **M/s Zenith Rubber Pvt Ltd**
   9/49, Industrial Area, Kirti Nagar,
   New Delhi - 110015

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।

(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 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.

सीना 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.

(30) 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)-

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

(Ixxiii) amount determined under Section 11 D;
(Ixxiv) amount of erroneous Cenvat Credit taken;
(Ixxv) 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

The present appeal has been filed by M/s. Zenith (Mumbai) Rollers (P) Ltd [now Zenith Rubber P. Ltd.], Plot No.K-8, Gallops Industrial Park-2, Sarkhej Bavla Road, Taluka : Sanand, Ahmedabad – 382 110 [previously at Plot No.2022, Opposite V-Trans, Vatva GIDC, Phase-III, Trikampura Patia, Ahmedabad – 382 445] (hereinafter referred to as the appellant) against Order in Original No. 04 to 08/AC/JSB/O&A/Zenith/2021 dated 29.06.2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, Division – II, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. AAACZ0021HSD005 under the category of Business Auxiliary Services. During the course of enquiry by the officers of the erstwhile Directorate General of Central Excise Intelligence (DGCEI) in the year 2007, it was revealed that the appellant was not registered with service tax department and neither were they discharging service tax on the services of Re-rubberizing of Rollers provided by them to various industries. After initiation of the enquiry by DGCEI, the appellant obtained service tax registration in July, 2007 and were availing exemption under Notification No.14/2004-ST dated 10.09.2004. Subsequently, the appellant started charging service tax on 40% of the invoice value under the category of Business Auxiliary Service (hereinafter referred to as BAS). It, however, appeared that the appellant was required to be registered under Management, Maintenance or Repair (hereinafter referred to as MMR) service and pay service tax accordingly as the service provided by the appellant did not merit classification under BAS and the services provided by them did not pertain to the Printing Industry. The appellant was, therefore, required to pay service tax on the gross value charged by them i.e. the total invoice value.

2.1 On conclusion of investigation, Show Cause Notice dated 02.04.2010 was issued by DGCEI for the period F.Y.2005-06 to F.Y.2008-09. Thereafter, periodical SCNs were issued to the appellant by the jurisdictional Service

Tax officers. A total of nine SCNs were issued to the appellant, out of which four SCNs were adjudicated vide OIO NO. 28 to 31/ORS/STC/JC(VG)/2012-13 dated 19.11.2012 wherein the service provided by the appellant was ordered to be classified under MMR service and the demands raised were confirmed and penalties were imposed under Sections 76, 77 and 78 of the Finance Act, 1994. Being aggrieved, the appellant filed appeal before the Commissioner (Appeals-IV), Ahmedabad, who vide OIA No. AHM-SVTAX-000-APP-396-13-14 dated 24.03.2014 rejected the appeal on the grounds of delay in filing appeal. The appellant, thereafter, filed appeal against the said OIA before the Hon'ble CESTAT, Ahmedabad. The Hon'ble Tribunal vide Order dated 09.12.2014 dismissed the appeal filed by the appellant on the grounds that the Commissioner (Appeals) was empowered to condone delay up to period of one month only. The appellant had then filed SCA No. 10231 of 2015 before the Hon'ble High Court of Gujarat against the order of the Hon'ble Tribunal. The Hon'ble High Court of Gujarat vide Order dated.17.01.2020 allowed withdrawal of the appeal as the appellant had filed application under the SVLDRS, 2019 and the appeal was dismissed as withdrawn.

2.2 As the appellant continued the practice of non-payment of service tax despite issuance of SCNs, information was called from them regarding service tax payable and service tax actually paid and periodical SCNs were issued to them under Section 73(1A) of the Finance Act, 1994. The details of the SCNs issued to the appellant are listed below :

SCN No. and Date	**Period**	**Service Tax demanded (Rs.)**
STC-19/O&A/SCN/Zenith/ADC/D-III/2013-14 dated 12.03.2014	April, 2012 to June, 2012	5,37,987
STC/O&A/SCN/ZRPL/ADC/D-III/2014-15 dated 19.09.2014	July, 2012 to March, 2013	17,69,072
STC/O&A/SCN/ZRPL/ADC/D-III/2014-15 dated 08.04.2015	April, 2013 to March, 2014	25,58,102
STC-35/O&A/SCN/Zenith/JC/D-V/2015-16 dated 01.03.2016	April, 2014 to September, 2015	28,05,892
V-84/16-10/SCN-Zenith/2017-18 dated 06.02.2018	October, 2015 to March, 2017	30,71,438

3. The above mentioned five SCNs were adjudicated vide the impugned order wherein the demand for service tax totally amounting to Rs.1,02,04,504/- was confirmed under the proviso to Section 73 (1) of the

Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. The service tax amounting to Rs.72,32,963/- paid by the appellant during pendency of the proceedings was appropriated. Penalty amounting to Rs.35,09,528/- was imposed under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

i. The adjudicating authority has overlooked the various submissions and oral arguments made at the time of personal hearing .

ii. The impugned order has been passed without appreciating the facts and law. The demand has been simply confirmed on the ground that there was no documentary evidence which supports their contention that VAT has been paid on the sale of rubber compound. The adjudicating authority has not appreciated the fact that they had provided VAT returns which clarifies that VAT was paid by them on sale of rubber.

iii. The adjudicating authority has also failed to consider the invoices issued by them which categorically states that they are paying service tax on 70% of the gross value of the re-rubberization and they were paying VAT on 60% value of the re-rubberization. The details of invoices clarifying the position is submitted.

iv. They had in their reply dated 26.04.2014 categorically stated that they are issuing VAT invoices and the same clearly mentions the percentage of gross re-rubberization charges on which VAT and service tax is charged by them. The impugned order failed to consider the same and simply confirmed the demand on the ground that no documentary evidence was produced by them.

v. They rely upon the judgment in the case of Cyril Lasardo (Dead) Vs. Juliana Maria Lasarado – 2004 (7) SCC 431 and Assistant Commissioner, Commercial Tax Department Vs. Shulka Brothers – 2010 (254) ELT 6 (SC).

vi. Since the impugned order being a non-speaking order, has been passed in gross violation of principles of equity, fair play and natural justice, it is liable to be set aside.

vii. They have discharged VAT on the amount received by them for sale of rubber. Therefore, service tax cannot be imposed on the transaction which are leviable to VAT.

viii. The provisions of Section 65B (44) of the Finance Act, 1994 clearly stated that any goods supplied which is deemed to be a sale within the meaning of Clause 29A of Article 366 of the Constitution shall not come within the purview of the definition of Services. Since supply of rubber shall be treated as supply of good as sales within the meaning of Clause 29A of Article 366 of the Constitution, the supply of rubber shall not come within the purview of the definition of services.

ix. Levy of VAT on a particular transaction is within the legislative competence of the respective State Government under Entry 54 of List II of the Seventh Schedule to the Constitution of India. Entry 54 is only subject to Entry 92A of the Union Lit and there can be no further curtailment of the State's power to levy tax. The powers of the Union and State to levy tax are mutually exclusive and there can be no overlap in the powers of taxation.

x. They rely upon the judgments in the case of Hoechst Pharmaceutical Ltd. and Ors. Vs. State of Bihar and Ors.- (1983) 4 SCC 45; Godfrey Philips India Ltd. and Anr. Vs. State of UP and ORs – (2005) 2 SCC (515).

xi. Service tax shall not be levied on the supply on which VAT has already been paid as the same leads to double taxation on the same transaction.

xii. The amounts received by them are towards Works Contract Services. They procure old rollers and after re-rubberization, they sell the rollers to the customers. The sale price of rollers include the price of rubber compound and the price of labour charges.

xiii. In the pre-Negative List regime, the services provided by them was under the purview of BAS as clarified by the Hon'ble Tribunal in their own case – 2014 (33) STR 678 (Tri.-Del.) which is not in dispute.

xiv. Under the Negative List of Service regime, Section 66B of the Act is the charging section as per which, service tax would be leviable on the value of all services provided or agreed to be provided, except services in the negative list.

xv. With effect from 01.07.2012, amendment was carried out in the definition of Works Contract services. Clause 54 of Section 65B of the

Finance Act,. 1994 defines Works Contract service. The amended definition clarifies that re-rubberization of old and used rollers which involved transfer of property in the form of rubber compound shall come within the definition of works contract. Since the service portion of execution of works contract is a declared service under Section 66E of the Act, they had taken new service tax registration under Works Contract Services.

xvi. They are providing works contract services by carrying out repair or maintenance on moveable property. Thus, abatement would be available to them. Therefore, the quantification of demand on the difference amount without ascertaining whether the scheme of abatement would be applicable or not, is not tenable in the eyes of law.

xvii. Service tax is a levy on provision of service by service provider and sales tax is a levy on sale of goods and both are mutually exclusive. Service Tax cannot be levied on the value of the goods supplied by the service provider during provision of service. Therefore, they are not liable to pay service tax on the rubber compound supplied by them.

xviii. The interpretation canvassed in the impugned order would lead to an anomalous situation. They rely upon the decision in the case of Godfrey Phillips India Ltd. Vs. State of UP – 2005 (139) STC 537; Bharat Sanchar Nigam Limited Vs. UOI – 2006 (3) TMI 1; Wipro GE Medical Systems Limited Vs CST – 2009 (24) STR 43 which was affirmed by the Hon'ble Supreme Court – 2012 (28) STR J44 (SC); Hindustan Aeronautics Limited Vs. CST – 2010 (17) STR 81 (Tri.-Bang.); Commissioner, Central Excise and Customs Vs. Larsen and Toubro Ltd. & Ors. – 2015 (39) STR 913 (SC); Safety Retreading Company Pvt. Limited Vs. CCE – 2017 (48) STR 97 (SC).

xix. Out of the five SCNs, one SCN pertains to the period April, 2012 to June, 2012. The issue prior to 01.07.2012 is no more *res integra* as the same was settled by the Hon'ble Tribunal in their own case Zenith Rollers Ltd. Vs. CCE, Noida – 2014 (33) STR 678 and 2016 (44) STR 302 (Tri.-Bang.). In both the cases, an identical activity was classified under BAS and that the same would fall within the ambit of exemption Notification No.14/2004-ST dated 10.09.2004.

xx. Similar view as taken in their own case, for a different unit in the following cases : Zenith Bangalore Rollers Pvt. Ltd. Vs. Commissioner

of CST, Chennai – Final Order No. 40267/2018; Zenith Bangalore Rollers Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad – Final Order No.21238/2015 and Zenith Punjab Rollers Pvt. Ltd. Vs Commissioner of CST, Ludhiana – Final Order No. A/62463/2018.

xxi. The activity of re-rubberization of old rollers falls under BAS and entitled to exemption under Notification No.14/2004-ST dated 10.09.2004, which exempts services provided in relation to printing from the whole of service tax. They are engaged in re-rubberization of old and used rollers for use in printing industry and therefore, exempted from service tax. The demand for the period prior to 01.07.2012 is liable to be set aside on this ground alone.

xxii. The onus is on the department to prove that they had wilfully suppressed facts with an intent to evade payment of service tax. The SCN or the impugned order fails to prove that they had acted with any mala fide intent. In the present case wilful nature of the suppression is not established. Therefore, the demand beyond the normal period of limitation is not sustainable. They rely upon the decision in the case of Pahwa Chemicals Vs. CCE – 2005 (189) ELT 257 (SC).

xxiii. They had paid service tax on 70% of the value of the goods and paid VAT on 60% value of the goods by treating the activity as Works Contract service on a bona fide interpretation of the provisions of the Finance Act, 1994 without any intention to evade payment of service tax. They were and are under the bona fide belief in view of the decisions referred supra, that they had classified the activity as Works Contract service. Thus, there was no wilful suppressions with an intent to evade service tax. They rely upon the decision in the case of Cosmic Dye Chemical Vs. Collector of Central Excise – 1995 (75) ELT 721 (SC).

xxiv. The demand raised by the department is based on periodical SCNs and it is a trite law that the extended period of limitation shall not be invoked in the case of raising demand through periodical SCNs. Therefore, the demand beyond the normal period of limitation is not sustainable.

xxv. As the tax demand itself is not sustainable, there can be no question of payment of any interest under Section 75 of the Finance Act, 1994. They rely upon the decision in the case of Pratibha Processors Vs. UOI

– 1996 (88) ELT 12 (SC) and Commissioner of Customs, Chennai Vs. Jayathi Krishna & Co. – 2000 (119) ELT 4 (SC).

xxvi. They are not liable to pay service tax, therefore, they cannot be subjected to penalty under Section 78 of the Finance Act, 1994. It is a settled principle of law that where there is no demand of duty, penalty cannot be imposed. They rely upon the decision in the case of Coolade Beverages Limited – 2004 (172) ELT 451 (All.); Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras – 1994 (74) ELT 9 (SC); DCW Ltd. Vs. Asst. Collector of Central Excise – 1996 (88) ELT 31 (Mad.).

xxvii. There has been no intention on their part to avoid any payment of service tax. Further, they had not suppressed any facts from the Department and provided all information to the Department which was requested in the course of investigation. At no pint of time they had intentionally sought to evade tax or committed an act of suppression. Consequently, imposition of penalty is against the settled law.

xxviii. They were under the bona fide belief that they are not liable to pay service tax. The question involved in the present case is purely of interpretation. This is a reasonable cause for non-payment of service tax. Therefore, no penalty can be imposed on them under Section 80 of the Act. They rely upon the various judicial pronouncements in this regard.

5. The appellant as part of their additional written submissions dated 18.07.2022 submitted illustrative copies of invoice, relevant provisions of the Service Tax Finance Act, 2016, Notification No.14/2004-ST dated 10.09.2004, Service Tax (Determination of Value) Rules, 2006 as well as copies of the judgments relied upon by them.

6. Personal Hearing in the case was held on 29.07.2022 through virtual mode. Shri Sanket Gupta, Advocate, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum as well as in additional written submission dated 18.07.2022.

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 materials available on records. The issue before me for decision is :

A. Whether the activity of re-rubberization of Rollers undertaken by the appellant amounts to Management, Maintenance or Repair (MMR) service prior to 01.07.2012, as held in the impugned order, or whether it amounts to Business Auxiliary Service, as claimed by the appellant.

B. Whether, for the period subsequent to 01.07.2012, the activity of re-rubberization of Rollers undertaken by the appellant amounts to Service in terms of Section 65B (44) of the Finance Act, 1994 as contended by the Department or whether it amounts to Work Contract Service, as claimed by the appellant.

The demand pertains to the period April, 2012 to September, 2015.

8. It is observed from the case records that the appellant had, for the period prior to 01.07.2012, claimed classification of the service provided by them under the category of BAS and also claimed exemption under Notification No. 14/2004-ST dated 10.09.2004. The appellant were issued four SCNs for the period prior to April, 2012, which was adjudicated vide OIO No. 28 to 31/ORS/SC/JC(VG/2012-13 dated 15.11.2012 and the service of re-rubberizing of old and used Rollers was ordered to be classified under Maintenance or Repair Service/Management, Maintenance or Repair Service. The appeal filed by the appellant against the said OIO was dismissed on limitation by the then Commissioner (Appeals-IV), Ahmedabad vide OIA No.AHM-SVTAX-000-APP-396-13-14 dated 24.03.2014. The appellant appealed against the said OIO before the Hon'ble CESTAT, Ahmedabad, who vide Order dated 09.12.2014 upheld the OIA. The appellant filed SCA No.10231 of 2015 before the Hon'ble High Court of Gujarat. The Hon'ble High Court vide Order dated 17.01.2020 allowed withdrawal of the appeal as the appellant had filed application under the SVLDRS, 2019 and the appeal was dismissed as withdrawn.

8.1 It is further observed that the matter pertaining to these four SCNs were decided against the appellant on limitation and not on merits. They have settled the issue for the period upto 31.03.2012 by opting for SVLDRS.

8.2 I find that the remaining five SCNs were issued to the appellant for the period 01.04.2012 to September, 2015 under Section 73 (1A) of the Finance Act, 1994. It is further observed that in the case of the another unit of the appellant, namely, Zenith Rollers Ltd. Vs. CCE, Noida – 2014 (33) STR 678 (Tri.-Del.), the Hon'ble Tribunal had held that re-rubberizing of old and used Rollers is classifiable under Business Auxiliary Services. The relevant part of the said judgment is reproduced below :

> **"9.** We find that activities of the appellants are equally classifiable under two services namely Business Auxiliary Service and Maintenance or Repair service. Since the service cannot be classified under clause 'a' and 'b' of Section 65A, clause 'c' of Section 65A is attracted according to which service is classifiable under the sub-clause of Clause (105) of Section 65 which comes first. We find that Business Auxiliary service is covered under Section 65(105)(zzb) and Management, Maintenance or Repair Service is covered under Clause 65(105)(zzr). Since Business Auxiliary Service comes first under Clause 65(105)(zzb), we hold that service is classifiable under Business Auxiliary Service. We set aside the Order-in-Original and allow the appeal."

8.3 The above judgment of the Hon'ble Tribunal was followed in the case of Zenith (Bangalore) Rollers P. Ltd. Vs. C.C., C. E, & S.T, Hyderabad-IV – 2016 (44) STR 302 (Tri.-Bang.); Zenith (Bangalore) Rollers P. Ltd. Vs. CST, Chennai – 2018 (4) TMI 1237-CESTAT-Chennai; Zenith (Bangalore) Rollers P. Ltd. Vs. CCE, Hyderabad-IV – 2015 (12) TMI 818-CESTAT Hyderabad and CCE, Ludhiana Vs. Zenith (Punjab) Rollers P. Ltd – 2018 (6) TMI 668-CESTAT Chandigarh. In view of these judgments of the Hon'ble Tribunal, the issue of classification of re-rubberizing of old and used Rollers is no more *res integra* and stands settled in favour of the appellant.

8.4 I find that the adjudicating authority has by relying upon the judgment in the case of Zenith Rollers Ltd. Vs. CCE, Noida – 2014 (33) STR 678 (Tri.-Del.) and Zenith (Bangalore) Rollers P. Ltd. Vs. C.C., C. E, & S.T, Hyderabad-IV – 2016 (44) STR 302 (Tri.-Bang.) held at Para 11 of the impugned order that the service provided by the appellant falls under Business Auxiliary Services. However, the adjudicating authority has proceeded to confirm the demand against the appellant by denying the benefit of exemption under Notification No.14/2004-ST dated 10.09.2004 on the grounds that the appellant have not come forward with documentary evidences showing that the service was in relation to agriculture, printing, textile processing or education which is the mandatory condition for availing exemption.

8.5 However, it is observed that the SCNs issued to the appellant was only on the issue of classification of the service provided by them. The issue of classification of the services provided by the appellant, for the period prior to 01.07.2012, has been decided by the adjudicating authority in favour of the appellant i.e. under Business Auxiliary Services. There is no proposal in the SCNs issued to the appellant for denial of the benefit of exemption in terms of Notification No.14/2004-ST dated 10.09.2004. Such being the case, the adjudicating authority has, by denying exemption under the said Notification, travelled beyond the scope of the SCNs issued to the appellant.

8.6 I find it pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Gas Authority of India Ltd. – 2008 (232) ELT 7 (SC), the relevant part of the said judgment is reproduced below :

> **"7.** As repeatedly held by this Court, show cause notice is the foundation of the Demand under Central Excise Act and if the show cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove. On this short point, we are in agreement with the view expressed by the Tribunal that nowhere in the show cause notice it has been alleged by the Department that Lean Gas is a final product. Ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice."

8.7 A similar view was taken by the Hon'ble High Court of Madras in the case of R.Ramdas Vs. Joint Commissioner of Central Excise, Puducherry – 2021 (44) GSTL 258 (Mad.). The relevant parts of the said judgment are reproduced below :

> **"7.** It is a settled proposition of law that a show cause notice, is the foundation on which the demand is passed and therefore, it should not only be specific and must give full details regarding the proposal to demand, but the demand itself must be in conformity with the proposals made in the show cause notice and should not traverse beyond such proposals.
>
> **11.** The very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given, for that particular demand for which a proposal has not been made.
>
> **12.** Thus, as rightly pointed out by the Learned Counsel for the petitioner, the impugned adjudication order cannot be sustained, since it traverses beyond the scope of the show cause notice and is also vague and without any details.

> Accordingly, such an adjudication order without a proposal and made in pursuant of a vague show cause notice cannot be sustained."

8.8 Further, in the case of Reliance Ports and Terminals Ltd. Vs. Commissioner – 2016 (334) ELT 630 (Guj.), the Hon'ble High Court of Gujarat had held that at Para 9 of the judgment that :

> "Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise."

8.8 In view the above judicial pronouncements, I find that it is settled position of law that a SCN is the foundation of demand. In the instant case, I find that in the SCNs issued to the appellant there is no proposal for denying the benefit of exemption under Notification No.14/2004-ST dated 10.09.2004. Therefore, confirmation of demand of service tax on an entirely new ground, which was not raised in the SCN, is bad in law and, is accordingly, not legally sustainable. Accordingly, I am of the considered view that the impugned order confirming the demand of service tax for the period from April, 2012 to June, 2012 by denying benefit of Exemption Notification No.14/2004-ST dated 10.09.2004 is not legally sustainable and, hence, is set aside.

9. For the period from 01.07.2012 to September, 2015, I find that despite there being a change in the legal position with the introduction of the Negative List based Services regime, the SCNs have been issued to the appellant under Section 73(1A) of the Finance Act, 1994, which is reproduced below :

> "Notwithstanding anything contained in sub-section (1) (except the period of thirty months of service the notice for recovery of service tax, the Central Excise Officer may service, subsequent to any notice or notices served under that sub-section, a statement containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices."

9.1 Consequent to the introduction of Negative List of Services from 01.07.2012, the classification of services provided in Section 65 of the Finance

Act, 1994 ceased to apply. The taxability of services was required to be determined in terms of Section 65B, 66D and 66E of the Finance Act, 1994.

9.2 The appellant have contended that they were paying service tax under the category of Works Contract Service and that the service tax was being paid by them on 70% of the gross value of re-rubberisation. They have submitted invoices on sample basis. On perusing these invoices, I find that the appellant were paying service tax on 70% of the value of re-rubberisation of old rollers. The appellant were also paying VAT on 60% of the value of re-rubberisation of old rollers.

9.3 Prior to 01.07.2012, 'Work Contract Service' was defined under Section 65(105) (zzzza) of the Finance Act, 1994 and the service provided in terms of the said definition was with reference to only 'immovable property'. From 01.07.2012, definition of Works Contract is as per Section 65B(54) of the Finance Act, 1994, which reads as :

> "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property."

9.4 It is observed that the definition of ' Work Contract Service' as per Section 65B (54) of the Finance Act, 1994 included even a service provided with reference to a 'movable property'. In the present appeal, I find that the service provided by the appellant involves re-rubberisation of old Rollers, which is undoubtedly a movable property, and therefore, is covered within the ambit of repair, maintenance, renovation, alteration specified in the definition of works contract service. It is also pertinent to note that even for the period prior to 01.07.2012, the Hon'ble Tribunal had in the case of Zenith Rollers Ltd. Vs. CCE, Noida – 2014 (33) STR 678 (Tri.-Del.) held that the activity of re-rubberisation of rollers was equally classifiable under Business Auxiliary Services and Maintenance or Repair services. Applying this finding of the Hon'ble Tribunal in the context of Works Contract Service as defined under Section 65B (54) of the Finance Act, it is amply clear that activity of re-rubberisation of rollers is covered by the definition of Works Contract Service. Therefore, I have no hesitation in holding that, from 01.07.2012, the

activity re-rubberisation of rollers undertaken by the appellant falls within the ambit of Works Contract service as defined in Section 65B (54) of the Finance Act, 1994.

9.5 It is also observed that payment of service tax under Works Contract Service was communicated by the appellant in their reply to the SCNs issued to them, vide letters dated 29.10.2014 and 23.06.2015. Further, the appellant had vide letter dated 14.05.2014 addressed to the jurisdictional Superintendent of Service Tax informed that they were discharging service tax under Works Contract Service. Copies of ST-3 returns for the period from 01.07.2012 to 31.03.2014 were also furnished by the appellant.

9.6 However, I find that the adjudicating authority has, in the impugned order, not discussed or given any findings on the issue relating to the activity undertaken by the appellant falling under the category of Works Contract Service post 01.07.2012. No findings have been given on the submission of the appellant as regards their contention that the service provided by them was, post 01.07.2012, covered under Works Contract Service. Neither has the adjudicating authority discussed or given any finding on the valuation of the service portion of the works contract in terms of Rule 2A (ii) (B) of the Service Tax (Determination of Value) Rules, 2006. On the other hand, he has discussed the non admissibility of exemption under Notification No.12/2003-ST dated 20.06.2003, which however, has not been claimed by the appellant and, therefore, the same has no relevance to the issue involved in the present appeal. Despite this, the adjudicating authority has at Para 17 of the impugned order recorded his finding that " *Further, I also find that Noticee has claimed their activity of Re-rubberisation as execution of a '**works contract**' and paying Sales Tax/VAT on the value of rubber compound used in Re-rubberisation as deemed sale and claimed abatement under Notification No.12/2003-ST without producing Sale Invoices of any goods while producing service*".

9.7 I further find that valuation of service portion in the execution of a works contract service is in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006. The provisions of Rule 2A (ii) which are relevant to the issue on hand, are reproduced below :

"Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contract entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of work contract, not covered under sub-clause (A), including works contract entered into for;-

(i) maintenance or repair or reconditioning or restoration or serving of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent of the total amount charged for the work contract."

9.8 In terms of the above provisions of Rule 2A (ii) (B) of the said Rules, the appellant were paying service tax on 70 per cent of the amount charged by them for re-rubberisation of rollers from their customers. This fact is also evidenced by the sample invoices submitted by the appellant as along with their appeal memorandum as well as part of their additional written submissions. Further, the fact of the appellant paying service tax on 70 per cent of the value charged by them has not been disputed by the department. It is also pertinent to mention that for claiming abatement under Rule 2A (ii) (B) of the said Rules, there is no requirement of producing any sales invoices of goods. The abatement is available as a percentage of the total value charged for the works contract. Once the service provided by the appellant is found to be falling within the ambit of Work Contract, only the applicable provisions of Rule 2A of the said Rules are required to be determined. In the instant case, I find that the activity of the appellant is covered by sub-rule (ii) (B) (i) of Rule 2A of the said Rules. Accordingly, the appellant are required to pay service tax only on seventy per cent of the value charged for the works contract. Therefore, I am of the considered view that the appellant have been correctly paying service tax. In view thereof, the demand of service tax confirmed vide the impugned order is not legally sustainable and, hence, set aside.

10. The appellant have also challenged the charging of interest and imposition of penalty under Section 78 of the Finance Act, 1994. Since the demand itself does not survive, there does not arise any question of interest or penalty in the matter. It, however, needs to be mentioned that the SCNs

have been issued to the appellant under Section 73 (1A) of the Finance Act, 1994. Further, for demanding service tax from the appellant, the provision of Section 73 of the Finance Act, 1994 has been invoked. However, there is no proposal for invoking the extended period of limitation in terms of the proviso to Section 73 (1) of the Finance Act, 1994. There is also no proposal in the SCNs issued to the appellant for imposition of penalty under Section 78 of the Finance Act, 1994. Despite this, the adjudicating authority has, in complete non application of mind, imposed penalty under Section 78 of the Finance Act, 1994.

11. In view of the facts discussed herein above, the impugned order is set aside for not being legal and proper and the appeal filed by the appellant is allowed.

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

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

27th September, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: .09.2022.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Zenith (Mumbai) Rollers (P) Ltd, — Appellant
[Zenith Rubber P. Ltd.],
Plot No.K-8, Gallops Industrial Park-2,
Sarkhej Bavla Road,
Taluka : Sanand,
Ahmedabad – 382 110

Previously at :
Plot No.2022, Opposite V-Trans,
Vatva GIDC, Phase-III,
Trikampura Patia, Ahmedabad – 382 445

The Assistant Commissioner, — Respondent
CGST, Division- II,
Commissionerate : Ahmedabad South.

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.