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 : **20221164SW0000222A48**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2647/2021/ 4613 - 17

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-001-APP-065/2022-23**
दिनाँक Date : **21-10-2022** 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. **13/CGST/Ahmd-South/ADC/MA/2021** दिनाँक: **05.03.2021** passed by Additional Commissioner, CGST, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Mahavir Concrete Movers**
   B-15, 4th Floor, Devani Apartment,
   Lad Society Road,
   Vastrapur, Ahmedabad – 380015

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

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

भारत सरकार का पुनरीक्षण आवेदन :

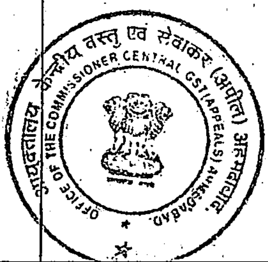
Revision application to Government of India:

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

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

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

(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 ड्यूटी 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) 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 हैं 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.

(41) 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)

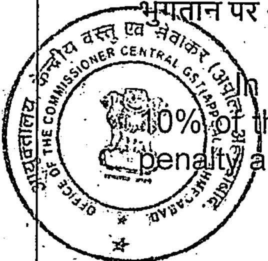
केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-
- (i) *(Section)* खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **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;
- (cvi) amount determined under Section 11 D;
- (cvii) amount of erroneous Cenvat Credit taken;
- (cviii) 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।



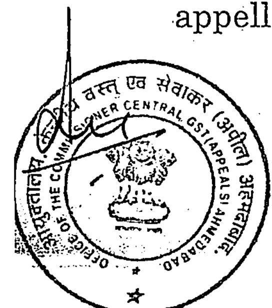
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Mahavir Concrete Movers, B-15, 4th Floor, Devani Apartment, Lad Society Road, Vastrapur, Ahmedabad 380 015 (hereinafter referred to as the appellant) against Order in Original No. 13/CGST/Ahmd-South/ADC/MA/2021 dated 05.03.2021 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, 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. ACYPT8136GSD001 and engaged in providing Business Auxiliary Services and Supply of Tangible Goods for use services. EA-2000 audit on the records of the appellant was conducted for the period from April, 2014 to F.Y.2017-18 (upto June, 2017) and FAR No. 271/2019-20 dated 04.11.2019 was issued in which the following Revenue Paras were raised.

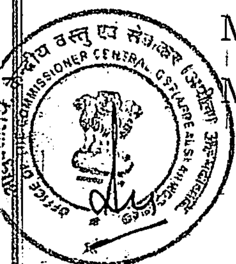
2.1 **Revenue Para 1** : During reconciliation of the taxable value of services reflected in the ST-3 returns and the financial record of the appellant, it was observed that the appellant had short paid service tax amounting to Rs.12,81,258/- during F.Y.2014-15 to F.Y. 2016-17. A query memo dated 30.08.2019 was issued and the appellant vide letter dated 30.08.2019 agreed to pay the service tax along with interest and requested for time. Subsequently, the appellant vide letter dated 21.09.2019 submitted that they were willing to pay service tax amounting to Rs.2,17,439/- for F.Y. 2014-15 but not willing to pay the service tax amounting to Rs.8,120/- and Rs.10,55,699/- for F.Y. 2015-16 and F.Y. 2016-17 respectively. The appellant contended that during F.Y. 2016-17, out of the differential taxable value of Rs.70,37,995/-, the taxable value of Rs.17,50,330/- pertained to the contract with M/s.Prism Cement Ltd against which they had paid UP VAT and, therefore, they were not liable to pay service tax amounting to Rs.2,62,550/-. For the remaining differential taxable value amounting to Rs.52,87,665/-, the appellant agreed to pay the service tax amounting to Rs.7,93,149/-.



2.2 It was found from an examination of the contract with M/s.Prism Cement Ltd. that the activity carried out by the appellant was that of providing Transit Mixers for transportation of Ready Mix Concrete (RMC) from the manufacturing plant to the sites of customers. It was observed that the Transit Mixers were owned by the appellant and they were responsible for the custody, control and all other related functions associated with transport of RMC to the site. In lieu of use of the Transit Mixers, a fixed monthly charge was paid by M/s.Prism Cement Ltd. to the appellant. It appeared that the activity of providing Transit Mixers by the appellant without transfer of right to use such goods was a declared service in terms of Section 66E (f) of the Finance Act, 1994.

2.3 It was further observed, on scrutiny of similar contract entered into by the appellant with M/s. Larsen & Toubro Ltd. (L&T), that the appellant had entered into agreement for hiring of Transit Mixers and were discharging service tax under the category of Supply of Tangible Goods. It appeared that the appellant was paying service tax under the category of Supply of Tangible Goods in the case of L&T but not paying service tax in the case of M/s.Lafarge Aggregates & Concrete Ltd., M/s.Ultratech Cement Ltd. and M/.ACC Ltd. It appeared that the appellant had provided taxable services but shown less gross value amounting to Rs.88,53,209/- in their ST-3 returns and thereby short paid service tax amounting to Rs.12,81,258/-. Subsequently, the appellant paid service tax amounting to Rs.5,00,000/- on 16.09.2019 and Rs.5,11,000/- on 19.10.2019 against their total liability of Rs.12,81,258/- for F.Y. 2014-15 to F.Y. 2016-17.

2.4. **Revenue Para 2** : On verification of the financial records of the appellant, it was observed that they had shown receipts under the head 'Transportation Income' during F.Y. 2014-15 and F.Y. 2015-16, on which service tax amounting to Rs.48,18,038/- was not discharged by them. The appellant informed that they were not paying service tax as the agreement was for Goods Transport Agency services on which the service recipient was liable to pay service tax in terms of Notification No.30/2012-ST dated 20.06.2012. On scrutiny of the contracts with the service recipients namely, M/s.Lafarge Aggregates & Concrete Ltd., M/s.Ultratech Cement Ltd. and M/s.ACC Ltd., it appeared that the activity carried out by the appellant was

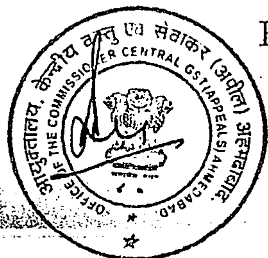


that of providing Transit Mixers for transportation of RMC for which they were paid a fixed charge per month. It, therefore, appeared that the appellant had given Transit Mixers on hire to these firms. Further, scrutiny of the invoices issued by the appellant to M/s.Ultratech Cement Ltd. indicated that the appellant had charged service tax on the gross amount for the services provided by them. It, therefore, appeared that they had collected service tax from M/s.Ultratech Cement Ltd. but not deposited the same to the government exchequer. Further, despite claiming to have provided Goods Transport Agency service, the appellant had failed to submit copies of consignment notes issued by them, as required in terms of Rule 4B of the Service Tax Rules, 1994. It, therefore, appeared that the service tax amounting to Rs.48,18,038/- was liable to be demanded and recovered from the appellant.

2.5 **Revenue Para 3** : It was observed that the appellant had availed 100% cenvat credit amounting to Rs.24,68,288/- in respect of Capital Goods received by them during F.Y. 2015-16 which was in contravention of Rule 4(2) (a) of the Cenvat Credit Rules, 2004 (hereinafter referred to a CCR, 2004). As the cenvat credit amounting to Rs.12,34,144/- was availed three months before they were actually eligible for the same, interest amounting to Rs.55,536/- on the said amount was liable to be recovered from them on the excess credit availed.

3. The appellant was, therefore, issued a Show Cause Notice bearing No. VI/1(b)/Tech-51/SCN/Mahavir/2019-20 dated 08.11.2019 wherein it was proposed to :

a) Demand and recover the service tax amounting to Rs.12,81,258/- and Rs.48,18,038/- under the proviso to Section 73 (1) of the Finance Act, 1994.
b) Appropriate the service tax amounting to Rs.10,11,000/- paid by them on 16.09.2019 and 19.10.2019.
c) Recover Interest under Section 75 of the Finance Act, 1994.
d) Impose penalty under Section 78 (1) of the Finance Act, 1994.
e) Recover interest amounting to Rs.55,536/- under Section 75 of the Finance Act, 1994 read with Rule 14 (1)(ii) of the CCR, 2004.



f) Impose penalty under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the CCR, 2004.

4. The SCN was adjudicated vide the impugned order wherein the demand for service tax was confirmed along with interest and the service tax paid by the appellant was appropriated. Penalty equivalent to the service tax confirmed was imposed under Section 78 of the Finance Act, 1994. Interest amounting to Rs.55,536/- was ordered to be recovered under Section 75 of the Finance Act, 1994 read with Rule 14 (1)(ii) of the CCR, 2004. Penalty amounting to Rs.12,34,144/- was imposed under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the CCR, 2004.

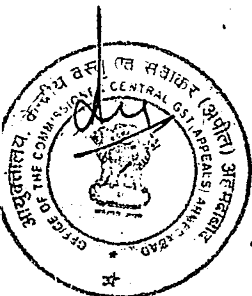
5. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

i. As per the terms of the contract with M/s. Prism Cement, all the conditions as laid down by the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Limited Vs. UOI are satisfied and, hence, there is transfer of right to use the goods. The control is with M/s. Prism Cement Ltd. and they have no right to transfer the right to another person while the right is transferred to M/s.Prism Cement Ltd.

ii. They have already paid VAT which is applicable in the said contract. As VAT has already been paid, on a single contract, VAT and service tax cannot be levied.

iii. Section 66D(e) of the Finance Act, 1994 specifically excludes trading of goods from the purview of service tax. When a transaction is covered under clause 29(a) of Article 366 of the Constitution, service tax cannot be levied and VAT is levied on such transaction. When there is transfer of right to use, it does not satisfy the conditions of clause (f) of Section 66E of the Finance Act, 1994. Therefore, demand of Rs.2,62,550/- is required to be set aside.

iv. It has been stated that they are paying service tax in a similar contract with L&T. It is submitted that the payment terms are different in the case of L&T where the payment is fixed based on hours.



v. In the case of Prism Cement Ltd., the consideration is fixed @ Rs.1,15,000/- while in the case of L&T the consideration is on the basis of hours i.e. Rs.1,25,000/- for 572 hours.

vi. The demand of Rs.48,18,038/- relating to contracts with M/s.Ultratech Cement Ltd., M/s.ACC Ltd., and M/s.Lafarge Aggregates and Concrete India Pvt. Ltd. It was submitted by them in response to the query memo that these contracts pertain to Goods Transport Agency service (GTA). In case of GTA service, liability to pay service tax is on the service recipient as per Notification No.30/2012-ST dated 20.06.2012. As per the Explanation to the said Notification, the person who pays the freight shall be treated as service recipient and would be liable to pay service tax under reverse charge.

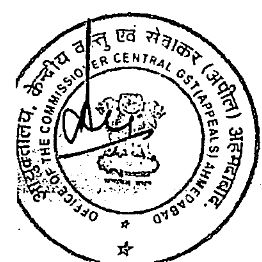
vii. Regarding the terms of Contract Lafarge A&C/Ahmedabad/2014-15 dated 10.06.2014, it is submitted that it is no where mentioned that the contract is for hiring of transit mixer. It is specifically mentioned that billing is as per GTA service and the consideration charged is for transportation of transit mixer and charged on the basis of period for which the transit mixer is used and number of transit mixer transported. Hence, as per the contract terms it can be said that Rs.1,10,000/- is charged for transporting one transit mixer for 24 months.

viii. In the contract with ACC Limited, the mechanism to determine freight is mentioned. Hence, when contract talks about freight, then such contract can never be for hiring transit mixer.

ix. Regarding the demand of interest amounting to Rs.55,536/-, it is submitted that they had stated in their reply dated 21.09.2019 to the query memo stated that they have complied with Rule 4(2)(a) of the CCR, 2004 and cenvat credit was properly availed. It was mentioned that 50% cenvat credit was availed in 1st year of procurement of goods and other 50% availed in subsequent year. Hence, there is no contravention of the above rule.

x. When no service tax is payable, the question of interest does not arise.

xi. Penalty under Section 78 can be imposed only if there is fraud, collusion, wilful mis-statement, suppression of facts or contravention of any provisions with intent to evade payment of service tax. It can be imposed by invoking extended period for issue of SCN.



xii. No penalty is imposable for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for failure. Reliance is placed upon the judgment in the case of CCE, Meerut-II Vs. On Dot Couriers & Cargo Ltd. – (2006) 6 STJ (CESTAT, New Delhi).

xiii. Reasonable cause has been interpreted by various courts. They rely upon the judgment in the case of Municipal Corporation of Delhi Vs. Jagannath Ashok Kumar – (1987) SIR 2316 (Supreme Court); Commissioner of Wealth Tax Vs. Jagdish Prasad Choudhary – (1996) AIR 58 (Patna); Gujarat Water Supply & Sewerage Board V. Unique Erectors (Gujarat) Pvt. Ltd. – (1989) AIR 973 (Supreme Court); Ram Krishna Travels Pvt. Ltd. Vs. CCE, Vadodara – 2007-TMI-977-CESTAT, Mumbai.

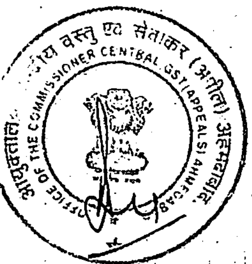
xiv. According to Section 67(2) of the Finance Act, 1994 where the gross amount charged by a service provider for the service provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to gross amount charged.

xv. They rely upon the judgment in the case of Commissioner of Central Excise & Customs, Patna Vs. Advantage Media Consultant & Anr.- 2008 (10) TMI 570 –SC; Commissioner of Service Tax, Mumbai-I Vs. Allied Aviation Ltd. – 2017 (4) TMI 438- CESTAT, Mumbai; Commissioner of Central Excise, Delhi Vs. Maruti Udyog Ltd. – 2012 (141) ELT 3 (SC).

6. Personal Hearing in the case was held on 29.08.2022. Shri Rashmin Vaja, Ms. Bhagyashree Dave and Ms. Komal Agrawal, Chartered Accountants, appeared on behalf of appellant for the hearing. They reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the material available on records. There are four issues involved in the present appeal, which are as under :

A. Whether the services by way of providing Transit Mixers to M/s.Prism Cement Ltd. by the appellant during F.Y.2016-17, on which VAT was



paid, is Supply of Tangible Goods service and whether the appellant is liable to pay service tax?

B. Whether the services by ways of providing Transit Mixers to M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India by the appellant during F.Y. 2014-15 to F.Y. 2016-17 can be considered Supply of Tangible Goods service and whether the appellant is liable to pay service tax ?

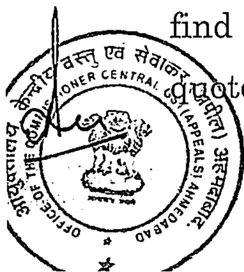
C. Whether the appellant had provided GTA service to M/s. L&T, M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India during F.Y. 2014-15 and F.Y. 2015-16 or whether the same was Supply of Tangible Goods as contended by the department?

D. Whether the appellant had correctly availed cenvat credit on capital goods during F.Y. 2015-16 or otherwise ?

8. Regarding the issue pertaining to the appellant providing Transit Mixers to M/s.Prism Cement Ltd., I find that the appellant had provided the Transit Mixers in terms of Contract dated 01.10.2016 with M/s. Prism Cement Ltd. The adjudicating authority has at Para 51 of the impugned order held that "*I find that the assessee had undertaken the activity of transfer of their goods by the use of hiring, leasing for M/s.Prism Cement ltd. for a consideration*". Accordingly, he has held at Para 55 of the impugned order that "*It, therefore, follows that such an activity of supplying transit mixers without transferring the right to use such goods, would be aptly covered within the ambit of clause (f) of Section 66E of the Finance Act, 1994*". Since the activity undertaken by the appellant has been held to be a taxable service covered by Section 66E (f) of the Finance Act, 1994, it would be pertinent to refer to the said Section, which is reproduced below :

> "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods:"

8.1 From a plain reading of the above, it is seen that to be covered within its ambit, the transfer of goods has to be without transfer of right to use such goods. In the backdrop of this legal provision, I proceed to examine the terms of the contract between the appellant and M/s. Prism Cement Ltd. to determine whether there is a transfer of right to use involved in the cae. I find that the adjudicating authority has, at Para 49 of the impugned order, quoted extensively the terms of the said Contract. I have perused the said



contract and find that contract is for "deployment of four nos. Transit Mixers" at the site of M/s. Prism Cement Ltd. Further, in terms of the said contract, the appellant was to provide the Transit Mixers which would be painted with the colour and name of M/s. Prism Cement Ltd., provide the personnel to operate the Transit Mixers, the Transit Mixers are provided on 24 hour basis and would operate as per the instructions of M/s. Prism Cement Ltd., the appellant would be paid a fixed monthly charge irrespective of the mileage or hours of running of the Transit Mixers, fuel would be provided by M/s. Prism Cement Ltd., M/s. Prism Cement Ltd. had the right to transfer the Transit Mixer to any other RMC plant, the appellant was to be registered with UP VAT and pay VAT, which would be reimbursed by M/s. Prism Cement Ltd.

8.2 It is observed from the above terms of the Contract that the Transit Mixers provided by the appellant to M/s. Prism Cement Ltd. are entirely at the disposal of M/s. Prism Cement Ltd. at all times during the tenure of the contract. Though the Transit Mixers are to be operated by the personnel of the appellant, they are required to follow the instructions of M/s. Prism Cement Ltd. at all times for their operation. Further, M/s. Prism Cement Ltd. also had the right to transfer the Transit Mixer to any other RMC Plant. Considering these facts, it is abundantly clear that the Transit Mixers provided by the appellant to M/s. Prism Cement Ltd. involved a transfer of right to use for the entire duration of the contract. Accordingly the same is out of the purview of Section 66E (f) of the Finance Act, 1994.

8.3 I find that the Hon'ble High Court of Andhra Pradesh was seized of a similar issue in the case of G.S.Lamba & Son Vs. State of Andhra Pradesh – 2015 (324) ELT 316 (A.P.). The relevant portion of the said judgment is reproduced below :

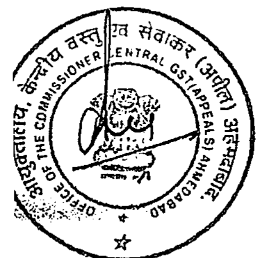
> "**40.** That brings us to the construction of the agreement between the parties which indisputably came into force on 1-10-2002. The intention of the parties as noticed supra has to be understood by reading the entire agreement; reading a word here or a clause there is not sufficient. Grasim was looking for a transporter to take care of the transporting need of their RMC plants in Hyderabad. The petitioners, who are owners of Transit Mixers, were looking for advancing their business interest in Hyderabad. The latter approached the former offering their Transit Mixers to take care of all transporting solution needs. These essentially form part of the recitals. The Habendum of the agreement speaks of the petitioners providing a dedicated fleet of five Transit Mixers painted in a particular style and colour as well as brand name of 'Grasim' to transport RMC, on 24 hours basis every day of the week as instructed by the lessee, failure of which will attract penalties. The staff of the

petitioners were required to obey the instructions issued by Grasim, and they should use safety equipment like helmets. These Transit Mixers cannot move or carry RMC to the work sites as per their convenience but are to be used as per the delivery schedule given by Grasim. The counsel also does not dispute that the agreement between the parties speaks of a dedicated fleet of vehicles to be made available on 24/7 basis duly painted in a particular style and colour, and staff being under the instructions of Grasim alone. It is, however, submitted that the parties agreed for five dedicated vehicles as RMC needs to be transported immediately after it is manufactured in the batching plant, and the manufacturer cannot identify and negotiate with the transporter for carrying the products every time an order is placed. Therefore, such a clause was included in the agreement to ensure there is no delay in delivering the product to the customers. He also submits that making available the vehicles through out the day or painting them with brand name of Grasim is required keeping in view the possible hurdles in logistics, and to ensure customer satisfaction of getting the required branded RMC. According to him, these clauses by themselves do not warrant an inference of transfer of the right to use Transit Mixers.

42. In addition to the above clauses, we have thoroughly perused and analysed the agreement between the petitioners and Grasim. With reference to the intention, the purpose and the rights/obligations created under the said agreement, we may divide the same into three parts. The recitals form the first part, which deals with the intention. Admitting that the petitioners are in possession of a fleet of Transit Mixers used for carrying RMC, and further admitting that Grasim was looking for a transporter of RMC, the recitals reveal that both the parties entered into an agreement for transporting RMC by using the vehicles owned by the petitioners. Though the phrase 'offer services to take care of transporting solution needs' is used the real purpose, as can be seen from the second part, is to enable Grasim to have the right to use the Transit Mixers. The agreement requires the petitioners to provide drivers to be dressed in uniform, and all of them are to obey the lawful instructions issued by Grasim. Further RMC has to be delivered by these drivers in Transit Mixers only at the time and places as instructed by the officials of Grasim, and the petitioners have no right to carry RMC wherever and whenever they like. Thus the full control on the method, manner and time of using the Transit Mixers, owned by the petitioners vests absolutely in Grasim.

43. Clauses A to E and L deal with the second aspect of the agreement. Under these. the petitioners agreed to provide five dedicated fleet of five Transit Mixers 24/7 i.e., twenty-four hours every day of the week as per the instructions of Grasim for transporting RMC during the period from 1-10-2002 to 31-3-2006 (42 months). These dedicated vehicles are to be painted in a particular style and colour which has to be re-painted once in six months. For any third party, during these 42 months, the goods as visible in use would create an immediate impression that they belong to Grasim. No reasonable man would even think that the Transit Mixers, being used for transporting RMC of Grasim, belong to the petitioners and they are only being used to meet the transportation needs of Grasim.

44. The third aspect deals with the petitioners indemnifying Grasim, paying all taxes for permits, insurance etc., the rent/lease amount payable by Grasim, the dispute resolution mechanism and the mutual rights of the parties to modify the agreement. Standing alone all of them by themselves have no meaning. They are clauses intended for working out the contract which is essentially for the petitioners placing the Transit Mixers painted with brand name at the disposal of Grasim for a period of 42 months for transporting RMC manufactured by Grasim.



45. Reading the recitals and various clauses, indeed there is a transfer of the

right to use Transit Mixers. All the tests as indicated hereinabove exist in the contract between the petitioners and Grasim. The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. **Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim.** For these reasons, we are not able to countenance any of the submissions made by the petitioners' counsel." [Emphasis supplied]

8.4 In the present case, I find that terms of the Contract dated 01.10.2016 between the appellant and M/s.Prism Cement Ltd. stipulates that :

a) The appellant would provide four Transit Mixers with cum capacity.
b) The appellant would paint the Transit Mixers with the colour and logo of M/s.Prism Cement Ltd., and thereafter every year at own cost.
c) The appellant would provide two drivers and two helpers (one each in 12 hour shifts) for operation of the Transit Mixers round the clock.
d) The Transit Mixers would operate as per the instruction of the Production in charge.
e) The appellant would, at their cost, obtain comprehensive insurance policy covering all risks, including accident, overturning, fire, theft etc.
f) The appellant would pay the road tax, goods tax and fitness tax, obtain Permit with U.P.

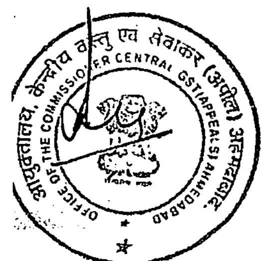
8.5 From the terms and conditions of the said contract, it is observed that they are identical to those in the case before the Hon'ble High Court of Andhra Pradesh. Therefore, the said judgment is squarely applicable to the facts of the present appeal. Accordingly, considering the facts and circumstances of the present appeal as well as the judgment of the Hon'ble High Court of Andhra Pradesh supra, I am of the considered view that the activity of providing Transit Mixers by the appellant to M/s. Prism Cement Ltd. involves transfer of right to use and, therefore, it is out of the purview of services of supply of tangible goods for use defined under Section 66E (f) of the Finance Act, 1994. Accordingly, the appellant are not liable to pay service

tax in respect of the Transit Mixers provided by them to M/s.Prism Cement Ltd. Therefore, the impugned order to this extent is set aside.

9. As regards the issue as to whether the providing of Transit Mixers to M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India by the appellant during F.Y. 2014-15 to F.Y. 2016-17 was Supply of Tangible Goods service, I find that there is no discussion in the impugned order about the terms of the contract entered in to by the appellant with these firms. The appellant have also not submitted copies of the contract with their appeal memorandum. In the absence of the contract and without examining the terms and conditions of the said contract, it is not possible for this authority to formulate any view on the issue. Therefore, I am left with no other option but to remand the issue back to the adjudicating authority to decide the matter afresh after examining the contracts of the appellant with M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India. The appellant are directed to submit copies of the relevant contracts/agreements/work orders to the adjudicating authority within 15 days of receipt of this order.

10. Regarding the issue a to whether the appellant had provided GTA service to M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India during F.Y. 2014-15 and F.Y. 2015-16 or whether the same was Supply of Tangible Goods as contended by the department, I find that the appellant have submitted copies of the contracts entered into by them with these firms. On a perusal of the contracts, I find that the Work Order dated 23.11.2012 issued by M/s. Ultratech Ltd. to the appellant is titled as '*Work order for transportation of Ready Mix Concrete in Vehicle/Vehicles from out Sumel 6 Dedicated Ready Mix Plant at Ahmedabad*. Further the terms and conditions of the Work Order states that :

> "1. You shall load material (Ready Mix Concrete) in you Vehicles, transport the same to the required destinations, unload the material at customer sites, return and take another load on similar basis in a clean vehicle in accordance with prudent industrial practices.
>
> 2. For this purpose you will deploy fleet of 6 M3 Capacity of Vehicles mounted on suitable chassis in numbers adequate to transport 2500 M3 of Ready Mix Concrete every month.
>
> 11. Transportation Charges : The transportation charges payable to you shall be as below :



a) Rs.182.46/- per CuM for actual quantity of Ready Mix Concrete transported during a calendar month.
b) Rs.31.00 per Km for distance travelled outside of Sumel 6 plant (External KM) during the month in the transportation of our Ready Mix Concrete. While calculating external KM, the cost of 3 KM/Trip will be deducted from the actual external KM Cost.

20. Payment of taxes, insurance etc:
The rates mentioned in clause 11 are exclusive of service tax but inclusive of all other taxes……"

10.1 The Agreement dated 08.12.2014 between the appellant and M/s. ACC Ltd. is titled as '*Agreement with Goods Transport Agency (GTA) for Transport of Ready Mix Concrete*'. The appellant have not submitted the complete agreement either before the adjudicating authority or with their appeal memorandum. From the Agreement submitted by the appellant, it is seen that the terms and conditions of the said Agreement states that :

"(B) The Transporter, owner of Truck chassis and concrete mixer drum (here in after called "TM" as defined below) has applied to the Company to transport the ready mix concrete (meeting the Product Delivery Service norms as defined below), on behalf of the Company to the Company's customers under the terms and conditions set out in this Agreement (including the Schedules).

1.12 Freight Rate : The cartage rate of Concrete using the TMs within the Transportation Area as described in Schedule B and as amended from time to time.

4.1 The Parties agree that this Agreement is a contract for GTA Services only for which concessional rate of service tax is applicable. This Agreement does not imply or constitute taking the TMs on hire."

10.2 As per Schedule B to the said Agreement, the appellant would be required to transport a target load of 500 m3/month and would be paid at a fixed rate of Rs.186/m3. The variable rate is Rs.39.84/m3.

10.3 The Contract dated 10.06.2014 between the appellant and M/s. Lafarge Aggregates & Concrete India Pvt. Ltd. is titled as '*Contract for Transportation of Transit Mixer(s) 2 nos for Ahmedabad (Sanathal plant)*'. It is stated therein that "*we are pleased to place an order for transportation of the ready mix concrete, in transit mixers, from the ready mix concrete plant(s) of Lafarge Aggregates & Concrete India Private Limited ('**Lafarge**') to various locations as per the terms and conditions mentioned in this Contract*". As per the terms of the contract, the appellant would be paid a fixed amount of Rs.1,10,000/- per Transit Mixer.

10.4 From a reading of the Agreement/Contract of the appellant with the aforesaid firms, it is evident the appellant are entrusted with transportation of RMC from the site of the firms to various locations for which the appellant is paid at the agreed upon rates in the case of ACC Ltd. and Ultratech. In the case of Lafarge, the appellant are paid a fixed monthly amount per Transit Mixer.

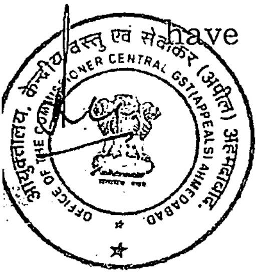
10.5 To examine the claim of the appellant that they are providing GTA service, it would be pertinent to refer to the definition of GTA provided in Section 65B(26) of the Finance Act, 1994, which is reproduced below :

> " "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;"

10.6 Rule 4B of the Service Tax Rules, 1994, which is relevant, is reproduced below :

> "4B. Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of service:
>
> Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.
>
> Explanation.- For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a good transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency."

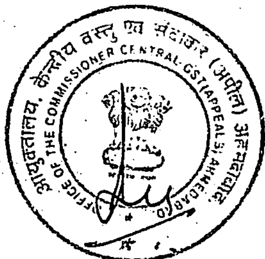
10.7 From a conjoint reading of Section 65B(26) of the Finance Act, 1994 and Rule 4B of the Service Tax Rules, 1994, it is clear that to qualify as a GTA, issue of consignment note is a mandatory requirement. In the instant case, the appellant have not submitted copies of any consignment notes issued by them to the aforesaid firms and the same has been recorded by the adjudicating authority in his findings at Para 76 of the impugned order. Considering the above facts, the adjudicating authority has held that the services provided by the appellant was Supply of Tangible Goods service as defined in Section 66E (f) of the Finance Act, 1994. I find that the appellant have in their appeal memorandum not challenged this finding of the



adjudicating authority and neither have they submitted copies of the consignment notes issued by them. The contention of the appellant that they have provided GTA service is also negated by the fact that they had in the case of M/s. Ultratech Cement Ltd. charged and collected service tax, the details of which are recorded in Para 71.1 of the impugned order. The appellant have not made any submission in this regard in their appeal memorandum.

10.8 I find it relevant to refer to the judgment of the Hon'ble Tribunal in the case of Birla Ready Mix Vs. Commissioner of Central Excise, Noida – 2013 (30) STR 99 (Tri.Del.) in a case involving similar facts. The relevant portion of the said judgment is reproduced below :

> **"5.** We have examined the terms of the contract. The contract is for hiring of vehicles. The vehicle are to be painted as directed by the appellant and showing appellants logo. The main responsibility of the supplier of vehicles is to ensure the availability of the vehicles in time and in proper condition. The agreement does not demonstrate that the operator has any special rights or responsibility about the goods as is the case of goods entrusted to a Goods Transport Agency. This obviates the need to issue consignment notes which normally is a document of title for the goods when it is in the custody of the transporter. There is one clause to the effect that the operator will obtain proper receipts from customers after the goods are delivered. Thus by itself cannot make the contract to be that of "Goods Transport Agency" as defined in Section 65(50b) of Finance Act, 1994.
>
> **7.** The above terms show that this is a case where the operator was responsible only for the vehicle and there is no custodial rights or responsibilities in matter of goods carried. Since the appellants are responsible for the goods transported, consignment note, which is a document of title to the goods, is not issued. Definition of goods transport agency as given in Section 65(50b) of Finance Act, 1994 reads as under :
>
> > "(50b) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;"
>
> **8.** When consignment notes are not issued by the operator they cannot be considered as a "Goods Transport Agency". In this context we have also considered the provision in Rule 4A and also Rule 4B of Service Tax Rules, 1994 which stipulate that every "Goods Transport Agency" shall issue consignment note. This provision read with Section 65(50b) of Finance Act, 1994 as quoted above leads to a situation where the definition is dependent on a requirement laid down using the defined term itself and leads to difficulties in proper understanding of the matter. Since the provision of Act has to prevail we understand the definition at Section 65(50b) has to be understood independent of Rule 4B of Service Tax Rules, 1994 to decide whether the person concerned is a goods transport agency by adopting ordinary meaning of consignment note and then apply Rule 4B of Service Tax Rules, if the person concerned is found to be a goods transport agency.
>
> **9.** We further note that service tax is levied on the services of a "Goods Transport Agency" and not on services of a "Goods Transport Operator". The



latter term was used in Finance Act, 1994 during the period Nov., 1997 to June, 1998 and the former expression is being used now. So it is to be understood that these two expressions refer to different types of persons. The mere fact that the operator is doing activity of transportation cannot make the operator a "Goods Transport Agency". So the operators in this case cannot be considered as "Goods Transport Agencies". We are not in agreement with the argument of Revenue that the log-book maintained by the operators should be considered as equivalent to consignment note. The fact that part of the hire charges for the vehicles is being paid on the basis of number of kilometers run cannot alter the nature of the responsibility of the operators because such payment is consistent with a scheme of hiring the vehicle though it may be consistent with a contract for transportation of goods also. On the other hand a fixed charge per month for the vehicle is more consistent with a scheme of hiring the vehicle rather than a contract for transporting the goods. It is seen the contracts provide for such component of remuneration also."

10.9 Considering the facts involved in the present appeal as well as the judgment of the Hon'ble Tribunal supra, I am of the considered view that there is no merit in the contention of the appellant that the services provided by them to these firms was GTA. I, therefore, uphold the order of the adjudicating authority holding the service provided by the appellant as Supply of Tangible Goods services as defined under Section 66E(f) of the Finance Act, 1994. Accordingly, I uphold the demand of service tax confirmed vide the impugned order.

11. As regards the issue of availment of cenvat credit on capital goods, I find that the appellant had taken 100% credit on the capital goods in the financial year of receipt i.e. F.Y.2015-16, which is in contravention of the provisions of Rule 4(2)(a) of the CCR, 2004. The text of Rule (4) (2) (a) and (b) of the CCR, 2004 which is relevant to the issue on hand, is reproduced below :

"(2) (a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service or outside the factor of the manufacturer of the final products for generation of electricity for captive use within the factory, or in the premises of the job worker, in case capital goods are sent directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be, at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year:

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years."

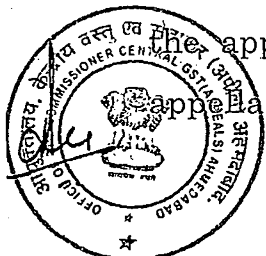
11.1 From the above provisions of Rule 4 (2) (a) and (b) of the CCR, 2004, it is clear that cenvat credit of only fifty per cent of the duty paid shall be available in a financial year and the balance fifty per cent may be taken in any financial year subsequent to the year of receipt of the capital goods. The appellant have in their appeal memorandum merely stated that they had correctly availed 50% cenvat credit in the first year of procurement of capital goods and other 50% was availed in the subsequent year. They have, however, not submitted any evidence substantiating their contention. Therefore, I do not find any merit in their contention and, accordingly uphold the finding of the adjudicating authority that the appellant had wrongly availed cenvat credit on capital goods three months before they were due for the same. The appellant were, therefore, correctly held to be liable to pay interest on the excess cenvat credit, which was utilized for payment of service tax.

11.2 The adjudicating authority has also imposed penalty equal to the amount of excess cenvat credit wrongly availed by the appellant, in terms of Section 78 (1) of the Finance Act, 1994 read with Rule 15 (3) of the CCR, 2004. I find that the said rule provides for imposition of penalty in terms of Section 78(1) of the Finance Act, 1994 in cases where the cenvat credit has been taken or utilized wrongly by reason of fraud, collusion or any wilful mis-statement of suppression of facts or contravention of any provisions with intent to evade payment of service tax. In the instant case, I find that there is no proposal in the SCN for recovery of the cenvat credit and the only dispute is relating to availment of 100% cenvat credit on capital goods in the same financial year. Therefore, the eligibility of the appellant to the cenvat credit, albeit in the next financial year, is not disputed. Accordingly, this is a case of the appellant prematurely availing full cenvat credit on capital goods and not a case of cenvat credit availed wrongly by resorting to fraudulent practices. It is also pertinent to mention that since the availment of the cenvat credit prematurely is a recorded transaction, the allegation of suppression or mis-statement or contravention of the provisions with 'intent to evade payment of tax' cannot be alleged or fastened on to the appellant, particularly when the eligibility to the cenvat credit is not in dispute. Considering these facts, I am of the view that the allegation of fraud, collusion or any wilful mis-statement

of suppression of facts or contravention of any provisions with intent to evade payment of service tax is not sustainable. Accordingly, I set aside the penalty imposed on the appellant under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the CCR, 2004.

12. The appellant have also challenged the imposition of penalty under Section 78 of the Finance Act, 1994. Having gone through the merits of the present appeal, I find that the appellant have clearly suppressed the fact that they were providing the service of Supply of Tangible Goods and wrongly claimed that they were providing GTA service. Further, the appellant in the case of M/s. Ultratech Cement Limited, to whom they were providing Transit Mixers, charged service tax for the services provided by them. However, the service tax collected by them from M/s. Ultratech Cement Ltd. was not paid to the government exchequer. It is, therefore, evident that the appellant were aware that the services provided by them to M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India during F.Y. 2014-15 and F.Y. 2015-16 was not GTA service but Supply of Tangible Goods and were chargeable to service tax under forward charge mechanism in their hands. Despite this stated legal position, the appellant have deliberately suppressed the facts from the department and wilfully mis-stated that the services provided by them to the said firms was GTA service and that the service recipients were discharging the service tax under reverse charge. This is clearly a case of wilful mis-statement and suppression of facts with an intent to evade payment of service tax. Consequently, the provisions of Section 78 of the Finance Act, 1994 are attracted and the adjudicating authority has rightly imposed penalty upon the appellant.

13. The appellant have claimed the benefit of cum-duty price and relied upon a few case laws in their support. However, I find that the claim of the appellant is not supported by any material evidences. In the case of M/s. Ultratech Cement Ltd., the Work Order dated 23.11.2012 clearly stipulates at Clause 20 that the prices are exclusive of service tax. The appellant have also collected service tax from M/s. Ultratech Cement Ltd., as detailed in Para 71.1 of the impugned order. As per the agreement with M/s. ACC Ltd., the appellant are entitled to fee at a fixed rate. The agreement of the appellant with M/s. Lafarge provides for payment of a fixed monthly charge



per Transit Mixer. Therefore, in the absence of any evidence that the amount received by the appellant was inclusive of the amount of service tax, the benefit of cum-duty prices is not admissible to them.

13.1 I find in pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. Vs. Commissioner of Central Excise, Ghaziabad – 2007 (210) ELT 183 (SC). The Hon'ble Supreme Court had in the said case held that :

> "**15.** In our view, in the facts and circumstances of the case the judgment of this Court in the case of *Bata India Ltd.* (supra) on principle would apply. Therefore, in the present case, the assessee will have to show as to how he has determined the value. What the appellant has really done in the instant case has to be examined. Whether the price charged by him to his customers contains profit element or duty element will have to be examined. As stated above, this examination is warranted because, in the present case, one cannot go by general implication that the wholesale price would always mean cum-duty price, particularly when the assessee had cleared the goods during the relevant years on the basis of the above exemption notification dated 1-3-1997."

13.2 It is observed that the appellant have in their appeal memorandum not submitted any evidence that the price charged by them from their customers was inclusive of the service tax element. Therefore, the claim of the appellant of the benefit of cum-duty price is without any merit and, hence, is rejected.

14. In view of the discussions hereinabove, I uphold the impugned order to the extent mentioned below :

(i) Confirmation of demand of service tax amounting to Rs.48,18,038/- along with interest under Section 75 of the Finance Act, 1994.

(ii) Imposition of penalty under Section 78 (1) of the Finance Act, 1994 equal to the demand confirmed amounting to Rs.48,18,038/-.

(iii) Ordering recovery of interest amounting to Rs.55,536/- under Section 75 of the Finance Act, 1994 read with Rule 14 (1)(ii) of the CCR, 2004.

14.1 I set aside the impugned order insofar as it pertains to :

i) Confirmation of demand of service tax in respect of the Transit Mixers provided by the appellant to M/s.Prism Cement Ltd during F.Y. 2016-

17 along with interest under Section 75 and Penalty under Section 78(1) of the Finance Act, 1994.

ii) Imposition of penalty amounting to Rs.12,34,144/- under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the CCR, 2004.

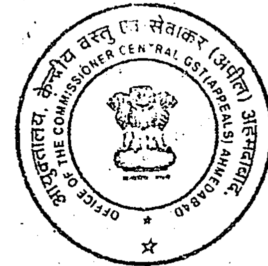
14.2 Further, the impugned order confirming of demand of service tax confirmed under Supply of Tangible Goods, in respect of the Transit Mixers provided by the appellant to M/s. ACC Ltd., M/s. Ultratech Ltd. and M/s. Lafarge Aggregates & Concrete India during F.Y. 2014-15 to F.Y. 2016-17, out of the total demand of service tax amounting to Rs.12,81,258/-, is set aside and remanded back to the adjudicating authority for decision afresh in terms of the directions contained in Para 9 above.

15. 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.

21st October, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 21.10.2022.



Attested:

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

BY RPAD / SPEED POST

To

M/s. Mahavir Concrete Movers,
B-15, 4th Floor, Devani Apartment,
Lad Society Road,
Vastrapur, Ahmedabad 380 015 — Appellant

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

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South. (for uploading the OIA)
4. Guard File.
5. P.A. File.