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 : **20221164SW0000848800**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/171/2022 /5458-62

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-080/2022-23**
दिनॉक Date : **18-11-2022** जारी करने की तारीख Date of Issue 28.11.2022

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

ग Arising out of OIO No. **21-22/CGST/Ahmd-South/JC/RKT/2021** दिनाँक: **29.04.2021** passed by Joint Commissioner, CGST, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s Prachi Forwarding Agency**
   Block No. 875, Parle Godown,
   Village Paldi Kankaj,
   Dascroi, Ahmedabad - 382427

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

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

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

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

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

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

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 कान्यायांलय 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.

(57) 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 ज़मा 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:

(clvii) amount determined under Section 11 D;
(clviii) amount of erroneous Cenvat Credit taken;
(clix) 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. Prachi Forwarding Agency, Block No.875, Parle Godown, Village: Paldi Kankaj, Taluka : Daskroi, Ahmedabad – 382 427 [previously at : Behind Tulsi Avenue, NH 8, Aslali, Ahmedabad – 382 427] (hereinafter referred to as the appellant) against Order in Original No. 21-22/CGST/Ahmd-South/JC/RKT/2021 dated 29.04.2021 [hereinafter referred to as "*impugned order*"] passed by the Joint 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. ABGPPC2017CST001 under the category of Clearing and Forwarding and GTA services. During the course of audit of the records of the appellant for the period F.Y. 2013-14 to F.Y. 2016-17 conducted by the officers of Central Tax, Audit Commissionerate, Ahmedabad, it was observed that the appellant had shown income under the head 'Transport and Other Receipts' in their Balance Sheet. The incomes were shown as reimbursement received from M/s. Parle Products Pvt. Ltd (hereinafter referred to as PP) and M/s. Parle Biscuits (hereinafter referred to as PB) on which no service tax was paid by the appellant. It appeared that the appellant had claimed deduction of income as a 'pure agent' of PP and PB in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 (hereinafter referred to as the Valuation Rules). It was further observed that the appellant had claimed reimbursement of miscellaneous expenses like Courier, Stationery, Telephone, Internet Charges etc. from their Principals on the same lines. However, the appellant did not produce any documentary evidences to establish the actual payment and reimbursement. Therefore, it appeared that the appellant had not fulfilled all the conditions for claiming deductions as a 'pure agent', and, therefore, service tax was payable by them on the amounts reimbursed to them by PP and PB.

2.1 The appellant was issued a Query Memo dated 17.10.2018 informing them that the amount of reimbursement expenditure claimed as deduction is

to be included in the gross taxable value for payment of service tax and that the service tax amounting to Rs.1,07,97,393/- was payable for the period from F.Y. 2013-14 to F.Y. 2016-17 on the differential taxable value amounting to Rs.7,95,87,305/-.

2.2 The appellant vide letter dated 27.11.2018 submitted that the freight/transportation service is separately identified under the agreements with PP and PB. The transportation cost in this case is a separate service meriting classification under GTA and, therefore, their action in discharging service tax on such transportation service after claiming abatement is legal.

2.3 From the agreements entered into by the appellant with PP and PB, it appeared that the appellant had undertaken a composite contract for receiving, storing, selling and dispatch of goods on behalf of PP and PB. Therefore, the service provided by the appellant appeared to be falling under the category of Clearing and Forwarding Agent and the income received by the appellant would be a composite one. It further appeared that the amounts received by the appellant towards Transportation Expensed was more than the actual expenditure incurred by them, which is contrary to the provisions of Condition No. (vii) to Rule 5(2) of the Valuation Rules, which provided for recovery of only such amount which has been paid to the third party. It also appeared that there was no contract between the appellant and PP and PB for acting as a 'pure agent'.

2.4 During the course of audit, it was also observed that the appellant had availed cenvat credit amounting to Rs.36,31,908/- during F.Y. 2014-15 to F.Y. 2017-18 (up to June, 2017) on the invoices of M/s. SNK Infraspace Pvt. Ltd. (hereinafter referred to as SNK) and it appeared that the cenvat credit was availed in respect of the service portion in a Works Contract Service used for construction. The cenvat credit amounting to Rs.19,03,652/- availed was relating to Civil and Construction work. The appellant informed the audit officers that the services provided by SNK were for godown, which was essential for providing C & F Agent's services and, therefore, they were eligible for cenvat credit. The contention of the appellant appeared not to be tenable in view of the exclusion provided in Rule 2(l) of the Cenvat Credit Rules, 2004 (hereinafter referred to as the CCR, 2004).

3. The appellant was, subsequently, issued a Show Cause Notice bearing No. VI/1(b)/CTA/Tech-41/CN/Prachi/2018-19 dated 03.04.2019 wherein it was proposed to :

a) Include the Transportation and Other Receipts amounting to Rs.7,95,88,380/- received as consideration from PP .and PB in the assessable value and demand and recover service tax amounting to Rs.1,07,97,893/- under the proviso to Section 73 (1) of the Finance Act, 1994.

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

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

d) Demand and recover the cenvat credit amounting to Rs.19,03,652/- under Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR, 2004 and appropriate the cenvat credit already reversed by them.

e) Vacate the protest lodged on 29.10.2019 for reversing the cenvat credit.

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

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

4. Subsequently, the appellant were called upon to submit the details regarding the income received under the head 'Transport and Other Receipts' for the period from 01.04.2017 to 30.06.2017. The appellant, vide letter dated 08.11.2019, submitted that they had received Reimbursement income amounting to Rs.76,087/- and Transport Income amounting to Rs.62,07,683/- during the said period. From the ST-3 returns filed by the appellant for the said period, it appeared that they had not paid any service tax on the reimbursement income, while service tax amounting to Rs.33,85,550/- and Rs.18,62,305/- was paid on C&F income and Transport income respectively. The appellant had claimed abatement under Serial No. 1 (iv) of Notification 08/2015-ST dated 01.03.2015. It appeared that the appellant had not included the income received as consideration from PP and PB in the assessable value for discharging service tax. It also appeared that the appellant was not entitled to abatement in terms of the said Notification.

Accordingly, the service tax amounting to Rs.6,63,219/- appeared to be recoverable from them.

4.1 Therefore, the appellant was issued Show Cause Notice bearing No. AR-IV/Div-IV/Prachi/2018-19 dated 16.01.2020 wherein it was proposed to:

a) Include the Transportation and Other Receipts received by them from PP and PB in the assessable value for charging service tax.

b) Demand and recover the service tax amounting to Rs.6,63,219/- under the proviso to Section 73 (1) of the Finance Act, 1994.

c) Charge and recover interest under Section 75 of the Finance Act, 1994.

d) Impose penalty under Section 76 (1) of the Finance Act, 1994.

5. Both the SCNs were adjudicated vide the impugned order wherein :

A) The Transportation charges already self-assessed under GTA was held as value of taxable services and the abatement amounting to Rs.3,18,17,234/- and Rs.43,45,378/- was disallowed.

B) The other so called reimbursable charges amounting to Rs.4,77,71,146 and Rs.76,087/- were ordered to be added to the assessable value.

C) The demand for service tax amounting to Rs.43,85,463/- and Rs.6,51,806/- on the taxable value amounting to Rs.3,18,17,234/- and Rs.43,45,378/- wrongly claimed as abatement was confirmed under Section 73 (1) of the Finance Act, 1994.

D) The demand of service tax amounting to Rs.64,12,430/- and Rs.11,413/- on the taxable value amounting to Rs.4,77,71,146/- and Rs.76,087/- was confirmed under Section 73 (1) of the Finance Act, 1994.

E) Interest under Section 75 of the Finance Act, 1994 was ordered to be recovered.

F) Penalty totally amounting to Rs.1,07,97,893/- was imposed under Section 78 (1) of the Finance Act, 1994.

G) Penalty amounting to Rs.66,322/- was imposed under Section 76(1) of the Finance Act, 1994.

H) The service tax amounting to Rs.19,03,652/-, evaded by wrong availment and utilization of cenvat credit, was confirmed under Section 73(1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR,

2004. The cenvat credit amounting to Rs.19,03,652/- paid vide Challan dated 26.10.2018 was appropriated and the protest lodged was vacated.

I) Interest was charged and ordered to be recovered under Section 75 of the Finance Act, 1994 read with Rule 14 (1) (ii) of the CCR, 2004.

J) Penalty amounting to Rs.19,03,652/- was imposed under Rule 15 (3) of the CCR, 2004 read with Section 78(1) of the Finance Act, 1994.

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

i. When the service provider is acting in multiple capacities (as CFA and GTA), these separate activities cannot be combined and a single tax treatment be applied.

ii. The agreement dated 08.09.2016 with their Principal is only for provision of CFA services and does not restrict them from carrying out their activity as GTA. The principles of classification do not extend to combining services that are provided independent of each other merely because the services are provided by the same party. They are acting in two separate capacities i.e. as provider of transportation services and as CFA. The impugned order has not substantiated the allegation that the C&F agreement is a composite contract.

iii. Reliance is placed upon the decision in the case of Sports Club of Gujarat Ltd. Vs. UOI – 2010 (20) STR 17 (Guj.); Greenwich Meridian Logistics (I) Pvt. Ltd. Vs. Commissioner of S.T., Mumbai – 2016 (43) STR 215 (Tri.-Mumbai); Transways Vs. Commissioner of Service Tax, Kolkata – 2010 (17) STR 201 (Tri.-Kolkata); Gupta Coalfield and Washeries Ltd. Vs. Commissioner of C.Ex., Nagpur – 2014 (35) STR 969 (Tri.-Mumbai); Asst. C.C., C.Ex. & S.T., Visakhapatnam Vs. Sree Siva Sankar Automobiles – 2012 (284) ELT 109 (Tri.- Bang.); Rashleela Enterprises Pvt. Ltd. Vs. CCE, Jaipur-1 – 2019-TIOL-1183-CESTAT-DEL; Toll India Logistics Pvt. Ltd. Vs. CCE – 2019 (25) GSTL 107 (Tri.-Che); Balaji Heavy Lifter Private Limited Vs. CCE, Rajkot – 2013 (30) STR 225 (Tri.-Ahmd.); E.V.Mathai & Co. – 2006 (3) STR 116 (Tri.-Bang); Bhagyanagar Services – 2006 (4) STR 22 (Tri.-Bang.); 2019-VIL-722-CESTAT-DEL-ST.

iv. Freight amount paid is in the nature of reimbursement and is not within the scope of CFA services provided by them. The transportation charges have been received towards outward transportation of the goods belonging to the Principal and are not in any way related to the activity of C&F service.

v. They are paying service tax on transportation charges after availing abatement as provided under the applicable Notifications. In some cases where the transportation charges did not exceed Rs.750/-, they have availed exemption in terms of Notification No.25/2012-ST dated 20.06.2012.

vi. Since the freight charges are borne by the Principal, the liability to pay service tax was on the Principal and they have paid service tax on behalf of the Principal. Hence, the question of payment of service tax by them, by including the transportation charged in the value of CFA services does not arise.

vii. Demand of service tax is not tenable in as much a service tax has been paid as GTA service.

viii. Apart from the other services provided as CFA, they also provide trucks for transportation of stock from godown to Principal's wholesalers and the transportation charges incurred on this account are reimbursed to them by the Principal.

ix. The transportation service is a separate activity from CFA service as there is no lumpsum amount charged for CFA services including transportation. Hence, transportation service cannot be taxed under C&F service. They rely upon the decision in the case of CCE Vs. Technical Associates – 2011 (24) STR 567 (T) which was upheld by the Hon'ble Allahabad High Court – 2013 (31) STR 538 (All.).

x. The Principal appointed them to pay service tax on GTA service on their behalf and reimbursed it at actuals. Accordingly, they paid service tax after availing abatement.

xi. They fulfil conditions to be considered a GTA service provider in terms of Section 65B(26) of the Finance Act, 1994.

xii. For availing the abatement, they have not claimed cenvat credit for transport services.

xiii. As service tax has already been paid on the transportation charges under GTA, if they have to pay the service tax as demanded, it would

amount to double taxation. They rely upon Board's Circular No.341/18/2004-TRU (Pt.) dated 17.12.2004.

xiv. It is settled position of law that service tax is payable only on the amounts received for rendering services towards CFA services and, hence, transportation charges borne and reimbursed by the Principal cannot be treated as consideration for rendering CFA service. They rely upon the provisions of law as well as the judicial pronouncements in this regard.

xv. Sub-rule (1) of Rule 5 of the Valuation Rules has been held to be ultra vires to Section 66 and 67 of the Finance Act, 1994 in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. – 2018 (10) GSTL 401 (SC).

xvi. They also rely upon the judicial pronouncements holding that reimbursable expenses like travel, hotel, lodging etc. are not includible in the taxable value.

xvii. Through Finance Act, 2015, Explanation (E) has been substituted to specifically include reimbursement expenditure or cost. However, it would have prospective effect from 14.05.2015.

xviii. Service tax is sought to be levied on the amount received as GTA and various other reimbursements. However, the income is nothing but reimbursement received by them as pure agent of the Principal. By virtue of Rule 5(2) of the Valuation Rules, the expenditure of costs incurred as a pure agent shall be excluded from the taxable value subject to the specified conditions.

xix. They have fulfilled all the specified conditions and, consequently, neither the amount recovered for transport charges nor any other reimbursements can be subjected to service tax. They have already paid tax on reimbursements wherever applicable.

xx. They fall within the definition of pure agent as per Explanation 1 to Rule 5(2) of the Valuation Rules. Therefore, service tax is not payable on the amounts reimbursed to pure agent.

xxi. They rely upon the decision in the case of Sangamitra Services Agency Vs. Commissioner of Central Excise, Chennai – 2007 (8) STR 233; Shri Sastha Agencies Pvt. Ltd. Vs. Asstt. CCE & ST – 2007 (6) STR 185; Commissioner Vs. S.K Enterprises – 2019 (14) STR J20 and

Commissioner of C.Ex. & Cus., Nashik Vs. J.A. Bindra C&F Agent – 2014 (35) STR 376 (Tri.-Mumbai).

xxii. Inclusion of the transportation activity in the CFA services or treating it as naturally bundled with transportation depends upon the terms of the contract.

xxiii. As per Clause 5 of their agreement, the duty of the CFA is to forward the goods to the transporter as per the instructions of the Principal and to not actually transport the goods. The Principal is at liberty to appoint any transporter and in this case, the Principal has appointed them as transporter as a separate arrangement. They issue consignment notes for every consignment and separate bills are issued against these consignment notes.

xxiv. They rely upon the judgment of the Hon'ble Supreme Court in the case of Coal Handlers Private Limited Vs. Commissioner of Central Excise, Kolkata-I – 2015-TIOL-101-SC-ST. Reliance is also placed upon the Education Guide issued by the CBIC.

xxv. Abatement of 75% availed for GTA services under Notification is admissible and also exemption under Notification in respect of individual consignments where the gross amount charged is less than Rs.750/-.

xxvi. In most of the individual consignments transported by them, the gross amount charged does not exceed Rs.750/- and, hence, they are eligible for exemption under Notification No.25/2012-ST dated 20.06.2012.

xxvii. They submit sample copies of the Lorry Receipt/Consignment Notes/Freight Invoices raised for recovery of freight during the disputed period.

xxviii. The services of SNK were utilized by them in respect of godown required for providing taxable output services, namely, C&F services. The invoices of SNK do not show that service tax was paid by them under Works Contract Service. The service was with regard to the godown which is absolutely essential for them to provide taxable output services. Therefore, they had availed cenvat credit.

xxix. It is only a presumption by the department that the service tax paid was under Works Contract. The impugned order has not considered the scope of Rule 2(l) of the CCR, 2004 and the interpretation placed on this Rule is too narrow and technical.

xxx. They rely upon the decision in the case of Coca Cola India Pvt. Ltd and Dynamic Industries – 2014 (35) STR 674 (Guj.) as well as the several decisions that buildings, civil structures etc. were essential for output services in the nature of storage facilities, renting of immovable property and the like. However, to show bona fide belief, they had deposited the cenvat credit without prejudice to their rights.

xxxi. They had paid the applicable taxes on CFA and GTA services and there was inadvertent error in reporting in their returns. The reconciliation of the turnover and the taxes would be provided as and when asked at the time of hearing.

xxxii. The impugned order has been passed without considering that they were having separate agreements for CFA and GTA services and were registered separately for these services. They have been consistently filing returns and deposited tax separately, which has, however, not been considered.

xxxiii. The adjudicating authority has disregarded the precedents cited and the facts furnished in the reply to the SCN.

xxxiv. The demand for the period from April, 2013 to June, 2017 is barred by limitation as extended period is not invocable in the absence of any suppression, mis-statement etc.

xxxv. The alleged tax liability should be recomputed by considering the receipts as inclusive of tax. They rely upon the decision in the case of CCE Vs. Maruti Udyog Ltd. – 2002 (141) ELT 3 (SC); Advantage Media – 2008 (10) STR 449 (T) which was upheld by the Supreme Court – 2009 (14) STR J49 and Bluechip Corporate – Order No.A/2687-2688/15/STB dated 12.08.2015.

xxxvi. If the demand is to be confirmed, they would be entitled to additional cenvat credit. They had not claimed cenvat credit on the goods/services used for providing GTA services as they had claimed abatement from the value of taxable services. Since there is no restriction on claim of cenvat credit under CFA services, they should be allowed full cenvat credit which was not claimed on this account.

xxxvii. As service tax itself is not payable, interest under Section 75 is not payable.

xxxviii. Since none of the exigencies listed under Section 78 are not present, proposal for imposition of penalty does not survive.

xxxix. There was no suppression of facts, mis-declaration etc. on their part and, hence, Section 78 is not invocable. They rely upon the judicial pronouncements in this regard.

xl. Penalty is not imposable in the absence of *mens rea* and in case of an interpretational dispute.

7. Personal Hearing in the case was held on 31.10.2022. Shri Samir Kapadia, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum. He stated that he would make additional written submissions based on which the case may be decided.

8. The appellant has subsequently filed additional written submissions on 08.11.2022, wherein it was contended, inter alia, that :

- The impugned order has been passed on the basis of surmises, conjectures and pre-conceived notions.
- They had right from 2004 to 2017 followed the same methodology of filing returns and depositing tax under the category of CFA and GTA. During this entire period, neither any allegation nor was any direction given to them that the classification adopted by them as incorrect or that the services were composite in nature or that they were artificially splitting upon the services in to two distinct services and wrongly claiming abatement in respect of GTA services.
- While levelling the allegation of mis-classification, the audit team and thereafter the adjudicating authority have not offered any legal basis for the change in their opinion.
- For concluding that the services of CFA and GTA was a composite service, Para 8 of the 2016 agreement had been deliberately and improperly omitted.
- The letter of 2011 sent by Parle, instructing them that Parle would issue instructions for transport of goods to its distributors and that the charges for such transport should be invoiced separately, has been ignored.
- The fact of their issuing consignment notes has also been conspicuously omitted.

- The provisions of Section 67(1), Explanation (a) (ii) of the Finance Act, 1994 has been applied even for F.Y. 2013-14 to 14.05.2016. This despite the fact that the said provision came into effect only from 14.05.2016.
- The adjudicating authority has erred in relying upon the ruling in the case of Modern Business Solution.
- The only allegation in the SCN was that the services were composite in nature and they were artificially splitting the same and wrongly claiming abatement. The adjudicating authority has confirmed the demand on the basis that they were not issuing consignment notes, not demonstrated that cenvat credit was not claimed and the receipt and transport of goods and issuance of consignment notes was not evidenced. The basis adopted by the adjudicating authority is completely different from that of the SCN. Thus, the impugned order has exceeded the scope of the SCN.
- Interpretation adopted by the adjudicating authority seek to defeat the purpose and benefit granted by abatement Notification. Reliance is placed upon the decision in the case of Government of Kerala Vs. Mother Superior Adoration Convent – 2021 (376) ELT 242 (SC).
- The fact that the department has failed to substantiate its allegations is clearly recorded in the detailed speaking order.
- The precedents relied upon by the adjudicating authority is not applicable to the facts of the present case.
- Copy of reimbursement bill is submitted.

9. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the material available on records. The issues before me for decision are :

A. Whether the appellant was a 'pure agent' in terms of Rule 5(2) of the Valuation Rules and whether the Transportation cost as well as other reimbursable expenses are includible in the taxable value for the purpose of levying service tax on the C&F services provided by the appellant to PP and PB.

B. Whether the cenvat credit availed by the appellant on the invoices issued by SNK is admissible or otherwise.

The demand pertains to the period F.Y. 2013-14 to F.Y. 2017-18 (up to June).

10. I find that the SCNs issued to the appellant propose inclusion of the cost of transportation and other reimbursable expenses in the taxable value for the purpose of charging service tax primarily on the grounds that the appellant is not a 'pure agent' as defined under Rule 5(2) of the Valuation Rules and that the appellant is providing services under a composite contract for receiving, storing, selling and dispatch of goods on behalf of PP and PB. However, it is seen that the adjudicating authority has travelled beyond the scope of the SCNs and framed the issues which were decided by him as i) whether the charges self assessed under GTA should be treated as taxable value of C&F services, whether abatement claimed in terms of Notification 26/2012-ST dated 20.06.2012 is to be dis-allowed and ii) whether the undeclared reimbursable charges should form part of the taxable value of the services provided by the appellant. It is further seen that the adjudicating authority has also proceeded to decide the eligibility to avail abatement in terms of the said Notification. Clearly, the adjudicating authority has, by framing these questions and thereafter giving his findings on these issues, lost sight of the fact that the issue to be decided by him was only that which was raised in the SCNs issued to the appellant. Therefore, by deciding issues, which have not been raised in the SCN, the adjudicating authority has travelled beyond the scope of SCNs issued to the appellant.

11. I find that in the SCNs it has been alleged that the respondent are providing composite services of receiving, storing, selling and dispatch of goods on behalf of PP and PB and that they had received consideration for composite services, which was artificially vivisected by them. I find that the appellant had entered into separate contracts with PP and PB. The appellant have submitted copies of the agreements dated 08.09.2016 entered in to by them with PP and PB.

11.1 It is observed that both the agreements are regarding appointment of the appellant as Clearing and Forwarding Agent (CFA). In terms of Clause 5 of the said agreements, the appellant is responsible for forwarding the goods of PP and PB to the wholesalers of PP and PB. Clause 6 of the agreements stipulates that the appellant would provide all infrastructure for clearing, forwarding, storage etc. of the products of PP and PB. Further, Clause 8 of

the agreements stipulates that "*The PARTY will be paid **Rs.27000/-** per month as service charges for the services rendered as decided by the COMPANY from time to time and reimbursed freight and handling charges incurred by the PARTY on behalf of the COMPANY*". It is evident from the Clause 8 of the said agreement that the amount paid to the appellant as service charges is only for the C&F services provided by them and does not include freight and handling charges. At the same time this is also indicative of the fact that the transportation of the goods, handled by the appellant as C&F agent, is not part of the agreement.

11.2 I further find that in terms of Clause 6 of the said agreements, the responsibility of the appellant is clearing, forwarding, storage etc. of the products of PP and PB. Therefore, the service provided by the appellant would be restricted to forwarding the products. If the scope of the agreements included transportation of the goods, the agreements would have been differently worded to clearly stipulate the transportation responsibility of the appellant. However, it is not so and therefore, transportation of the goods is not a part of the said agreements. The appellant have submitted letters dated 08.10.2011 of PP and PB wherein it is stated that the appellant would undertake transportation of the products from the depot to the wholesalers as per the directions of PP and PB and that the activity of transportation would be an independent activity. It is also stated therein that the appellant would be paid the freight and handling charges incurred on behalf of PP and PB. This is in consonance with the C&F agreements of the appellant with PP and PB.

11.3 I further find that it is clear from the said agreements that the appellant would be paid a composite amount for the C&F service provided by them and the agreements clearly state at Clause 8 that the appellant would be reimbursed the freight and handling charges incurred on behalf of PP and PB. Therefore, it cannot in any way be inferred or interpreted that the agreements between the appellant and their Principals is that of composite services, which includes transportation, and for which composite consideration is being paid to the appellant. That being the case, I do not find any merit in the contention of the department that the appellant have artificially vivisected the income received by them in to different incomes.

11.4 I also find it pertinent to refer to the judgment of the Hon'ble Tribunal in the case of Balmer Lawrie & Co. Ltd. – 2014 (35) STR 800 (Tri.Mumbai). In the said case, the appellant was providing cargo handling services in relation to containers and charging handling charges as well as transportation charges which were shown separately in the invoices. Considering these facts and based on the clarification issued by the CBIC vide Circular No. B-11/1/2002-TRU dated 01.08.2002, the Hon'ble Tribunal held that the clarification issued by the Board applies to the facts of the appeal and since the appellant had discharged the service tax, the question of levying service tax on the whole amount under one taxable service was not sustainable in law. In the present appeal, it is seen that the appellant is raising separate invoices for C&F Agent Service Charges and Transportation Charges. They are paying service tax on the C&F Agent service charges and also paying service tax on the transportation charges under GTA services. Therefore, the ratio of the above judgment is squarely applicable to the facts of the present case. Accordingly, I am of the considered view that the impugned order holding that the Transportation charges are includible in the taxable value of the C&F services is not legally sustainable and, hence, is accordingly set aside.

11.5 The impugned order has also dealt with the issue of admissibility of abatement in terms of Notification No. 26/2012-ST dated 20.06.2012. However, I find that this is an extraneous issue inasmuch as this issue was not raised in the SCN issued to the appellant. Therefore, by dealing with this aspect in the impugned order, the adjudicating authority has travelled beyond the scope of the SCN, which is legally not permisible. Accordingly, this issue is not being dealt with in the present appeal.

12. Regarding the issue of inclusion of the reimbursable expenses in the taxable value of the C&F services provided by the appellant, I find that it is alleged in the SCN that the appellant have not complied with the conditions specified in Explanation (1) to Rule 5(2) of the Valuation Rules and, therefore, the entire consideration received by them, including the reimbursable expenses under different heads, is required to be included in the taxable value for charging service tax.

12.1 The appellant have apart from other submissions, contended that the SCN as well as the impugned order have resorted to Explanation (a) (ii) to Section 67 (1) of the Finance Act, 1994 for the entire period from F.Y. 2013-14 right upto 14.05.2015, while the said Explanation was inserted w.e.f 14.05.2015. I find that there is merit in the contention of the appellant. In the SCN issued to the appellant, reliance has been placed upon Explanation (a) (ii) to Section 67 (1) of the Finance Act, 1994 as well as Rule 5(2) of the Valuation Rules. Explanation to Section 67 of the Finance Act, 1994 defines 'consideration'. Explanation (a) (ii) to Section 67 of the Finance Act, 1994 is reproduced as below :

> " (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;".

12.2 The said Explanation (a) to Section 67 of the Finance Act, 1994 was inserted vide the Finance Act, 2015 w.e.f 14.05.2015. Therefore, its applicability is for the period from 14.05.2015 and would not apply to the period prior to 14.05.2015. The SCN and the impugned order have clearly erred in applying the said provisions for the period from F.Y. 2013-14 to 13.5.2015. The period prior to 14.05.2015 would be governed by the provisions of Section 67 as it existed prior to its amendment.

12.3 In this regard, it would be pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. – 2018 (10) GSTL 401 (SC). The relevant paragraphs of the said judgment are reproduced below :

> **"24.** In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the

valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service.

29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature."

12.4 In view of the aforesaid judgment of the Hon'ble Supreme Court, for the period prior to 14.05.2015, the reimbursable expenses and transportation charges received by the appellant from PP and PB are not includible in the taxable value of the C&F services provided them. Consequently, the demand of service tax for the period from F.Y. 2013-14 to 13.05.2015 confirmed by including the reimbursable expenses and transportation charges in the taxable value is not legally sustainable and, is accordingly, set aside.

13. For the period from 14.05.2015 to June, 2017, the provisions of Section 67 of the Finance Act, 1994 and Rule 5(2) of the Valuation Rules are applicable for determining whether the reimbursable expenses are includible in the taxable value of the C&F services provided by the appellant. Rule 5 (2) of the Valuation Rules is reproduced below :

"(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely:-

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation1.–For the purposes of sub- rule (2), "pure agent" means a person who–

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

Explanation2.– For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice."

13.1 In terms of the provisions of Rule 5 (2) of the Valuation Rules, a service provider, as a 'pure agent', is required to satisfy all the conditions specified in the said rule for excluding the expenditure or costs incurred from the taxable value of the service. In the instant case, the SCN was issued to the appellant alleging that they have not fulfilled all the specified conditions and, therefore, they cannot be considered a 'pure agent'. Accordingly, the reimbursable expenses were sought to be included in the taxable value of the C&F service provided by the appellant for charging service tax.

13.2 The appellant have, in their appeal memorandum, contended that they fulfil all the requirements of a 'pure agent. Therefore, service tax is not payable on amounts reimbursed to 'pure agent' in terms of Rule 5 (2) of the Valuation Rules. In my considered view, when the demand of service tax is based on the ground that the appellant cannot be considered as a 'pure agent' nor have they fulfilled the conditions specified in Rule 5 (2) of the Valuation Rules, the adjudicating authority ought to have given a detailed finding on whether the appellant are a 'pure agent' and whether they have fulfilled the conditions of Rule 5(2) of the Valuation Rules. However, the

adjudicating authority has, without giving any detailed finding, merely held at Para 48.2.11 of the impugned order that the appellant have failed to submit any evidences on record to substantiate their claim of admissibility of deduction of such receipts that remained undeclared in their ST-3 returns.

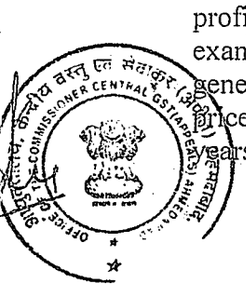
13.3 Be that as it may, I find that the agreements dated 08.09.2016 entered into by the appellant with PP and PB is only with regard to appointment of the appellant as C&F agent and the agreements are not regarding appointment of the appellant as a 'pure agent' of PP and PB. Therefore, it cannot be said that the appellant are a 'pure agent' of PP and PB. Further, as per clause 6 of the said agreements, the appellant shall "*provide all such infrastructure including manpower required to monitor activities in connection with clearing, forwarding, storage etc. of the products of THE COMPANY*". Therefore, the appellant were required to provide the required infrastructure and manpower for providing C&F services. However, the said agreements do not provide for reimbursement of the expenditure incurred on the infrastructure, manpower etc. used in providing the C&F services.

13.4 The appellant, as part of their additional written submission, submitted a copy of Bill No. Suppl.-2/2015-16 dated 20.08.2015 issued to PP as evidence of the reimbursement claimed by them. I find that the said bill is in respect of Courier, Telephone, Internet Charges and Pest Control. The appellant have also submitted the supporting bills issued by the respective service provider in the name of the appellant in respect of these charges. It is observed that these expenses are towards services which are used by the appellant in providing the C&F services to PP and PB. These are not services rendered by the respective service providers to PP and PB. In terms of Explanation 1 (c) of Rule 5 (2), a 'pure agent' is a one who does not use such goods or services so procured. Since the appellant are the recipient and user of the services, in respect of which reimbursement is claimed by them from PP, they fall foul of Explanation 1 (c) of Rule 5 (2) of the Valuation Rules inasmuch as the reimbursement is being claimed in respect of services not provided to PP but provided to the appellant and used by the appellant. Therefore, the appellant cannot be considered a 'pure agent' as specified in Rule 5 (2) of the Valuation Rules.

13.5 It is further observed that Clause 8 of the agreements provides for reimbursement of only the freight and handling charges incurred by the appellant on behalf of PP and PB. However, from the bill submitted by the appellant, it is clearly evident that the appellant are claiming reimbursement of expenses other than those specified in the said agreements. As per Explanation 1 (a) of Rule 5 (2), a 'pure agent' is a one who enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service. However, in the instant case, the contract between the appellant and PP and PB only provides for incurring of freight and handling charges which would be reimbursed to the appellant. Further, as stated hereinabove, the expenses, reimbursement of which is claimed by the appellant, are those incurred towards services received and used by the appellant. Therefore, the appellant do not satisfy the condition specified in Explanation 1 (a) of Rule 5 (2) of the Valuation Rules and, consequently, they are not a 'pure agent' of PP and PB. Accordingly, the reimbursable expenses are not deductible from the taxable value of the C&F services provided by the appellant to PP and PB and for the period from 14.05.2015 to June, 2017, the appellant are liable to pay service tax on the taxable value inclusive of the expenses reimbursed to them by PP and PB in terms of Explanation (a) (ii) of Section 67 of the Finance Act, 1994. I, therefore, uphold the demand of service tax for the period from 14.05.2015 to F.Y. 2017-18 (up to June, 2017).

14. The appellant have also contended that if they are liable to pay service tax, their tax liability should be recomputed by considering the amount of receipts as inclusive of tax. In this regard, I find it 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."



14.1 It is observed that the appellant have in their appeal memorandum not submitted any evidence that the amount 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.

15. Regarding the issue of availment of cenvat credit on the invoices of SNK, I find that the cenvat credit was disallowed on the grounds that it pertained to Civil and Construction work which is excluded in terms of Rule 2 (l) of the CCR, 2004. The said Rule 2 (l) of the CCR, 2004 prevalent during the period is reproduced below :

> "(l) input service" means any service,-
>
> (i) used by a provider of output service for providing an output service; or
>
> (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,
>
> and includes services used in relation to modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation up to the place of removal;
> but excludes,-
>
> (A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –
>
> (a) construction or execution of works contract of a building or a civil structure or a part thereof; or
>
> (b) laying of foundation or making of structures for support of capital goods,
>
> except for the provision of one or more of the specified services; or"

15.1 The appellant have contended that the records and invoices do not show that SNK have provided the services for godown which were in the nature of original works and that godown is essential for their providing the services of C&F. I find that the adjudicating authority has held at Para 49.17 of the impugned order that "*However, I find that the description of service is*

mentioned in the invoices as CIVIL & CONSTRUCTION WORK. From the invoices, it is clear that VAT @ 0.60% is charged in the invoices meaning that goods is involved in the invoices and thus fulfils the condition of being works contract. From the invoices, it is also clear that Service Tax is charged in the invoices @ 5.60% applicable to works contracts for execution of original works".

15.2 It is clear from the provisions of Rule 2 (l) of the CCR, 2004 that the service portion in the execution of a works contract and construction services including service listed under clause (b) of Section 66E of the Finance Act, 1994 in so far as they are used for construction or execution of work contract of a building or civil structure or a part thereof are specifically excluded from the definition of 'input service'. I find that it is not disputed by the appellant that the services received by them from SNK was relating to construction services which is covered by the exclusions specified under Rule 2 (l) of the CCR, 2004. Consequently, the appellant have wrongly availed cenvat credit on the invoices of SNK. The appellant have relied upon a few judgments in support of their contention. However, I find that the adjudicating authority has correctly held at Para 49.16 of the impugned order that the decisions relied upon by the appellant pertain to the period prior to the amendment made in Rule 2 (l) of the CCR, 2004 w.e.f. 20.06.2012. Therefore, the judgments relied upon by the appellant are not relevant to the issue involved in the present appeal and are distinguished. In view of the above findings, I am of the considered view that the adjudicating authority has rightly disallowed the cenvat credit to the appellant on the invoices issued by SNK. Accordingly, I uphold the impugned order confirming the demand of service tax evaded by way of wrong availment and utilization of cenvat credit.

16. The appellant have also contested the confirmation of demand on the grounds of limitation. However, I do not find any merit in the contention of the appellant insamuch as the appellant had not disclosed the amount of expenditure reimbursed to them in their ST-3 returns. The appellant had thereby suppressed the true and correct taxable value of the services provided by them which resulted in short payment of service tax. This is clearly a case of suppression of facts on the part of the appellant with an

intent to evade payment of service tax. Consequently, the extended period of limitation has been correctly invoked for demanding service tax.

17. The appellant have challenged the imposition of penalty. However, since the service tax was evaded by the appellant by resorting to suppression of facts, the provisions of Section 78 (1) of the Finance Act, 1994 are applicable to the facts of the case. The adjudicating authority has, therefore, correctly imposed penalty under Section 78 (1) of the Finance Act, 1994. However, as the demand of service tax for the period from F.Y. 2013-14 to 13.05.2015 has been set aside, the amount of penalty under Section 78 (1) stands reduced to that extent.

18. As regards the penalty imposed under Section 76 of the Finance Act, 1994, it is observed that the same pertains to the demand of service tax for the period from April, 2017 to June, 2017, which has been upheld in the foregoing paragraphs. The said Section 76 provides for imposition of penalty in cases where service tax has not been levied or paid, or has been short levied or short paid for any reason, other than the reason of fraud or collusion etc. In the instant case, the appellant had during the said period failed to discharge their liability to pay service tax by wrongly excluding the expenses reimbursed to them by their Principals. They had thereby short paid service tax rendering them liable to penalty under Section 76 of the Finance Act, 1994. I, therefore, am of the considered view that there is no infirmity in the impugned order imposing penalty upon the appellant under Section 76 of the Finance Act, 1994.

19. In view of the facts discussed herein above, I set aside the impugned order insofar as it pertains to confirmation of demand of service tax for the period from F.Y. 2013-14 to 13.05.2015 along with consequential interest and penalty under Section 78(1) of the Finance Act, 1994. I uphold the impugned order insofar as it pertains to the confirmation of demand of service tax for the period from 14.05.2015 to F.Y. 2017-18 (upto June, 2017) in respect of the reimbursable expenses, by excluding transportation charges received by the appellant from PP and PB. The appellant are also liable to pay interest and penalty equivalent to the amount of demand upheld, for the period from 05.2015 to F.Y.2016-17, in terms of Section 78 (1) of the Finance Act, 1994.

In respect of the demand for the period April, 2017 to June, 2017, the penalty imposed under Section 76 (1) of the Finance Act, 1994 is upheld. The impugned order confirming the demand of service tax evaded by wrong availment and utilization of cenvat credit amounting to Rs.19,03,652/- is also upheld along with interest and penalty.

20. 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.

18th November, 2022.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 18.11.2022.

Attested:

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

BY RPAD / SPEED POST

To

M/s. Prachi Forwarding Agency, — Appellant
Block No.875, Parle Godown,
Village, Paldi, Kankaj,
Taluka : Dascroi,
Ahmedabad – 382 427

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

Copy to:

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