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 : 20221164SW0000720127

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/170/2022 / 4816-22

ख अपील आदेश संख्या Order-In-Appeal Nos.AHM-EXCUS-001-APP-061/2022-23
दिनाँक Date : 19-10-2022 जारी करने की तारीख Date of Issue 10.11.2022

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

ग Arising out of OIO No. CGST/WS07/O&A/OIO-07/RAG/AC/2021-22 दिनाँक: 20.09.2021 passed by Assistant Commissioner, CGST, Division-VII. Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. M/s JMC Projects (India) Ltd
A-104, Shapath-4, Opp. Karnavati Club,
S.G. Highway, 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 अतः नीचे बताए गए मामलों के बारे में पूर्वोक्त 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.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उपरलिखित 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 आदेश 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) इस 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.

(38) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलों 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) सेननैट 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:

(xcvii) amount determined under Section 11 D;
(xcviii) amount of erroneous Cenvat Credit taken;
(xcix) 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. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opposite Karnavati Club, S.G.Road, Ahmedabad-380 015 (hereinafter referred to as the appellant) against Order in Original No. CGST/WS07/O&A/OIO-07/RAG/AC/2021-22 dated 20.09.2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division – VII, 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. AAACJ3814EST001 and engaged in providing Consulting Engineer service, Erection, Commissioning and Installation service, Works Contract service and Commercial Construction service. During the course of CERA audit on the records of the appellant for the period from F.Y. 2012-13 to F.Y. 2016-17, it was observed vide Para No. 3 of LAR No. 115/2017-18 dated 22.12.2017 that the appellant had received an amount of Rs.8.17 lakhs as 'Guarantee Commission' on bank guarantee given by the appellant on behalf of their fully owned subsidiary SPVs during F.Y. 2015-16 and F.Y. 2016-17. However, the appellant had not paid the applicable service tax amounting to Rs.1,20,550/- on the same. On being asked by the jurisdictional Range Officer, the appellant submitted details of the notional bank guarantee commission received by them in respect of the bank guarantees given on behalf of their subsidiaries, from which it appeared that they had received bank guarantee commission on which service tax amounting to Rs.2,49,525/- was not paid for the period F.Y. 2015-16 to F.T. 2017-18 (upto June, 2017). The appellant submitted that IND-AS was effective from 01.04.2016 and F.Y. 2015-16 figures are only restated for comparing with F.Y. 2016-17. Therefore, no entries are passed in the books for F.Y. 2015-16. They further submitted that service tax is not payable on such guarantee commission. It, however, appeared to the department that the bank guarantee commission was received as consideration under declared services provided by the appellant.

3. Therefore, the appellant was issued Show Cause Notice No. WS07/SCN-14/O&A/JMC/2018-19 dated 04.01.2019 wherein it was proposed to demand and recover service tax amounting to Rs.2,49,525/- under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of penalty under Sections 77(2) and 78 of the Finance Act, 1994 was also proposed.

4. The SCN was adjudicated vide the impugned order wherein the demand for service tax was confirmed along with interest. Penalty of Rs.10,000/- was imposed under Section 77(2) of the Finance Act, 1994. Penalty equivalent to the service tax confirmed was also imposed under Section 78 of the Finance Act, 1994.

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

i. The demand has been proposed under the provisions of the erstwhile Finance Act, 1994 read with Section 174 (2) of the CGST Act, 2017. With effect from 01.07.2017, the provisions of Chapter V of the Act have been omitted vide Section 173 of the CGST Act, 2017. Article 268A of the Constitution was also omitted from 16.09.2016 vide Section 7 of the Constitution Amendment Act, 2016.

ii. Section 6 of the General Clauses Act, 1897 saves the right accrued under the old legislation. However, in the case of Rayala Corporation Vs. Directorate of Enforcement – 1969 (2) SCC 412, it was held that the said section applies to only repeals and not omissions.

iii. Therefore, initiation of the impugned proceedings vide SCN dated 04.01.2019 is without jurisdiction, unconstitutional and erroneous and deserved to be quashed. The impugned order is also liable to be set aside on this ground alone.

iv. They had made various submissions before the adjudicating authority. However, their submissions have been overlooked and the demand has been mechanically confirmed without appreciating their

submissions and without providing any reasons for not considering their submissions. The impugned order is non speaking and non reasoned order and liable to be set aside on this ground alone.

v. They rely upon the decision in the case of Cyril Lasardo (Dead) Vs. Juliana Maria Lasardo – 2004 (7) SCC 431; Asst. Commissioner, Commercial Tax Department Vs. Shukla & Brothers – 2010. (254) ELT 6 (SC).

vi. As per Section 65B(44) of the Finance Act, 1994, the two elements of service are activity and consideration. The adjudicating authority has nowhere exhibited any facts on record relating to performance of an activity by them. He has erroneously considered the notional bank guarantee commission as consideration received by them.

vii. No consideration, either monetary or non-monetary, was agreed upon by mutual understanding between them and their subsidiaries. Hence, the charge of service tax is not attracted.

viii. From the interpretation of the term 'consideration, it is clear that consideration has to be in return for something. Consideration is payable by service recipient to the service provider. In the present case, no consideration is being charged by them from their associate companies and this fact has not been disputed by the adjudicating authority.

ix. Application of the notional principles for deeming charging of consideration is beyond the mandate of the provisions of the Act read with the Valuation rules. Unless consideration monetary or non-monetary has been charged by the service provider, the provisions of Section 66/66B are not attracted.

x. It is an admitted fact that no commission has been charged or received by them for issuing bank guarantees on behalf of their related entities. Despite this the SCN and the impugned order has attempted to apply notional principles for deeming charging consideration, which is not permitted in Service Tax law.

xi. They rely upon the judgment in the case of Reliance Infratel Limited Vs. Commissioner – 2016 (42) STR 452 (Tri.-Mum).

xii. As a common industry practice, companies issued guarantees on behalf of their related companies to enable the lender to extend loan facility to the borrower.

xiii. The adjudicating authority has not ascertained the exact proviso under Section 67 of the Act for valuation purpose. From a perusal of Section 67 it is clear that the value on which tax is to be computed is the consideration in money or the money value of the consideration. In the event the consideration is not ascertainable, the value is to be determined in accordance with the provisions of the Valuation Rules.

xiv. The value of the taxable service for charging service tax has to be in consonance with Section 66 which levies tax only on the taxable service. They rely upon the decision in the case of Intercontinental Consultant & Technocrats Private Limited Vs. UOI – 2013 (29) STR 9 (Del) which was upheld by the Hon'ble Supreme Court – 2018 (10) GSTL 401 (SC). They also rely upon the decision in the case of Commissioner Vs. Bhayana Builders (P) Limited – 2018 (10) GSTL (SC).

xv. As the issuance of bank guarantee by them is not in return of a consideration, the charging provisions of Section 66 and 66B are not attracted. Where no consideration is charged by a service provider or agreed upon between the parties, Section 67 is not applicable. They rely upon the decision in the case of Association of Leasing & Financial Service Companies Vs. UOI – 2010 (20) STR 417 (SC).

xvi. Any notional commission, not agreed upon by the parties cannot form part of the value of taxable service under Section 67. The impugned order confirming demand by adopting notional methods for valuing alleged services is without any basis and deserves to be set aside:

xvii. In the present case, no consideration flowed from their subsidiaries to them under a contract.

xviii. There is no deeming provision under Service Tax law for determining the existence of consideration and it is only the actual consideration agree, which can be valued and charged to service tax.

xix. In the absence of a deeming fiction under Section 67, excise provisions cannot be borrowed for valuation under Service Tax.

xx. They rely upon the decision in the case of Moriroku UT India (P) Limited Vs. State of UP – 2008 (224) ELT 365 (SC); Murli Realtors Private Limited Vs. Commissioner – 2015 (37) STR 618 (Tri.-Mum.); Chandravadan Desai Vs. Commissioner – 2006 (2) STR 237 (Tri.-Kol.).

xxi. The notional bank guarantee commission shown in the books of accounts is only to comply with the Indian Accounting Standards-109, which defines a financial guarantee contract as a contract that requires the issuer to make specified payments to reimburse the holder for a loss it incurs because a specified debtor fails to make payment when due in accordance with the original or modified terms of a debt instrument.

xxii. In the instant case, they provided a guarantee to the banks to make payment of the due amount, if the SPVs fail to make payment when due. Based on this definition of Ind AS-109, the contract between them and banks qualify a Financial Guarantee Contract.

xxiii. Nothing, but notional bank guarantee commission is received by them from SPVs, which is a result of compliance of Ind AS-109, which is in absence of any activity/value addition by them. In the absence of any value addition by them to the SPVs, service tax is not payable. Reliance is placed upon the decision in the case of Home Solution Retail India Limited V. UOI – 2009 (14) STR 433 (Del.); Mormugao Port Trust Vs. Commissioner of Central Excise & ST – 2016-TIOL-2843-CESTAT-Mum.

xxiv. The observation of the adjudicating authority that their act falls under declared service by virtue of Section 66B is a result of non application of mind, firstly because their act is in absence of any positive activity for service recipient and there is no flow of actual consideration from the SPVs to them.

xxv. Out of all the declared services listed in Section 66E of the Finance Act, 1994, none of them remotely mentions the alleged activity performed by them.

xxvi. The department has concluded the tax liability without ascertaining the classification of the service and actual tax liability as they don't have documentary evidence. In this regard, reliance is placed upon the decision in the case of Shubham Electricals Vs. CST, Rohtak – 2015 (40) STR 1034 (Tri.-Del.) which was affirmed by the High Court – 2016 (42) STR J312 (Del.); Coromandel Infotech India Ltd. Vs. Commissioner of GST & CE – 2019 (1) TMI 323 and Chopra Bros (India) Pvt. Ltd. Vs. CCE & ST – 2020 (5) TMI 172.

xxvii. Even if they are liable to pay service tax then also the calculation made in the SCN is not proper. They had clarified vide letter dated 28.11.2018 that no entries were passed in the books for F.Y. 2015-16 and the figures mentioned therein were only restated for comparing with F.Y. 2016-17. However, the entries of F.Y.2015-16 have been considered and demand proposed accordingly.

xxviii. The gross amount representing the value of alleged taxable service has to be considered as inclusive of the amount of service tax payable. They rely upon Section 67 (2) of the Act. Reliance is also placed upon the decision in the case of Commissioner Vs. Advantage Media Consultant – 2008 (10) STR 449 (Tri.-Kol.) which was affirmed by the Hon'ble Supreme Court – 2009 (14) STR J49 (SC); Sri Chakra Tyres V. Collector – 1999 (108) ELT 361 (Tri.-LB) which was affirmed by the Hon'ble Supreme Court – 2002 (142) ELT A279 (SC); Commissioner Vs. Maruti Udyog Limited – 2002 (49) RLT 1 (SC).

xxix. Extended period of limitation is not applicable as there was no suppression of facts with an intent to evade payment of service tax. Therefore, the demand for the period F.Y. 2015-16 to F.Y. 2016-17 is barred by limitation. The demand is based on financial returns which are a public document.

xxx. They rely upon the judgment in the case of Commissioner of Central Excise Vs. Bajaj Auto Limited – 2010 (260) ELT 17 (SC); Swarn Cars Pvt. Ltd. Vs. CCE, Kanpur – 2020 (2) TMI 222.

xxxi. Non disclosure of information which was not required to be disclosed or recorded by statutory provisions or prescribed proforma does not

amount to suppression or concealment and accordingly, larger period of limitation cannot be invoked. They rely upon the various judicial pronouncements in this regard.

xxxii. It is a well settled law that the department cannot invoke extended period of limitation unless there is established an act of suppression or mis-declaration with an intent to evade payment of tax/duty. Reliance is placed upon the various judicial pronouncements in this regard.

xxxiii. Neither the SCN nor the impugned order disclose any specific acts of fraud and suppression with intent to evade tax liability. They have all along acted honestly in a bona fide manner.

xxxiv. As the demand itself is not sustainable, there can be no question of payment of any interest. Reliance is placed upon the decision in the case of Pratibha Processors V. UOI – 1996 (88) ELT 12 (SC); Commissioner of Customs, Chennai Vs. Jayathi Krishna & Co. – 2000 (119) ELT 4 (SC).

xxxv. As they are not liable to pay service tax, they cannot be subjected to penalty under Section 77 and 78 of the Finance Act, 1994. They rely upon the decision in the case of Coolade Beverages Limited – 2004 (172) ELT 451 (All.).

xxxvi. The Hon'ble Supreme Court has consistently held that penalty can be imposed only if an intentional act is committed and not otherwise. Reliance is placed upon the decision in the case of Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras – 1994 (74) ELT 9 (SC) and DCW Ltd. Vs. Asst. Collector of Central Excise – 1996 (88) ELT 31 (Mad.).

xxxvii. They were under the bona fide belief that they were not liable to pay service tax. The question involved in the present case is purely one of interpretation. This is a reasonable cause for non payment of service tax. Therefore, no penalty can be imposed under Section 77 & 78 of the Act. Hence, no penalty should be imposed on them in terms of Section 80 of the Act. Reliance is placed upon the judicial pronouncements in this regard.

6. Personal Hearing in the case was held on 07.10.2022. Shri Ambarish Pandey, Advocate, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum. He submitted a compilation of case laws as well as Indian Accounting Standards- 109 during the hearing. He further stated that he would submit additional written submissions based on which the case may be decided.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the material available on records. The dispute involved in the present appeal relates to the confirmation of demand for service tax amounting to Rs.2,49,525/- on the bank guarantee commission received by the appellant. The demand pertains to the period F.Y. 2015-16 to F.Y. 2017-18 (up to June).

8. I find that in the SCN issued to the appellant, it is stated at Para 6.1 that " *It appears that the above referred Bank Guarantee Commission is consideration under declared services provided by the said assessee on Bank Guarantee given by them on behalf of fully owned subsidiaries SPVs*". But for this assertion, the SCN does not anywhere elaborate or specify under which of the declared services, as contained in Section 66E of the Finance Act, 1994, the alleged service provided by the appellant is sought to be charged to service tax.

8.1 In the regime of Negative List based Services, in terms of Section 65B (44) of the Finance Act, 1994, service is defined to be any activity carried out by a person for another for a consideration, and includes a declared service. Therefore, a taxable service is not restricted to merely those listed under the declared services in Section 66E of the Finance Act, 1994. However, to be a taxable service there must be present the two essential ingredients i.e. an activity carried out for another person and consideration for the activity.

8.2 In the instant case, the appellant have in their elaborate submissions before the adjudicating authority, detailed in Para 4 of the

impugned order, claimed that no consideration was received by them for providing bank guarantees to their subsidiaries and the bank guarantee commission recorded in their books of accounts was only on notional basis so as to comply with the Indian Accounting Standards-109. However, I find that the adjudicating authority has not considered the submissions of the appellant and neither has he given any findings on the contentions of the appellant. The adjudicating authority has, without giving any reason or justification, held at Para 6.3 of the impugned order that " *The contention of the assessee that they have not provided any service and not received any consideration is not acceptable as the amount of consideration is the service provided by them to their subsidiary*". The impugned order passed without considering the submissions of the appellant and without giving any findings on the submissions made by them is in violation of the principle of natural justice as well as in violation of the tenets of administration of justice. Accordingly, the impugned order is liable to be set aside on this very ground.

9. The appellant have in their appeal memorandum contended that the adjudicating authority has given finding on the point of inadmissible cenvat credit, without appreciating that the issue involved in the case is demand of service tax. I find merit in the contention of the appellant. The adjudicating authority has at Para 6.4 of the impugned order given findings on the admissibility of cenvat credit and recovery of inadmissible cenvat credit under Rule 14 (1) (iii) of the CCR, 2004. Similarly, at Para 6.7 of the impugned order, it is recorded that " *the discussions at para 16 clearly indicates that the assessee had resorted to suppression of material facts with an intent to evade payment of tax by way of utilizing ineligible CENVAT credit.... The deliberate act of taking and utilizing ineligible CENVAT credit by the Noticee is in utter disregard to the requirements*". It, therefore, is apparent that the impugned order has been passed in a very shoddy manner without application of mind and deserves to be set aside.

10. The appellant have, before the adjudicating authority as well as in their appeal memorandum, contended that the bank guarantee commission recorded in their books of accounts is only on notional basis and is in compliance of Indian Accounting Standards-109. However, they have not submitted any explanation as to the applicability of the Indian Accounting Standards-109 for recording notional income in the books of accounts. Neither have the appellant submitted any material evidence to indicate how the notional income entries are recognized and treated in the subsequent financial years in their books of accounts. The appellant in the course of the personal hearing undertook to submit details in this regard, but they have failed to do so.

11. In view of the facts discussed herein above, I am of the considered view that the matter is required to be remanded back to the adjudicating authority for adjudication afresh after considering the submissions of the appellant and by following the principles of natural justice. The appellant are also directed to submit before the adjudicating authority the details of the accounting treatment of the notional income in their books of accounts in the subsequent financial years along with relevant documentary evidence. Accordingly, the impugned order is set aside and remanded back to the adjudicating authority. The appeal filed by the appellant is allowed by way of remand.

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.

19 October, 2022

(Akhilesh Kumar)
Commissioner (Appeals)
Date: .10.2022.

Attested:

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

BY RPAD / SPEED POST

To

M/s. JMC Projects (India) Pvt. Ltd., Appellant

A-104, Shapath-4,
Opposite Karnavati Club.
S.G.Road,
Ahmedabad- 380 015

The Assistant Commissioner, Respondent
CGST, Division- VII,
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.