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 : 20230564SW0000222B74

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2645/2022 /1052-91

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-11/2023-24**
दिनाँक Date : **28-04-2023** जारी करने की तारीख Date of Issue 04.05.2023

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

ग Arising out of OIO No. **38/CGST/Ahmd-South/JC/NB/2021-22** दिनाँक: **28.03.2022** passed by Joint Commissioner, CGST, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Vedica Procon Pvt Ltd
[Presently known as M/s Iscon City Centre LLP]
Iscon House, Behind Rembrandt Building,
C.G. Road, Opposite Associate Petrol Pump,
Navrangpura, Ahmedabad - 380009

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 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.

21ण 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)-

a. *(Section)* खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:

(clxix) amount determined under Section 11 D;
(clxx) amount of erroneous Cenvat Credit taken;
(clxxi) 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. Vedica Procon Pvt. Ltd. (presently known as M/s. Iscon City Centre LLP), Iscon House, Behind Rembrandt Building, C.G. Road, Opposite Associate Petrol Pump, Navrangpura, Ahmedabad – 380 009 (hereinafter referred to as the "appellant") against Order in Original No. 38/CGST/Ahmd-South/JC/NB/2021-22 dated 28.03.2022 [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 are that the appellant were engaged in Construction of Industrial and Commercial Complexes and were holding Service Tax Registration No. AAECV0994KSD001. The name of the appellant was subsequently changed to M/s. Iscon City Centre Pvt. Ltd and they obtained new Service Tax Registration No. AAECV0994KSD002 on 10.11.2015. Thereafter, the appellant converted into M/s. Iscon City Centre LLP and obtained Service Tax Registration No. AAGFI1767ESD001 on 23.02.2017. Information shared by the Central Economic Intelligence Bureau (CEIB) with the Directorate General of Goods & Service Tax Intelligence (DGGI) indicated that search and seizure proceedings were conducted by DGIT (Inv), Unit-1(3), Income Tax, Ahmedabad on 25.02.2016 against M/s. J.P. Iscon Group (JPI). The appellant was one of the companies of JPI and they were also covered in the search and seizure proceedings carried out by the Income Tax department. In the course of the search proceedings, evidences of receipt of substantial cash were unearthed. The evidences indicated that JPI was also receiving sale consideration in cash in addition to the amount received by cheque and the Sale Deeds were made only for the amount paid through cheque. The books of accounts also recorded only the amounts received by cheque. The information received from CEIB indicated that the appellant had evaded service tax by resorting to recovering substantial part of the taxable value in cash from their clients and not accounting for the same in their regular books of accounts.

Consequently, such unaccounted receipts were neither considered for computing the taxable value for filing ST-3 returns nor the applicable service tax was paid on such cash receipts by the appellant.

2.1 Based on the above information, inquiry was initiated against the appellant by DGGI, Ahmedabad and an inspection of records was conducted at the premises of the appellant on 08.07.2019 and further information was also called for from Income Tax department. The evidences provided by Income Tax department revealed that the appellant had received cash amounting to Rs. 30,77,20,996/- during the period from April, 2014 to February, 2016 (upto 25.02.2016) from their prospective customers for provision of Construction of Residential/Commercial Complex services in their project 'Iscon Commercial VIP/Complex which was neither considered for computing the taxable value nor any service tax was paid on the same.

2.2 In the course of the inquiry by DGGI, the appellant had informed that BU permission for the project Iscon Commercial Complex was not received by them till date from the competent authority. From the details and documents available on record, it appeared that the cash receipts amounting to Rs. 30,77,20,996/- from prospective buyers against sale of shops/units in the project Iscon Commercial VIP/Complex, received before BU permission, are chargeable to service tax. It, therefore, appeared that the service tax amounting to Rs. 1,32,59,891/- on the said cash receipts was recoverable from the appellant.

3. On conclusion of the investigation, the appellant were issued Show Cause Notice bearing No. DGGI/AZU/Gr.A/36-124/2019-20 dated 08.11.2019 wherein it was proposed to :

a) Demand and recover the service tax amounting to Rs. 1,32,59,891/- under the proviso to Section 73 (1) of the Finance Act, 1994 in respect of the taxable services viz. Construction of Residential Complex services/Construction of Commercial Complex services, along with interest under Section 75 of the Finance Act, 1994.

b) Impose penalty under Sections 76 and/or 78 of the Finance Act, 1994.

c) Impose penalty under Sections 77(1)(b) and 77(1)(c)(i) of the Finance Act, 1994.

3.1 Shri Jayesh T. Kotak, Shri Jatin M. Gupta, Shri Amit M. Gupta and Shri Rajendra Patel, Directors of the appellant, were also called upon to show cause as to why penalty should not be imposed upon them under Section 78A of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein :

I. The demand of service tax amounting to Rs. 31,99,807/- was confirmed along with interest.

II. Penalty amounting to Rs. 10,000/- each, was imposed under Sections 77(1) (b) and 77(1)(c)(i) of the Finance Act, 1994.

III. Penalty amounting to Rs. 31,99,807/- was imposed under Section 78 of the Finance Act, 1994.

IV. The demand of service tax amounting to Rs. 1,00,60,084/- was dropped.

4.1 Penalty amounting to Rs. 1,00,000/- each was imposed on Shri Jayesh T. Kotak, Shri Jatin M. Gupta, Shri Amit M. Gupta and Shri Rajendra Patel, Directors of the appellant.

5. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds :

i. The demand of service tax cannot be confirmed merely on the basis of a statement of a third party. There is no corroborative evidence produced by the department to show that they had received unaccounted cash towards provision of alleged construction services during the disputed period.

ii. Their employee had in their statement categorically denied receipt of any cash consideration. Hence, the department does not have any corroborative evidences about allegation of receipt of cash as consideration for construction services.

iii. Reliance is placed upon the judgment in the case of Godavari Khore Cane Transport Co. Vs. CCE – 2013 (29) STR 31 (Bom.) and Mahesh Sunny Enterprises P. Ltd. Vs. CST, New Delhi – 2014 (34) STR 21 (Del.).

iv. Service tax cannot be proposed to be recovered merely on the basis of investigation done by the Income Tax Department against them without an independent investigation to establish that the amount is towards taxable services provided by them.

v. They have preferred an appeal against the Assessment Orders for F.Y. 2013-14 to F.Y. 2015-16 on the grounds that there was no land acquired by them during the disputed period and no commercial scheme was launched at the time, and thus, the determination of any income in respect of such a project during the disputed period is not sustainable.

vi. The SCN has not adduced any evidence to show receipt of unaccounted cash by them towards rendering of construction services. In the absence of any evidence, service tax cannot be demanded.

vii. Reliance is placed upon the judgment in the case of N.R. Agarwal Industries Ltd. Vs. CCE & ST – 2021 (11) TMI 243 – CESTAT Ahmedabad; Final Order No. A/10270-10275/2022 dated 17.03.2022 of CESTAT, Ahmedabad in the case of J.P.Iscon Pvt. Ltd.; Deltax Enterprises Vs. CCE, Delhi-I – 2018 (10) GSTL 392 (Tri.-Del.); Kipps Education Centre, Bathinda Vs. CCE, Chandigarh – 2009 (1) STR 422 (Tri.-Del); Commissioner Vs. Mayfair Resorts – 2011 (21) STR 589 (T) which was upheld by the Hon'ble High Court of P&H – 2011 (22) STR 263 (P&H); CCE, Ludhiana Vs. Ramesh Studio & Colour Lab – 2010(20) STR 817 (Tri.-Del.); CCE, Chandigarh Vs. Bindra Tent Service – 2010 (17) STR 470 (Tri.-Del.) and Ravi Foods Pvt. Ltd. Vs. CCE, Hyderabad – 2011 (266) ELT 399 (Tri.-Bang.).

viii. There is no statement of any person indicating or admitting that income as reflected in the assessment orders stands derived from provision of service. It has been held by various Courts that the same cannot be attributed to regular business of appellants unless there is evidence to that effect.

ix. Reliance is placed upon the judgment in the case of CCE, Ludhiana Vs. Zoloto Industries – 2013(294) ELT 455 (Tri.-Del.); Trikoot Iron and Steel Casting Ltd. Vs. Commissioner – 2015 (315) ELT 65; CCE Vs. Havukal Tea & Produce Co. (P) Ltd. – 2011(267) ELT 162 (Mad.) and Girdhari Lal Nannelal Vs. Sales Tax Commissioner – (1976) 3 SCC 701.

x. The onus of proof lies on the department to prove that they had received alleged cash receipts from buyers during the disputed period. This onus has not been discharged by the department.

xi. The SCN has been issued on the basis of loose papers and coded dairies recovered from third parties and loose papers recovered from the residence of an employee of JPI and the statement of Shri Venkatramana Ganesan.

xii. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of Common Cause & Others Vs. UOI & Ors. in IA No.3 and 4 of 2017 in W.P (Civil) 505 of 2015.

xiii. The department has not investigated about the fact of provision of service by them. Statements of recipients of service have also not been recorded. They cannot be called upon to prove the negative.

xiv. Reliance is also placed upon the judgment in the case of Samta Khinda Vs. Asst. Commr. of IT – 2016 (11) TMI 1366 – ITAT Delhi; CCE Vs. Magnum Steels Ltd. – 2017 (357) ELT 226 (Tri.-Del.); Ruby Chlorates (P) Ltd. Vs. CCE – 2006 (204) ELT 607 (Tri.-Chennai); Charminar Bottling Co. (P) Ltd. Vs. CCE – 2005 (192) ELT 1057 and Nagubai Ammal & Others Vs. B. Shama Rao – AIR 1956 SC 593.

xv. It is settled principle of law that in the absence of corroborative evidences when the only relied upon document is disputed by the assessee, the assessee cannot be penalized for the same. They rely upon the judicial pronouncements in this regard.

xvi. Where the statute confers the same power on different officers, especially when they belong to different departments, they cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power of re-assessment must also be exercised by the same officer or his successor.

xvii. DGGI Officers are not the Central Excise officer empowered to issue SCN. Where the statute confers the same power on different officers, especially when they belong to different departments, they cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power of re-assessment must also be exercised by the same officer or his successor.

xviii. Reliance is placed upon the judgment in the case of ITC Ltd. Vs. Commissioner of Central Excise – 2019(368) ELT 216 (SC); Commissioner of Customs Vs. Sayed Ali – 2011 (265) ELT 17 (SC); Canon India (P) Ltd. Vs. Commissioner of Customs – 2021-VIL-34-SC-CU; Consolidated Coffee Ltd. & Anr. Vs. Coffee Board, Bangalore – (1980) 3 SC 358; Shri Ishar Alloy Steels Ltd. Vs. Jayaswals Neco Ltd. – (2001) 3 SCC 609.

xix. The SCN issued by DGGI, Ahmedabad is without authority of law and liable to be set aside.

xx. Section 73(4B) of the Finance Act, 1994 prescribes that show cause notice, where it is possible to do so, shall be adjudicated within a period of six months or one year from the date of notice, as the case may be. Since the present SCN was issued on 11.11.2019 and personal hearing was held on 24.12.2021, the impugned SCN is not sustainable as the time period of one year has lapsed.

xxi. Reliance is placed upon the judgment in the case of Sunder System Pvt. Ltd. Vs. UOI & Ors. – 2020 (1) TMI 199- Delhi High Court; National Building Construction Co. Ltd. Vs. UOI – 2019 (20) GSTL 515 (Del.).

xxii. They had submitted their reply to the SCN dated 11.11.2019 on 24.03.2021. However, the notice for personal hearing was issued in July, 2021. Thus, the present SCN may not be adjudicated after lapse of one year from the date of issuance of SCN.

xxiii. The classification of the activity of construction of commercial units/shops undertaken by them as 'Construction of Complex Service' in terms of Section 66E(b) of the Finance Act, 1994 is not sustainable.

xxiv. Construction service in terms of Section 66E(b) is applicable only where contract is for pure service. The said category would not be

applicable to indivisible composite contracts, wherein material, land and services are provided together.

xxv. The SCN itself alleges that the alleged receipt of cash is for sale/booking of shops/units in their project. Thus, the whole activity undertaken by them is an indivisible composite contract service, wherein value of service component, material component and value of undivided portion of land is included in the total consideration charged from the buyer. Their activities would be classified as Works Contract Service.

xxvi. Reliance is placed upon the judgment in the case of Larsen & Toubro Ltd. Vs. State of Karnataka – 2014 (303) ELT 3 (SC); K. Raheja Development Corporation Vs. State of Karnataka – 2006 (3) STR 337 (SC); Suresh Kumar Bansal Vs. UOI – 2016 (43) STR 3 (Del.).

xxvii. Since the demand of service tax is raised under erroneous category of 'Construction of Complex Service', the same is not sustainable. Reliance is placed upon the judgment in the case of Real Value Promoters Pvt. Ltd. V. Commissioner of GST & C.Ex., Chennai – 2018 (9) TMI 1149 and the various judgment of the Courts and Tribunals pronounced by relying upon the judgment in Real Value Promoters. Reliance is also placed upon the judgment in the case of Emaar MGF Construction Pvt. Ltd. Vs. CCE, New Delhi – 2020 (34) GSTL 509 (Tri.-Del.).

xxviii. Demand of service tax on the amount charged by them for sale of flats/shops is not sustainable in view of the decision in the case of Suresh Kumar Bansal Vs. UOI- 2016 (43) STR 3 (Del.).

xxix. They had undertaken construction of flats/shops for sale to buyers after obtaining commencement certificate from AMC on 08.06.2016. The SCN has proposed to demand service tax on the alleged unaccounted cash receipts during April, 2014 to February, 2016 when the construction has not even begun.

xxx. There is no machinery provision for ascertaining the service element involved in the composite contract. Neither Section 66E(b) nor any of the rules provide any machinery for excluding non-service components.

xxxi. Reliance is placed upon the judgment in the case of Commissioner of C.Ex., and Customs, Kerala and Ors. Vs. Larsen and Toubro Ltd. and Ors. – 2015 (39) STR 913 (SC); Wipro Ltd. Vs. Assistant Collector of Customs – 2015 (319) ELT 177 (SC).

xxxii. The SCN and the impugned order has computed their liability by assuming the value of land as 70% of the amount allegedly collected by them as advances during the disputed period. In view of the judgments relied upon, fictionalized cost is to be adopted only in absence of actual cost of goods or services. The department has failed to compute the demand on the basis of actual value of land and such quantification of demand is wholly arbitrary and erroneous.

xxxiii. Service tax under Works Contract Service is also not payable for the period prior to 01.02.2017, as there is no mechanism to ascertain the value of consideration towards Works Contract Services.

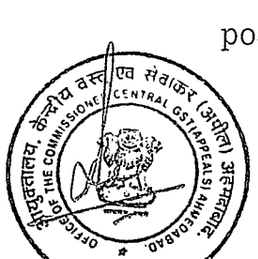
xxxiv. Prior to amendment of Rule 2A of the Valuation Rules, 2006 vide Section 129 of the Finance Act, 2017, there was no measure of levy of service tax on works contract service and the amendment made on 01.02.2017 cannot be applied retrospectively.

xxxv. Even otherwise, the calculation of service tax is erroneous as the SCN presumes the entire receipt as consideration of services which is against the principle of law settled by Hon'ble Supreme Court in the case of Larsen and Toubro Ltd. – 2014 (303) ELT 3 (SC).

xxxvi. They employed their own labour for execution of the various projects and are not a contractor doing construction work for another person. In respect of the constructed property sold by them to various buyers, it cannot be held that they rendered Works Contract Services to the buyers. The service was rendered to themselves.

xxxvii. Reliance is placed upon CBIC Circular No. 332/35/2006-TRU dated 01.08.2006 and 108/02/2009 dated 29.01.2009.

xxxviii. The SCN was issued on 08.11.2019 covering the period from April, 2014 to February, 2016 by invoking the extended period of limitation merely on the basis of assumption and presumption in as much as no positive evidence of cash collection has been brought on record. They



have never suppressed any facts relating to the activities carried on by them with intention to evade payment of service tax.

xxxix. Reliance is placed upon the judgment in the case of Padmini Products Vs. CCE – 1989 (43) ELT 195 (SC); CCE Vs. Chemphar Drugs & Liniments - 198– (40) ELT 276 (SC); Gopal Zarda Udyog Vs. CCE – 2005 (188) ELT 251 (SC); Lubri-Chem Industries Ltd. Vs. CCE – 1994 (73) ELT 257 (SC); Anand Nishikawa Co. Ltd. Vs. CCE – 2005 (188) ELT 149 (SC).

xl. For imposing penalty under Section 78 there must be an intention to evade payment of service tax, or there should be suppression or concealment of facts. They had at no point of time had the intention to evade service tax or suppressed any fact wilfully from the department. They rely upon the various judicial pronouncements in this regard.

xli. As the demand itself is not sustainable, the question of imposing interest does not arise.

xlii. The issue involves interpretation of complex legal provisions. Therefore, imposition of penalty is not warranted in the present case. They rely upon the various judicial pronouncements in this regard.

xliii. No penalty is leviable on the under Sections 76, 77 and 78 of the Finance Act, 1994.

xliv. Section 80 of the Finance Act, 1994 provides that no penalty shall be imposed if the assessee proves that there was reasonable cause for failure. In the present case, there was a bona fide belief on their part that the liability to pay service tax was correctly discharged by them. Therefore, there was reasonable cause for failure, if any, on their part to pay service tax on the alleged cash receipts. Hence, penalty cannot be imposed under Section 76 and 78 of the Act.

xlv. Reliance is placed upon the judgment in the case of ETA Engineering Ltd. Vs. CCE, Chennai – 2004 (174) ELT 19 (T-LB); Flyingman Air Courier Pvt. Ltd. Vs. CCE – 2004 (170) ELT 417 (T) and Star Neon Singh Vs. CCE, Chandigarh – 2002 (141) ELT 770 (T).

6. Personal Hearing in the case was held on 20.02.2023. Shri Rashmin Vaja, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the submissions made during the personal hearing and the materials available on records. The issues before me for decision is whether the confirmation of demand of service tax amounting to Rs. 31,99,807/-, along with interest and penalties, under the category of Construction of Commercial Complex Services, in the facts and circumstances of the case, is legal and proper or otherwise. The demand pertains to the period F.Y. 2014-15 and F.Y. 2015-16.

8. It is observed that the SCN in the case was issued to the appellant on the basis of the evidences unearthed in the course of the searches carried out by the Income Tax department at the premises of JPI and some of their Brokers. The evidences were shared with DGGI by CEIB and based on these evidences an inquiry was initiated by DGGI. On conclusion of the inquiry, DGGI issued SCN to the appellant demanding service tax amounting to Rs. 1,32,59,891/- along with interest and penalties. The demand of service tax was computed on the cash component amounting to Rs. 30,77,20,996/-. However, the adjudicating authority, accepting the contention of the appellant that service tax ought to be demanded only on the alleged cash amount received by them during F.Y. 2014-15 and F.Y. 2015-16, concluded that the cash amount received by the appellant during the said period totally amounted to Rs. 7,53,09,000/- and after allowing abatement @ 70%, held that the appellant were liable to pay service tax amounting to Rs. 31,99, 807/-. The service tax confirmed is in respect of 19 buyers, who had allegedly paid part amount in cash to the appellant towards booking/purchase of offices/shops/units in the Iscon Commercial VIP/Complex of the appellant. The details of these buyers and the amount paid in cash by them is sourced from the Assessment Order of Income Tax department for the period under dispute. It is, however, observed that in the SCN issued to the appellant, no evidence has been brought on record to

indicate that these 19 buyers had made payments in cash to the appellant towards booking/purchase of property in the project being developed by the appellant. It is also pertinent to mention that in his statement, Shri Venkatramana Ganesna, Authorized Signatory of the appellant, had not admitted to receipt of part amount in cash from their customers. Therefore, it is apparent that except for the evidences shared by Income Tax department indicating receipt of unaccounted cash by the appellant, there is no evidence establishing the receipt of cash by the appellant for providing taxable services to their customers.

8.1 The appellant have, in their appeal memorandum, contended that the department has not carried out any independent investigation and neither has any corroborative evidences been brought on record. It is observed from the materials available on record that apart from evaluating the evidences shared by Income Tax, DGGI had, in the course of their inquiry, recorded the statement of Shri Venkatramana Ganesna, the Authorised Signatory of the appellant. In his statement, Shri Venkatramana Ganesna had stated that they are not in agreement with the assessment orders passed by the Income Tax department and that they have challenged the same by way of appeal before the Commissioner of Income Tax (Appeals) and the decision is pending. In respect of the evidences recovered from the premises of the Brokers of JPI group, he did not offer any explanation on the grounds that the same were not recovered from their premises or directors of employees.

8.2 The appellant have in support of the contention that demand of service tax cannot be raised and confirmed merely on the basis of investigation conducted by Income Tax department relied upon the judgment of the Hon'ble Tribunal in the case of J.P. Iscon Pvt. Ltd. Vs. Commissioner of Central Excise, Ahmedabad-I – 2022(63) GSTL 64 (Tri.-Ahmd.). I have perused the said judgment and find that the same was passed in a case involving the same set of facts i.e. issue of SCN on the basis of evidences recovered in an investigation by Income Tax department and confirmation of demand of service tax by the adjudicating authority. The

relevant portion of the judgment of the Hon'ble Tribunal is reproduced below :

> **"18.** We have considered the submissions made at length by both sides and perused the records. We find that the Revenue has proceeded in confirmation of the demand on the basis of documents and information provided by the Income Tax Department. The entire case of Revenue in the present matter is based on .xls sheets retrieved by the Income Tax Authorities and Statement of Smt. Kalindi Shah recorded by the Income tax Authorities. However, it is seen that apart from recording the statement of Shri Venkataramana Ganesa in the present matter no independent investigation has been carried out by the department. We observed that Department has not brought out any independent facts or evidence as who is the service receiver, whether the cash receipts shown in the xls. Files pertaining to the service component only or otherwise and no corroborative evidence produced in support of details mentioned in the said xls. files. In the present matter collection of a huge amount of cash in respect of provisions of services involved. However not a single rupee of unaccounted cash was found during the search conducted by the Income-tax. The Hon'ble Gujarat High Court in the matter of *State of Gujarat* v. *Novelty Electronics* - 2018 (16) G.S.T.L. 87 (Guj.) held that -
>
> > 14. In the opinion of this Court, the findings recorded by the Income Tax authorities during the course of search, could have been made a starting point for inquiry as regards the discrepancy in the physical stock and that shown in the stock register. However, the statement made by the dealer, *ipso facto,* could not have been the basis of an addition. Acting upon the findings recorded by the Income Tax authorities, the authorities under the Value Added Tax Act were required to make an independent examination into the facts before making the assessment. As noted hereinabove, the Commercial Tax Department had also searched the premises of the dealer and no discrepancies could be found in stock and the investigation report of the department had given a clean chit to the appellant. In these circumstances, the Tribunal was wholly justified in setting aside the order of the first appellate authority to the extent it had confirmed the demand which had no legal basis, and confirming the order to the extent it had reduced the tax liability imposed by the assessing authority. The second and third questions as proposed, therefore, also do not merit acceptance.
>
> Without conducting the independent enquiry, the demand of Service tax only on the basis of document/information/data provided by the Income-tax authorities by the Revenue legally not sustainable. The documents relied upon loses its evidentiary value in absence of any independent enquiry.
>
> **19.** We find that, in the whole matter Revenue rely upon the statement of Ms. Kalindi Shah and Shri Venkataramana Ganesna both are the employees of the assessee's company. No statement of Directors of the Appellant company recorded by the Revenue to find out the truth of employee's statements. It was on records that Assessee company have raised the dispute on both the statements of employees recorded during the course of investigation by Income-tax Authority and Revenue. Therefore the said statement cannot be relied upon as admissible evidence in terms of the provisions of Section 9D of the Act. The provisions of Section 9D which are reproduced as under
>
> > **"9D. Relevancy of statements under certain circumstances.** - (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

The above Section deals expressly with the circumstances in which a statement recorded before a gazetted officer of Central Excise (under Section 14 of the Act) can be treated as relevant for the purposes of proving the truth of the contents thereof. Reliance is placed on the ruling of the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs (Infra),* 2016 (340) E.L.T. 67 (P & H) wherein the Hon'ble High Court laid down the detailed procedure, *inter alia,* providing for cross-examination of the witness of the Revenue by the Adjudicating Authority and thereafter, if the Adjudicating Authority is satisfied that the statement of the witness is admissible in evidence than the Adjudicating Authority is obligated to offer such witnesses for cross-examination by the other side/assessee. Such view has also been affirmed by the Hon'ble Supreme Court in the case of *Andaman Timber (Infra)* - 2015 (324) E.L.T. 641 (S.C.) = 2017 (50) S.T.R. 93 (S.C.).

20. We further find that Hon'ble Punjab & Haryana High Court in the case of *Sukhwant Singh* - (1995) 3 SCC 367 it has been observed as under :-

8. It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides :

"138. Order of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898.

21. In adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. We find that in the present matter Ld.

Adjudicating Authority failed to do such exercise. We also note that Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which examination-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

22. Statements recorded during investigation in the present matter, whose makers are not examination-in-chief before the adjudicating authority, would have to be eschewed from evidence, and it will not be permissible for Ld. Adjudicating Authority to rely on the said evidences. Therefore, we hold that none of the said statements were admissible evidence in the present case.

24. We also noticed that in the present matter it is on the records that demand is based on the .xls worksheet which was seized during the search by the Income Tax officers from the computer being used by Ms. Kalindi S. Shah and the said Excel files were shared by the Income tax authorities with Revenue. The Revenue heavily relied upon these .xls printout documents. In this context we find that the Hon'ble Apex Court in case of *M/s. Anvar P.V.* v. *P.K. Basheer* - reported at 2017 (352) E.L.T. 416 (S.C.) has prescribed certain guidelines before accepting electronic documents as an admissible piece of evidence. The Hon'ble Supreme Court held that -

> "13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a *non obstante* clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, *i.e.*, electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act :
>
> (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
>
> (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
>
> (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.
>
> 14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.
18. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility."

The above prescribed certain guidelines were not followed by the Revenue during the investigation of impugned matter before accepting electronic documents as an admissible piece of evidence. Therefore in our view no service tax demand is sustainable on the basis of contents of said .xls sheets.

25. Further on the basis of details of investigations shared by the Income-tax Authority, Revenue knew the name of author of said xls. sheet but Revenue failed to record the statement of author of said xls. sheets. Therefore, the said .xls sheet is not corroborated with any other evidence, hence, cannot be used as evidence against the assessee.

26. In the impugned matter Revenue and Adjudicating authority has relied upon the statement of Ms. Kalindi Shah recorded by the Income tax Authorities. In this regard we find that Section 132(4) of the Income-tax Act, 1961 provides as under :

> "The authorized officer may, during the course of search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery to other valuable articles or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income tax-Act, 1922 (11 of 1922), or under this Act." We agree with the argument of Ld. Counsel that the above provision explicitly indicates that the evidentiary value of the statement recorded under Section 132 of the Income-tax Act is restricted and limited to the provisions of the income-tax and the same cannot be used or relied upon for any other purpose.
>
> **27.** We also find that in the present case the Revenue has raised the Service tax demand merely on the ground of investigation conducted by the Income Tax Authorities. We find that demand cannot be raised merely on the basis of assessment made by the Income Tax Authorities. Tribunal in the case of *Ravi Foods Pvt. Ltd.* v. *C.C.E., Hyderabad* - 2011 (266) E.L.T. 399 (Tri. - Bang.) has held that admission by assessee to Income Tax department as regards undisclosed/suppressed sales turnover cannot be held to be on account of clandestine removal of their final products, in the absence of any other corroborative evidence. Similarly, in the case of *C.C.E., Ludhiana* v. *Mayfair Resorts* - 2011 (22) S.T.R. 263 (P & H), it was held so. We also find that the CESTAT in the case of *Kipps Education Centre, Bathinda* v. *C.C.E., Chandigarh* - 2009 (13) S.T.R. 422 (Tri. - Del.), has held that the income voluntarily disclosed before the income-tax authorities could not be added to the taxable value unless there is evidence to prove the same.
>
> **28.** In view of above, we are of the considered view that in the present matter entire demand of service tax as proposed in the show cause notice is not sustainable."

8.3 In the instant case the department has not conducted any independent investigation on the evidences submitted by the Income Tax authorities and has raised the demand of service tax based on the evidences shared by Income Tax department. Despite Shri Venkatramana Ganesna not offering any explanation regarding the evidences recovered from the premises of the Brokers of JPI group and not admitting receipt of cash from their customers, no statement of the Brokers were recorded and neither were they investigated. The department has also not conducted any investigation at the end of the persons/firms who had booked/purchased offices/shops in the Iscon Commercial VIP/Complex of the appellant. Therefore, in view of the judgment of the Hon'ble Tribunal in the J.P. Iscon Pvt. Ltd. case supra, I am of the considered view that the confirmation of demand of service tax is not sustainable.

8.4 Further, there is no material on record to indicate that the said judgment of the Hon'ble Tribunal has been overruled by any higher appellate authority. It is also pertinent to mention that the above judgment

of Hon'ble Tribunal, Ahmedabad, being of the jurisdictional Tribunal, is binding upon this authority. Therefore, considering the similarity of the facts involved in the present appeal and the case before the Hon'ble Tribunal and by following the principles of judicial discipline, I set aside the impugned order and allow the appeal filed by the appellant.

9. 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.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 28.04.2023

Attested:

(N.Suryanarayanan. Iyer)
Assistant Commissioner (In situ),
CGST Appeals, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Vedica Procon Pvt. Ltd. — Appellant
(presently known as M/s.Iscon City Centre LLP),
Iscon House,
Behind Rembrandt Building,
C.G. Road, Opposite Associate Petrol Pump,
Navrangpura, Ahmedabad – 380 009

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.