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 : **20221164SW000000E574**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2651/2021/4634 - 38

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-001-APP-066/2022-23**
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. **03/CGST/Ahmd-South/ADC/MA/2021** दिनाँक: **28.01.2021** passed by Additional Commissioner, CGST, Ahmedabad South

ध अपीलकर्त्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Dhruv Enterprise**
   F/F/2, Popular Estate,
   Near Prime Estate,
   Behind Ujjala Restaurant,
   Sarkhej, Ahmedabad - 382210

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 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.

(42) 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:

(cix) amount determined under Section 11 D;
(cx) amount of erroneous Cenvat Credit taken;
(cxi) 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. Dhruv Enterprise, F/F/2, Popular Estate, Near Prime Estate, Behind Ujjala Restaurant, Sarkhej, Ahmedabad- 382 210 (hereinafter referred to as the appellant) against Order in Original No. 03/CGST/Ahmd-South/ADC/MA/2021 dated 28.01.2021 [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. AAIFD6457ASD001 and engaged in providing Works Contract Service, Site Formation and Clearance Service, Excavation, Earth Moving and Demolition Services. Audit of the records of the appellant for the period from April, 2015 to June, 2017 was conducted, by the Officers of Central Tax, Audit Commissionerate, Ahmedabad. Six objections were raised in the course of the Audit, as per Final Audit Report No.2017/2018-19-Service Tax dated 05.07.2019, which are enumerated below.

2.1 **Revenue Para 1** : On reconciliation of the financial statements of the appellant with their ST-3 returns, it was observed that there was a difference in the income amounting to Rs.57,02,677/- during F.Y. 2015-16 to F.Y. 2017-18 (upto June) on which service tax amounting to Rs.8,37,562/- was payable. In this regard, it was contended by the appellant that the difference was due to classification of two Works Contract Service bills as construction service, instead of Works Contracts, which attracted service tax on abated value and that they had paid service tax (50% by them and 50% by the service recipient). They requested for re-verification. It was observed that the appellant had issued Bill No.01/2015-16 dated 07.05.2015 and No. 02/2015-16 dated 20.05.2015 to M/s. Samar Buildtech Pvt. Ltd and it was seen from these bills that there was no material supply by the appellant and neither was the activity liable to VAT. Accordingly, the contention did not appear to be correct and the appellant were liable to pay service tax amounting to Rs.8,37,562/-.

2.2 **Revenue Para 2** : It was observed that the appellant had not paid service tax on Royalty payment made to the Governmental authority for use of natural resources i.e. soil. The appellant contended that the payment made by them were legal fees. As regards royalty, it was submitted that it is a tax on minerals and, therefore, cannot be termed as fees and, hence, there was no liability of service tax. In terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, the appellant was liable to pay 100% service tax in respect of the services provided to the Government or Local authority. It, therefore, appeared that the appellant was liable to pay service tax amounting to Rs.39,69,620/- during F.Y. 2016-17 and F.Y. 2017-18 (upto June).

2.3 **Revenue Para 4** : It was observed during the audit that the appellant had not paid service tax on the value of the services provided to M/s. M.H. Khanusiya. The Chief Administrative Officer (Construction), Western Railway, Mumbai had awarded a contract for Earthwork in bank/cutting, including blanketing, construction of side drains, central drains and other Misc. works to M/s. M.H.Khanusiya, Himmatnagar, who in turn sub-contracted the work of Earthwork in cutting to the appellant. The appellant availed the benefit of exemption under Serial No.14A as well as under Serial No. 29 (h) of Notification No.25/2012-ST dated 20.06.2012. The appellant submitted that they had carried out the work of railway authorities and irrigation as a sub-contractor and they had claimed exemption under Sr.No.29 (h) of the said Notification. It appeared that as per the contract agreement of the appellant with M/s. M.H.Khanusiya, the contract was not that of Works Contract and the appellant were only sub-contracted a small work of earth cutting out of the entire work order received by M/s. M.H.Khanusiya from the Railways. It appeared that the activity carried out by the appellant was not original work in the nature of construction, erection, commissioning or installation, as envisaged in Sr.No.14 of the said Notification. It was also observed that no sales tax was paid on the Earthwork in cutting carried out by the appellant. It, therefore, appeared that the services provided by the appellant to M/s. M.H.Khanusiya was not works contract and, therefore, the benefit of exemption under Sr.No.29 (h) of the said Notification was not available to the appellant and they were required to pay the service tax amounting to Rs.66,47,209/-.

2.4 **Revenue Para 5** : It was observed that the appellant had provided Works Contract service to M/s. Sanwaliya Seth Garden Pvt. Ltd. and availed exemption under Serial No.12(d) of Notification No.25/2012-ST dated 20.06.2012. It appeared that the appellant had provided services to a business entity and, therefore, they were not eligible for exemption under Sr.No.12 (d) of the said Notification. The appellant submitted that they had worked as sub-contractor and carried out work for railway authorities and irrigation and claimed exemption under Sr.No.29(h) of the said Notification. It further appeared that as per the Purchase Order issued by M/s. Sanwaliya Seth Garden Pvt. Ltd., the activity undertaken by the appellant was not in the nature of Works Contract service and, therefore, not eligible for exemption under Sr.No.29(h) of the said Notification and the appellant were required to pay service tax amounting to Rs.53,012/-.

2.5 **Revenue Para 6** : It was observed that the appellant had not made payment to the service provider for Bill dated 29.2.2016 of M/s. Aval Enterprise and Bill dated 12.5.2017 of M/s. D & D Buildcon. Therefore, in terms of Rule 4 (7) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004), the appellant had wrongly availed cenvat credit amounting to Rs.1,30,170/-.

2.6 **Revenue Para 8** : The Government of Gujarat had given Contract No. GP-101 to the appellant for clearing 20000 MTs of soil. The appellant had sub-contracted some of the right to use the natural resources to M/s. Skill Infra for which they have received payment of Rs.6,71,673/-. In this regard the appellant submitted that the royalty payment is a tax on minerals and not liable to service tax. However, the contention of the appellant was not found acceptable and the appellant appeared to be liable to pay service tax amounting to Rs.1,00,751/-.

3. The appellant was, therefore, issued a Show Cause Notice bearing No. VI/1(b)/Tech-33/SCN/Dhruv Enterprise/2019-20 dated 07.10.2019 wherein it was proposed to :

a) Recover service tax amounting to Rs.8,37,562/-, on the difference found on reconciliation, under the proviso to Section 73 (1) of the Finance Act, 1994.

b) Recover service tax amounting to Rs.39,69,620/-, on the services provided to Government, under the proviso to Section 73 (1) of the Finance Act, 1994.

c) Recover service tax amounting to Rs.66,47,209/-, on wrong availment of exemption, under the proviso to Section 73 (1) of the Finance Act, 1994.

d) Recover service tax amounting to Rs.53,012/-, on wrong availment of exemption, under the proviso to Section 73 (1) of the Finance Act, 1994.

e) Recover service tax amounting to Rs.1,00,751/-, on income received, under the proviso to Section 73 (1) of the Finance Act, 1994.

f) Recover Interest under Section 75 of the Finance Act, 1994.

g) Impose penalty under Section 78 (1) of the Finance Act, 1994.

h) Disallow and recover cenvat credit amounting to Rs.1,30,170/- under the proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR, 2004.

i) Recover Interest under Section 75 of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR, 2004.

j) 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 as well as cenvat credit was confirmed along with interest. Penalty equivalent to the service tax and cenvat credit confirmed was imposed under Section 78 (1) 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 of service tax on the basis of reconciliation it is submitted that the reconciliation is not correct. If the factual details are taken into account, then there was no such liability. The working is required to be re-worked and they submit a detailed reconciliation as per which they have paid excess service tax amounting to Rs.3,21,312/-. As the demand has been raised by the department without looking to the

factual data and details, the demand on the basis of reconciliation is not sustainable.

ii. They rely upon the decision in the case of Regional Manager, Tobacco Board Vs. Commissioner of C.Ex., Mysore – 2013 (31) STR 673 (Tri.-Bang.); Anvil Capital Management (P) Ltd. Vs. Commissioner of Service Tax, Mumbai – 2010 (20) STR 789 (Tri.-Mumbai); Commissioner of Service Tax, Ahmedabad Vs. Purni Ads. Pvt. Ltd. – 2010 (19) STR 242 (Tri.-Ahmd.); Sify Technologies Ltd. Vs. Commissioner of Service Tax, Chennai – 2009 (16) STR 63 (Tri.-Chennai); BhogilalChhagulal& Sons Vs. Commissioner of Service Tax, Ahmedabad – 2013 (30) STR 62 (Tri.-Ahmd.).

iii. Regarding service tax under reverse charge on the royalty charges paid to the government, it is submitted that royalty is not a payment in respect of any taxable service and it is imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 in respect of any mineral removed or consumed by the holder of a mining lease. The royalty represents the State's share in such minerals and there is no element of service by the State in this respect and levy of service tax is clearly ultra vires.

iv. The issue of whether mining royalty is a tax or not is pending before the Larger Bench of Nine Judges of the Supreme Court in the case of Mineral Area Development Authority &Ors., Steel Authority of India &Ors. – (2011) 4 SCC 450. The seven judge bench of the Hon'ble Supreme Court in the case of India Cement Ltd. &Ors. V. State of Tamil Nadu & ORs. – (1990) 1 SCC 12 had held that mining royalty is a tax. Therefore, again service tax cannot be imposed on mining royalty.

v. Mining royalty is paid for receiving benefits over land/mine/quarry. It is settled position of law that 'Transfer of land' also includes transfer of benefits arising out of the land. They rely upon the decision in the case of Safiya Bee Mohd. VajahathHussain – (2011) 2 SCC 94 ; Pradeep Oil Corporation, Municipal Corporation of Delhi – (2011) 5 SCC 270 ; N. Chandrashekar Vs. State of Karnataka – (20060 3 SCC 208 ; Dena Bank B.B.P. Parekh & Co. – (2000) 5 SCC 694.

vi. From a combined reading of the definition of Service as per Section 65B (44) of the Finance Act, 1994 and the judgments of the Supreme Court,

it is clear that the definition excludes the transfer of title in the land and includes not only land but also rights over the land. Transfer of title over the mine for mining activity also construes transfer of title in immovable property and is accordingly excluded from the definition of service.

vii. Service Tax cannot be imposed on the grant of 'profit a prendre' which is a transaction in immovable property. A profit a prendre is a benefit arising out of the land, an interest in the land, and, in view of Section 3 (26) of the General Clauses Act, it is immovable property within the meaning of Transfer of Property Act. Therefore, there is no sale or service element in this transaction. They rely upon the decision in the case of Titaghur Paper Mills Co. Ltd. – (1985) 60 STC 213; AnandBeheraVs. State of Orissa – AIR 1958 SC 532; State of Andhra Pradesh Vs. ITC – 2014-TIOL-2367-HC-AP-CT.

viii. All of the above issues have not been raised in the case of Udaipur Chamber of Commerce and Industry Vs. UOI – 2018 (8) GSTL 470 (Raj.). Therefore, the judgment in this case is not authoritative and, hence, will not stand further judicial review.

ix. Their audit was also carried out by department wherein no such query was raised.

x. If service tax is applicable on royalty charges under reverse charge, then the service tax would be allowable as cenvat against their output liabilities. Therefore, it is a revenue neutral situation.

xi. Regarding the service provided as a sub-contractor, it is submitted that as per Sr.No. 14(a) of Notification No.25/2012-ST dated 20.06.2012, when the principal contractor has been exempt from service tax, they as a sub-contractor have also claimed exemption.

xii. If service tax is applicable to the sub-contractor, then the principal will get credit or refund of the same. So it is a revenue neutral situation.

xiii. They rely upon the decision in the case of Popular Vehicles & Services Ltd. Vs. Commissioner of C.Ex., Kochi – 2010 (18) STR 493 (Tri.-Bang.); Dineshchandra R. Agarwal Infracon Pvt. Ltd. Vs. CCE, Ahmedabad – 2010 (18) STR 39 (Tri.-Ahmd.); Sakthi Auto Components Ltd. Vs. Commissioner of C.Ex., Salem – 209 (14) STR 694 (Tri.-Chennai.).

xiv. Regarding the service as a sub-contractor for railway authority, it is submitted that they had provided work contract service to M/s.Sanwaliya Seth Garden Pvt. Ltd. and availed exemption under Serial No.12(d) of Notification No.25/2012-ST dated 20.06.2012. They had carried out the work of railway authorities irrigation and worked as a sub-contractor and, hence, claimed exemption. In terms of the said Notification, the principal contractor has been exempt from service tax, accordingly, as a sub-contractor, they are also exempt from service tax.

xv. Regarding the service availed by them for executing works contract, it is submitted that they had availed continuous supply service from the sub-contractor for providing output service, which has partial reverse charge, so the condition of payment to the service provided has been made applicable from the due date of payment and on such date, they have made payment. It is also not disputed that as soon as they made payment, they were eligible for cenvat credit. So there was no loss to the government.

xvi. During the impugned period, they had assigned sub-contract to the contractor where as per the market condition, on change of market price of material, excess collected has been returned as a discount to the principal contractor. On that total amount service tax has been discharged by the sub-contractor. Only some part, around 1 to 3% has been returned back by the sub-contractor, which can form par of service.

xvii. The entire demand is time barred. The SCN covers the period from 01.04.2015 to 30.06.2017 and the SCN was issued on 07.10.2019. Thus, the SCN has invoked the extended period of limitation. Extended period cannot be invoked as there is no suppression, wilful mis-statement on their part. No case of suppression, wilful mis-statement has been made out in the SCN.

xviii. Penalty cannot be imposed under Section 78 of the Finance Act, 1994. They have demonstrated that they have not suppressed any information from the department and there was no wilful mis-statement on their part. They are entitled to entertain the belief that their activities were not taxable. That cannot be treated as suppression from the department. They rely upon the decision in the case of Steel Case Ltd. – 2011 (21) STR 500 (Guj.).

xix. The issue involved is of interpretation of statutory provision and therefore, penalty cannot be imposed. They rely upon the decision in the case of :- Bharat Wagon &Engg. Co Ltd. Vs. Commissioner of C.Ex., Patna – (146) ELT 118 (Tri.-Kolkata); Goenka Woolen Mills Ltd Vs. Commissioner of C.Ex., Shillong – 2001 (135) ELT 873 (Tri.-Kolkata); Bhilwara Spinners Ltd Vs. Commissioner of C.Ex, Jaipur – 2001 (129) ELT 458 (Tri._Del).

6. Personal Hearing in the case was held on 07.10.2022. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum.He submitted a written submission, during the hearing, containing ledgers and work order.

7. In the written submission filed during course of the personal hearing, the appellant reiterated the submissions made in the appeal memorandum.

8. 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 and denial of cenvat credit. The demand pertains to the period F.Y. 2015-16 to F.Y. 2017-18 (upto June, 2017). There are multiple issues involved in the present appeal which are dealt with individually in the succeeding paragraphs.

9. **Short payment of service tax observed during reconciliation of the financial statements with the ST-3 returns.** It is observed that the impugned order has confirmed the demand of service tax amounting to Rs.8,37,562/-. I find that in the SCN issued to the appellant, it is stated that the appellant had contended that the difference was due to classification of two Works Contract service bills as construction service, instead of under Works Contract, which attracted service tax on abated value and that they had paid service tax (50% by them and 50% by the service recipient). They had requested for re-verification. However, it was observed by the department that the appellant had issued Bill No.01/2015-16 dated 07.05.2015 and No. 02/2015-16 dated 20.05.2015 to M/s.Samar Buildtech Pvt. Ltd and it was seen

from these bills that there was no material supply by the appellant and neither was the activity liable to VAT. Accordingly, the contention did not appear to be correct and the appellant were held liable to pay service tax amounting to Rs.8,37,562/-.

9.1 The appellant have, in their appeal memorandum and the submissions made during course of the personal hearing, not made any submissions in this regard and neither have they explained the reasons for the difference in taxable income noticed on reconciliation of the financial statements with the ST-3 returns filed by them. The appellant have in their appeal memorandum and additional written submission submitted a reconciliation statement and contended that they have made excess payment of service tax amounting to Rs. 3,21,312/-. However, their very own reasons cited for the difference in taxable value has not been explained by the appellant and neither have they made any submissions in this regard. I have perused the reconciliation statement as well as copies of ledgers submitted by the appellant and find that no explanation to the difference in taxable value, detected in the course of the audit, is forthcoming. The appellant have, except for merely submitting copies of the ledgers, not given any explanation regarding the difference in the taxable value. Since the appellant have not come forward with any tenable reason explaining the difference in taxable value either before the adjudicating authority or in their appeal memorandum, I do not find any infirmity in the impugned order confirming the demand of service tax. Accordingly, I uphold the impugned order confirming the demand of service tax amounting to Rs. 8,37,562/-.

10. **Non payment of service tax amounting to Rs.39,69,620/-, on Royalty payment made to the Governmental authority for use of natural resources i.e. soil.** The department is of the view that in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.2012, the appellant was liable to pay 100% service tax in respect of the services provided to the Government or Local authority. On the other hand, the appellant have contended that royalty itself is a tax on the minerals mined and that the mining rights involves transfer of title in immovable property and hence, service tax would not apply.

10.1 I find that in the instant case, the appellant is given the right to mine soil – a natural resource by the government and for assignment of such right, the appellant are required to pay a Royalty to the government. The fact that the assignment of right to use is a service is also forthcoming from Sr.No. 61 of Notification No.25/2012-ST dated 20.06.2012 as amended by Notification No. 22/2016-ST dated 13.04.2016. The said Sr. No.61 reads as :

> "Services provided by Government or a local authority by way of assignment of right to use any natural resource where such right to use was assigned by the Government or the local authority before the 1st April, 2016 :
>
> Provided that the exemption shall apply only to service tax payable on one time charge payable, in full upfront or in installments, for assignment of right to use such natural resource;"

10.2 The above said Notification No. 25/2012-ST dated 20.06.2012 is an exemption notification. However, the implication of the said exemption notification is that the 'assignment of right to use any natural resource' by the government is a taxable service and, therefore, the necessity of providing for exemption by way of a notification. It, therefore, is amply clear that by assigning the right to mine soil to the appellant, the government has provided a taxable service. For being assigned the right to use the natural resource, the appellant are required to pay the government a Royalty, which is nothing but a consideration paid by the appellant in lieu of the service provided by the government to the appellant.

10.3 Section 68 of the Finance Act, 1994 provides for payment of service tax under reverse charge and in terms of Sr. No. 6 of Notification No. 30/2012-ST dated 20.06.2012, issued under Section 68 (2) of the Finance Act, 1994, in respect of services provided or agreed to be provided by the Government or local authority, the recipient of the service is liable to pay 100% of the applicable service tax. Therefore, in the instant case, the appellant, being the recipient of the service provided by the government, is liable to pay the service tax on service received by them i.e. assignment of right to use the natural resources. I further find that Sr.No. 61 of Notification No.25/2012-ST dated 20.06.2012 exempts only the onetime charge payable for assignment of the right to use and not the royalty paid from time to time upon extraction of the natural resource. Accordingly, the appellant are liable to pay service tax, under reverse charge, on the royalty paid to the government as consideration

for the service received by them i.e. assignment of the right to use the natural resource.

10.4 I find that the appellant have relied upon the judgments of the Hon'bleSupreme Court supra, and submitted that the question of whether mining royalty is a tax or not is pending before the nine judge Bench of the Hon'ble Supreme Court. I find that the Hon'ble Supreme Court in the case of India Cement Ltd. & Others Vs. State of Tamil Nadu & Others – (1990) 1 SCC 12 held that royalty is a tax and as such a cess on royalty being a tax on royalty is beyond the competence of the State legislature. However, the Hon'ble Supreme Court had doubted the correctness of this judgment in the case of State of W.B. Vs. Kesoram Industries Ltd. & Others – (2004) 10 SCC 201. Thereafter, the Hon'ble Supreme Court had, in the case of Mineral Area Development Authority & Others Vs. Steel Authority of India & Others – (2011) 4 SCC 450, referred the matter to a larger bench of nine judges for deciding the issue and the same is pending decision.

10.5 This issue has also been a subject matter of litigation before various High Courts. The Hon'ble High Court of Rajasthan in the case of Udaipur Chambers of Commerce and Industry Vs. UOI – 2018 (8) GSTL 170 (Raj.) had held that :

> **"17.**We have scaled merits of the argument advanced by taking into consideration all relevant provisions.
>
> 18.As per Section 9 of the Act of 1957, the holder of a mining lease notwithstanding anything contained in the instrument of lease or in any law in force is supposed to pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate the time being specified in the Second Schedule in respect of that material. In light of the provision aforesaid, the mining operations by a mining lease holder are absolutely dependent to payment of royalty and no mining activity by any mining holder shall be valid without payment of royalty. Any mining operation not followed by payment of royalty is subject to penalty also under the Act of 1957 and the Rules framed thereunder.
>
> **19.**Precisely, we are required to examine that the royalty under the Act of 1957 is a "consideration" or not and further if that is "consideration", then what would be the effect pertaining to payment of service tax?
>
> **20.**Under the Act of 1957, no mining lease would be granted without adhering the procedure given under Sections 10 to 12. The prospecting licence and mining leases are further regulated by the Rules framed under Sections 13 and 13A of the Act of 1957. As per the Mineral Concession Rules, 1960 (hereinafter referred to as "the Rules of 1960"), prospecting licence in respect of land in which minerals vest in the

Government, can be granted by adhering the procedure given in Chapter III and further mining lease can be granted only after adhering the procedure prescribed under Chapter IV of the Rules of 1960. At the threshold, applications for granting mining lease are required to be entertained by the State Government in the prescribed format and further after adhering a definite procedure, mining lease is required to be granted and executed between the parties. The mining lease executed is nothing but a contract to undertake mining operations in the leased mining area.

21.As already stated, the mining operations, as per the conditions of mining lease deed, are subject to payment of royalty. According to Section 2(d) of the Indian Contract Act, 1872, when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise. In general, "consideration" is the price for a promise and is an essential ingredient for a contract. It is a value received as incentive for the promise and a contract without that is not binding on the parties. It is a vital element and benefit i.e. to be settled between the parties and also an essential reason for a party entering into contract for exchange of any thing of value by each party.

22.Taking into consideration all these principles relating to "consideration", we are of considered opinion that the royalty is nothing but a "consideration" to have mining operations in the leased area on execution of a mining lease. It is a part of agreement arrived between the parties to have lease of a mining area to undertaking mining operations. The royalty being "consideration" certainly places assignment of right to use natural resources deposited in the leased area as a "service" as defined under Section 65B(44) of the Act of 1994, according to which, any activity carried out by a person for another for considerationis a service. The finding arrived by us as above is sufficient to say that the notification dated 13-4-2016 is not at all in conflict with its enabling Act i.e. the Finance Act, 1994 and the same does not suffer from any illegality.

23.On arriving at the conclusion that the activity in question is a service, there is no need to examine the other argument advanced by counsel for the petitioners to challenge the notification aforesaid on the ground that the assignment of right to use natural resource i.e. the mineral deposited in the leased area is also not a "declared service".

24.An effort is also made to bring assignment under consideration in exclusion category with submission that by awarding lease the State transfers its title in goods in other manner than the sale or gift, as such, no service tax could have been claimed. This argument too, in our opinion, is bereft of merits as the term "goods" is defined under Section 65(50), assigning the same meaning as given under clause (7) of Section 2 of the Sale of Goods Act, 1930, according to that, it is every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale. The assignment of right to use any natural resource i.e. mineral cannot be treated as a goods for the purpose of the Act of 1994.

25.There is no transfer of immovable property too as the lease granted is only to excavate mineral from the leased area and that activity at the most can be physical transfer of property by its "renting" as prescribed under Section 65(90a) of the Act of 1994, but not the transfer of title in

> immovable property. Section 65(90a) pertains to transfer of immovable property by renting and that includes leasing of immovable property for use in furtherance of business and commerce. The absence of the word "title" in this provision is quite important and that indicates the entire activity as transfer of possession of the immovable property for its use or consumption by way of renting, letting, leasing, licensing or by other similar arrangements, as the case may be. The exclusion under Section 65B(44) is for transfer of title in immovable property, which is conspicuously absent in the grant of lease for mining operations. The [title] of the mining area admittedly retains with the State even on execution of mining lease to excavate mineral from the leased area.
>
> **26.**For the reasons given above, the petitions for writ are bereft of merits, hence, dismissed."

10.6 It is seen that in their judgment the Hon'ble High Court has held that royalty being "consideration" places assignment of right to use natural resources deposited in the leased area as a "service" as defined under Section 65B(44) of the Act of 1994.

10.7 The above judgment of the Hon'ble High Court of Rajasthan was carried in appeal to the Supreme Court and the Hon'ble Supreme Court, while issuing notice in the case, has only stayed the payment of service tax on grant of mining lease/royalty. The appellant have contended that many issues, as submitted by them in their appeal memorandum, have not been raised before the Hon'ble High Court of Rajasthan and, therefore, the judgment is not an authoritative judgment which will not stand judicial review. I do not find any merit in the contention of the appellant. The Hon'ble Supreme Court has not stayed the operation of the judgment of the Hon'ble High Court of Rajasthan and, hence, the same is applicable to the facts and circumstances of the present appeal.

10.8 In view of the above facts and by following the judgment of the Hon'ble High Court of Rajasthan in the Udaipur Chambers of Commerce and Industry, supra, I am of the considered view that the assignment of right to use the natural resource is a taxable service and the royalty paid by the appellant to the government has to be considered as consideration for the said service. Consequently, the appellant are liable to pay service tax under reverse charge in terms of Sr. No. 6 of Notification No. 30/2012-ST dated 20.06.2012.

11. Non payment of service tax amounting to Rs.66,47,209/- in respect of the services provided to M/s.M.H.Khanusiya. The department has contended that the contract agreement of the appellant with M/s. M.H.Khanusiya was not that of Works Contract and the appellant were only sub-contracted a small work of earth cutting out of the entire work order received by M/s. M.H.Khanusiya from the Railways. Therefore, the services provided by the appellant to M/s.M.H.Khanusiya was not works contract and, hence, the benefit of exemption under Sr.No.29 (h) of the said Notification was not available. It was also contended that the activity carried out by the appellant was not original work in the nature of construction, erection, commissioning or installation as envisaged in Sr.No.14 of the said Notification. The appellant have contended that the principal contractor has been exempt from service tax in terms of the said Notification. Accordingly, they have, as a sub-contractor, claimed exemption from service tax.

11.1 I find that Serial No.14 and Serial No.29 (h) of Notification No.25/2012-ST dated 20.06.2012 provides for exemption in respect of the following :

> "14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-
> (a) Railways, excluding monorail and metro."
>
> "29. Services by the following persons in respective capacities-
> (h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;"

11.2 I find that the adjudicating authority has recorded at Para17.3.3 of the impugned order that the appellant was sub-contracted only the work of 'Earthwork in cutting' by M/s. M.H.Khanusiya, Himmatnagar out of their total contract for 'Earthwork in bank/cutting, including blanketing as per RDSO specification, Construction of Side drains, central drains and other Misc. works etc.' To qualify as Work Contract service, there has to be transfer of property in goods involved in the execution of such contract and such goods are leviable to tax as sale of goods. In the instant case, the appellant have not disputed the fact that no transfer of property in goods was involved in the 'Earthwork in cutting' undertaken by them under the sub-contract with M/s. M.H.Khanusiya. Therefore, the activity of 'Earthwork in cutting' undertaken by them is clearly out of the purview of Work Contract and, therefore, the

appellant are not eligible for exemption in terms of Serial No. 29 (h) of Notification No.25/2012-ST dated 20.06.2012.

11.3 The appellant have also claimed exemption in terms of Sr.No.14(a) of the said Notification. The said Serial No. provides exemption to the services by way of constriction, erection, commissioning, or installation of original works pertaining to Railways. The adjudicating authority has at Para 17.3.8 of the impugned order recorded his finding that "*The activity carried out by the assessee is not original works in the nature of construction, erection, commissioning or installation, as envisaged under Sr no 14 to Notfn No 25/2012-ST dated 20.6.2012, as amended*". I find that the appellant have not substantiated their claim for exemption under the said Notification except for contending that since the principal contractor is exempt from service tax, they too are exempted being sub-contractor. However, I do not find any merit in the contention of the appellant. It is a settled position in law that the claim of exemption has to established strictly and that they are eligible for exemption in terms of the exemption notification. In the instant case, I find that the activity of 'Earthwork in cutting' undertaken by the appellant is neither construction nor erection, commissioning or installation. Consequently, they are not eligible for exemption in terms of Serial No. 14 (a) of Notification No.25/2012-ST dated 20.06.2012.

11.4 I also find it relevant to refer to Circular No. 138/7/2011-ST dated 06.05.2011 issued by the CBIC, the relevant part of which is reproduced below :

> "(ii) In this case the service provider is providing WCS and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service. The services received by the WCS provider from its sub-contractors are distinctly classifiable under the respective sub-clauses of section 65(105) of the Finance Act by their description. When a descriptive sub-clause is available for classification, the service cannot be classified under another sub-clause which is generic in nature. As such, the services that are being provided by the sub-contractors of WCS providers are classifiable under the respective heads and not under WCS."

11.5 Further, the CBIC had vide Circular No.147/16/2011-ST dated 21.10.2011 clarified that :

> "2. The matter has been examined. Vide the circular referred above, it was clarified that when the service provider is providing WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc. and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service, then while exemption is available to the main contractor [as per Section 65 (zzzza) of the Finance Act], as regards the services provided by its subcontractors, the same are distinctly classifiable under the respective sub-clauses of section 65(105) of the Finance Act, as per their description and that their taxability shall be decided accordingly. *It is thus apparent that just because the main contractor is providing the WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as WCS.* Rather, the classification would have to be independently done as per the rules and the taxability would get decided accordingly."

11.6 In the instant case, the activity of the appellant i.e. 'Earthwork in cutting' is neither construction nor erection, commissioning or installation. Therefore, they do not qualify for exemption in terms of Serial No.14 (a) of Notification No.25/2012-ST dated 20.06.2012. Consequently, theappellant are liable to pay service tax.

11.7 The appellant have also raised the issue of revenue neutrality and contended that even if service tax was payable, the principal contractor would be eligible for cenvat credit of the same.However, I am of the considered view that revenue neutrality cannot come in the way of payment of the applicable service tax. The appellant are legally bound to pay the service tax. Eligibility to cenvat credit and eligibility to exemption are altogether different matters. The principal contractor can avail cenvat credit of the service tax paid by the appellant, if otherwise admissible to them. In view of the above facts, I uphold the demand of service tax confirmed vide the impugned order.

12. **Non payment of service tax amounting to Rs.53,012/- in respect of service provided to M/s.Sanwaliya Seth Garden Pvt. Ltd.** The appellant had availed exemption in terms of Serial No.12(d) of Notification No.25/2012-ST dated 20.06.2012 in respect of the services provided by them to the said firm. The appellant had contended before the Audit that they had carried out work for railway authorities and irrigation as a sub-contractor and, therefore, they had claimed exemption under Serial No.29(h) of the said Notification. However, it appeared to the departmental that the services were provided by

the appellant to a business entity and, therefore, they were not eligible to exemption under Serial No.12(d) of the said Notification. Further, since there was no transfer of property in goods involved in the execution of the service provided to the said firm, the appellant were not eligible for exemption under Serial No.29(h) of the said Notification. The appellant have in their appeal memorandum contended that as the principal contractor is exempt from service tax, they as a sub-contractor had also claimed exemption.

12.1 The text of Serial No. 12 and 12(d) of Notification No.25/2012-ST dated 20.06.2012 is reproduced below :

> "12. Services to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-
>
> (d) canal, dam or other irrigation works;"

12.2 It is clear from the above, that the said entry provides for exemption from service tax in respect of the specified services provided to the Government, a local authority or a governmental authority. In the instant case, the appellant have provided services to M/s.Sanwaliya Seth Garden Pvt. Ltd, a private business entity. Accordingly, the services provided by the appellant to the said firm are not within the scope of exemption under Serial No.12(d) of the said Notification. The appellant have also claimed that they are exempt in terms of Serial No.29(h) of the said Notification. However, as enumerated in Para 11.1 above, the said entry provides for exemption to a sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt.As stated in Para 11.2 above, to qualify as Work Contract service, there has to be transfer of property in goods involved in the execution of such contract and such goods are leviable to tax as sale of goods.

12.3 I find that the adjudicating authority has, at Para 17.4.9 of the impugned order, given his clear finding that the contract undertaken by the appellant does not involve transfer of property in goods which is leviable to tax as sale of goods. The appellant have in their appeal memorandum not submitted any material to refute the findings of the adjudicating authority and establish that the service provided by them to the said firm involved transfer of property in goods which are liable to tax as sale of goods. In view

thereof, I am of the considered view that there is no infirmity in the impugned order confirming the demand of service tax amounting to Rs.53,012/-.

13. **Non payment of service tax amounting to Rs.1,00,751/- on the royalty payment received from M/s.Skill Infra.** It has been alleged that the appellant had sub-contracted some of the right to use the natural resources to the said firm for which they have received royalty payment of Rs.6,71,673/- and the appellant were liable to pay service tax on this consideration received by them. The appellant had submitted that royalty payment is a tax on minerals and not liable to service tax. The adjudicating authority has at Para 17.5.8 of the impugned order recorded his finding that the amount received by the appellant against sub-contracting the right to use the natural resource in respect of mining activity, is consideration against for assignment of right to use natural resources in the leased area. Accordingly, he has proceeded to hold that the same amounts to taxable service which is leviable to service tax. The appellant have in their appeal memorandum submitted that on change of market price of material, the excess collected has been returned to them by the sub-contractor as a discount and that the sub-contractor has discharged service tax on that total amount. However, the appellant have not submitted any material evidence to establish that the sub-contractor had paid service tax on the full taxable value and the amount returned to them had suffered the incidence of service tax. Therefore, I do not find any reason to interfere with the order of the adjudicating authority confirming the demand of service tax.

14. **Wrong availment of cenvat credit amounting to Rs.1,30,170/- on invoices where the payment of service tax has not been made to the service provider.** It has been alleged in the SCN that the appellant had not made payment of service tax to the service provider for Bill dated 29.2.2016 of M/s.Aval Enterprise and Bill dated 12.5.2017 of M/s.D & D Buildcon. Therefore, in terms of Rule 4 (7) of the CCR, 2004, the appellant was required to reverse the cenvat credit availed by them.The appellant have contended that they had availed continuous supply of service, which is under partial reverse charge. Accordingly, the condition of payment to the service provider

is applicable from the due date of payment and that on such due date the payment has been made by them.

14.1 The text of Rule 4 (7) of the CCR, 2004 is reproduced below :

> "(7) The CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received:
>
> Provided that in respect of input service where whole or part of the service tax is liable to be paid by the recipient of service, credit of service tax payable by the service recipient shall be allowed after such service tax is paid:
>
> Provided further that in case the payment of the value of input service and the service tax paid or payable as indicated in the invoices, bill of, as the case may be, challan referred to in rule 9 is not made within three months of the date of invoice, bill or, as the case may be, challan, the manufacturer or the service provider who has taken credit on such input service, shall pay an amount equal to the CENVAT credit availed on such input service, except an amount equal to the CENVAT credit of the tax that is paid by the manufacturer or the service provider as recipient of service, and in case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules:"

14.2 From the above provisions of Rule 4 (7) of the CCR, 2004, it is clear that the cenvat credit of the input service is allowed to be taken only after the value of the input service and the service tax thereon is paid. In cases where the payment is not made within three months from the date of invoice, an amount equal to the credit availed is required to be paid.

14.3 I find that the adjudicating authority has at Para 17.6.2 of the impugned order recorded that the appellant have not produced any documentary evidence to support their contention that the payment has been made by them. The appellant have in their appeal memorandum raised the same contention, which was made by them before the adjudicating authority. However, they have again not submitted any material evidence to substantiate their contentions. Therefore, I do not find any reason to interfere with the impugned order confirming service tax on account of non reversal of cenvat credit.

15. The appellant have also raised the issue of limitation and contended that the extended period of limitation cannot be invoked in the present case. In this regard, I find that the adjudicating authority has in the impugned

order elaborately dealt with the contentions of the appellant on the issue of limitation. The appellant have in their appeal memorandum not refuted the findings of the adjudicating authority and have merely reiterated the submissions already made by them before the adjudicating authority. Further, it has been clearly brought out in the SCN and the impugned order that the facts about their correct taxable value of service, non payment of service tax and wrong availment of cenvat credit were suppressed from the department. The fact of the appellant not declaring the correct taxable value as well as not paying the applicable service tax on the taxable services provided by them were unearthed only in the course of the audit on the records of the appellant carried out by the departmental officers. But for the audit on the records of the appellant, the non payment of service tax by mis-stating the facts by the appellant in respect of the service provided by them and thereby wrongly claiming exemption to which they were not eligible, would not have been unearthed. The only reason behind suppressing such facts from the department is attributable to the intent of the appellant to evade payment of service tax. Therefore, the extended period of limitation was rightly invoked in raising demand against the appellant by the impugned SCN.

16. Section 75 of the Finance Act, 1994 provides for charging of interest in case where the applicable service tax is not paid within the prescribed period. In the instant case, the appellant have failed to pay the applicable service tax within the prescribed period. They had also wrongly availed and utilized cenvat credit in contravention of the provisions of the CCR, 2004. Accordingly the demand of service tax and cenvat credit has been upheld. Therefore, the appellant are alsoliable to pay interest under Section 75 of the Finance Act, 1994 and Rule 14 (1) (ii) of the CCR, 2004.

16.1 Section 78 (1) of the Finance Act, 1994 provides for imposition of penalty in cases where service tax has not been paid or short paid by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of the provisions of the Act or the Rules framed thereunder. Since the appellant have not paid/short paid service tax by indulging in wilful mis-statement and suppression of facts with the intent to evade payment of service tax, the invocation of extended period has been upheld. Accordingly,

they are also liable for penalty under Section 78 (1) of the Finance Act, 1994 and the adjudicating authority has rightly imposed penalty upon the appellant under the said Section. Therefore, I do not find any reason to interfere with the impugned order imposing penalty under Section 78(1) of the Finance Act, 1994.

17. In view of the facts discussed herein above, I am uphold the impugned order and reject the appeal filed by the appellant.

18. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्तरीकेसेकियाजाताहै।

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. Dhruv Enterprise,
F/F/2, Popular Estate,
Near Prime Estate,
Behind Ujjala Restaurant,
Sarkhej, Ahmedabad- 382 210

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.