



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एम टी भवन / 2nd Floor, GST Bhavan.

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइल नं./ Appeal / File No.	मूल आदेश नं./ O.I.O No	दिनांक/ Date
	V2/ 129/RAJ/2019	08/DC/KG/2019-20	19/09/2019

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-074-2020

आदेश का दिनांक / Date of Order:	30.06.2020	जारी करने की तारीख / Date of issue:	03.07.2020
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श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,
राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित:
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-

M/s Balaji Multiflex Pvt Ltd, Plot no. G-1612, Gate No.2, GIDC Metoda, Kalawad Road, Rajkot.

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) मीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों में मीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों में मीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्ट्रेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन अमारवा अहमदाबाद- 380016 को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित फ़ॉर्म गे एच ई-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपय 5 लाख या उससे कम, 5 लाख रुपय या 50 लाख रुपय तक अथवा 50 लाख रुपय से अधिक है तो क्रमशः 1,000/- रुपय, 5,000/- रुपय अथवा 10,000/- रुपय का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपय का निर्धारित शुल्क जमा करना होगा।/
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.5000/-, Rs.10,000/- where amount of duty demanded/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित फ़ॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसमें साथ जिन आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपय 5 लाख या उससे कम, 5 लाख रुपय या 50 लाख रुपय तक अथवा 50 लाख रुपय से अधिक है तो क्रमशः 1,000/- रुपय, 5,000/- रुपय अथवा 10,000/- रुपय का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपय का निर्धारित शुल्क जमा करना होगा।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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- (i) विन अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा महायुक्त आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) मीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विनियम अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर का भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, वशते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपय से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- वशते यह कि इस धारा के प्रावधान विनियम (सं० 2) अधिनियम 2014 के आरंभ से पूर्व किमी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थान अर्जी एवं अपील को लागू नहीं होगा। /
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार कोपनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामला में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर मन्त्रि, भारत सरकार, पुनरीक्षण आवेदन डेकार्ड, विन मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, समद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
- (i) यदि माल के किमी नुकसान के मामले में, जहां नुकसान किमी माल को किमी कारखाने से भंडार गृह के पारगमन के दौरान या किमी अन्य कारखाने या फिर किमी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किमी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किमी कारखाने या किमी भंडार गृह में माल के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs 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
- (ii) भारत के बाहर किमी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिवेट) के मामले में, जो भारत के बाहर किमी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
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.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) मुनिश्चिन उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विन अधिनियम (नं० 2), 1998 की धारा 109 के द्वारा नियत की गई नारीख अथवा समयाविधि पर या बाद में पारित किए गए हैं। /
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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी 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.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000/- का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) मीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाना है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in का देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Balaji Multiflex Pvt Ltd, Rajkot (*herein after referred to as "Appellant"*) filed appeal No. V2/129/Raj/2019 against Order-in-Original No. 8/DC/KG/2019-20 dated 19.9.2019 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Central GST, Division-II, Rajkot (hereinafter referred to as 'adjudicating authority').

2. The brief facts of the case are that during audit of the records of the Appellant, it was observed that the Appellant had imported machineries on 25.3.2014 and 4.6.2015; that as per the agreements entered with the overseas supplier, the charges for installation and commissioning service provided by the technician of supplier was included in the price of machineries. It appeared to the Audit that the Appellant had received service from a person having business establishment outside India and hence, the Appellant, being recipient of service, was liable to pay service tax in terms of Section 66A of the Finance Act, 1994 (hereinafter referred to as 'Act').

2.1 The Show Cause Notice No. IV/3-24/D/ST/2017-18 dated 23.2.2018 was issued to the Appellant calling them to show cause as to why service tax of Rs. 34,65,759/- should not be demanded and recovered from them under Section 73(1) of the Act, along with interest under Section 75 and proposed penalty under Sections 76,77 and 78 of the Act.

2.2 The aforesaid Show Cause Notice was adjudicated by the Adjudicating Authority vide the impugned order who confirmed service tax demand of Rs. 34,65,769/- under Section 73(1) of the Act, along with interest under Section 75 and imposed penalty of Rs. 34,65,769/- under Section 78 and Rs. 10,000/- each under Section 77(1) and Section 77(2) of the Act.

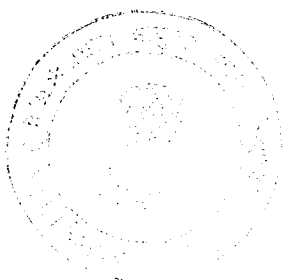
3. Aggrieved, the Appellant has filed the present appeal, inter alia, on following grounds:

(i) The impugned Order passed by the Adjudicating Authority is ex-facie illegal and without authority of law as Section 66A of the Finance Act invoked in the present proceeding had no application whatsoever; that service having been provided by an Indian entity, deeming fiction provided under Section 66A of the said Act shifting the liability on the service recipient could not have been



applied in the present case. Section 66A of the said Act provides that where any service specified in clause (105) of Section 65 is provided or to be provided by a person who has a fixed establishment from which the service is provided or has his permanent address or place of residence, in a country other than India and received by a person who has his place of business, fixed establishment, permanent address or usual place of residence in India, such service shall, for the purposes of this section be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India. In the present case, it is an undisputed fact that the machineries imported by the appellant were installed and commissioned at their factory by an Indian entity, M/s Nordmeccanica India Pvt. Ltd. having fixed establishment in India. Therefore, it is evident that the facts of the present case did not justify invocation of Section 66A of the said Act to shift the liability from the service provider i.e.. M/s Nordmeccanica India Pvt. Ltd., to the appellant. Services having been provided by an Indian entity, the service tax liability were therefore, to be discharged by the said service provider and not the recipient. The appellant has not received any such installation and commissioning service from any foreign supplier and the actual service has been provided by an Indian entity who have their own work force, required equipments and other facilities for installing and commissioning such machineries, and thus, it is an admitted position of fact that installation and commissioning of machines is actually done by these contractors on their own.

(ii) That the Appellant has treated the entire purchase price agreed between the parties under the contract as the assessable value under the Customs Act, 1962 and Customs Duties have been discharged on the entire price for the machines in question. When assessment of customs duty on sale price considering the same as the assessable value is thus, concluded by the Customs authorities, the Adjudicating Authority could not have held that service tax on the part of the value attributable to installation and commissioning service was still recoverable from the appellant, and that too in a case where no value for installation and commissioning activities was paid by the appellant and hence, there was no value attributable to this activity. The appellant has thus, discharged duty liability on the entire amount paid by it to the customers, the proceedings for recovery of another tax on the same amount paid for the same transactions was wholly impermissible. On the ground that service tax is demanded on the same value on which customs duty is fully assessed and



recovered, the proceedings were wholly without jurisdiction and the impugned order passed as a result of such proceedings deserves to be set aside.

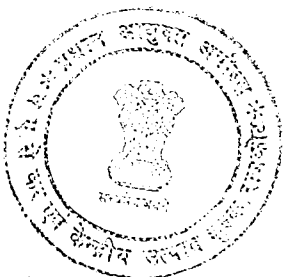
(iii) The Adjudicating Authority has acted without jurisdiction in treating 40% of the purchase price of the machines to be the value of installation and commissioning service and committed grave error in holding that the entire transaction of importing the said machines was "works contract"; that the appellant had only imported the machines and there was no "works contract" service involved in the present case; that the Adjudicating Authority erred in treating the service as works contract and erection, commissioning and installation of machinery was original works. The Adjudicating Authority relied upon the Notification No. 24/2012-ST dated 06.06.2012 to hold that in case of original works 40% of the value of works contract is service. When the appellant has not received this service, the Adjudicating Authority could not have treated the entire contract price as value of taxable service of installation and commissioning on the ground that the appellant failed to submit bifurcation of price of machine and value of installation and commissioning activities. A composite contract could not have been vivisected by the Adjudicating Authority for levying service tax on a part of composite contract particularly, when the appellant had not even received any such service under the composite contract. The action of demanding service tax on the entire contract value, which was basically the price of the machineries purchased by the appellant, is therefore without jurisdiction and relied upon CESTAT Order No. A/11894/2019 dated 17.9.2019 passed in the case of Rahil Air Bubble Pvt Ltd Vs CCE, Rajkot and case law of Bhvik Terryab -2017-TIOL-1429-CESTAT-DEL.

(iv) The entire exercise is revenue neutral. There could be no dispute to the fact that the appellant would not only be eligible to claim Cenvat credit of the service tax now demanded by the authorities but would also be in a position to utilize the same for discharge of their liability. When the appellant was thus, in a position to avail and utilize Cenvat credit of the entire amount of service tax if paid on the alleged installation and commissioning services rendered by the foreign supplier, the situation was revenue neutral and hence, as held by the Hon'ble Supreme Court in cases like Normodo Chemotur Pharmaceuticals Ltd. reported in 2005 (179) ELI 276 (S.C.), no proceedings could have been initiated against them.



(v) The show cause notice dated 19.09.2019 for the import made in March, 2014 and June 2015 was barred by limitation and therefore, invocation of extended period of limitation is not justified; that the demand of service tax on the same issue for the prior period i.e. March, 2012 in the appellant's own case is pending before Hon'ble CESTAT, Ahmedabad. The appellant has filed on appeal against the order of the Commissioner(Appeals) before the Hon'ble CESTAT, Ahmedabad wherein the identical dispute was raised by the department. Therefore, the department was aware of the fact that the appellant was importing machinery without payment of service tax from the date of issuing first Show Cause Notice way back in January , 2016 and proposal to demand service tax was made by invoking extended period of limitation. Therefore, the Adjudicating Authority has no jurisdiction to confirm demand of service tax for the subsequent period by invoking extended period of limitation. The action of the Adjudicating Authority is contrary to the law laid down by the Hon'ble Supreme Court in case of Nizam Sugar Factory -2006 (197) E.L.T. 465 (\$C.) wherein the Hon'ble Supreme Court has held that demand for the larger period of limitation cannot be made on the ground of suppression of facts when all relevant facts were in knowledge of authorities when first show cause notice was issued. Therefore, the invocation of extended period of limitation is unlawful and the impugned order deserves to be set aside.

(vi) The Adjudicating Authority has also misdirected himself in imposing equal amount of penalty when there was a clear doubt about service tax liability on port of the appellant herein. It was not a mandatory condition that penalty equal to the amount of service tax involved is to be imposed in every case as the adjudicating authority certainly possesses discretion to impose a lesser penalty or a token penalty considering the facts and circumstances of each case. The action of imposing penalty equal to the amount of service tax alleged to have been evaded by the appellant company is therefore, unreasonable and hence, liable to be set aside. Section 78 of the Finance Act provides for a penalty equal to the amount of service tax determined under the Act in cases of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with an intent to evade payment of service tax. In the present case, there has been no such intention to evade payment of service tax on the appellant's part and therefore, Section 78 was not attracted at all.

4. In hearing, Shri Amal Dave, Advocate appeared on behalf of the Appellant and reiterated the grounds of appeal and filed additional written submission dated 17.1.2020 wherein grounds raised in appeal memorandum are reiterated.

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and submission made by the Appellant at the time of personal hearing. The issue to be decided in the present appeal is whether the impugned order confirming service tax demand of Rs. 34,65,759/- under Section 73 and imposing penalty under Sections 77(1), 77(2) and 78 of the Act is correct, legal and proper or not.

6. On going through the records, I find that the Appellant had imported certain machineries on 25.3.2014 and 4.6.2015 and the overseas supplier provided installation and commissioning service to the Appellant. The adjudicating authority confirmed service tax demand on the grounds that sale price of the machineries was inclusive of installation and commissioning charges for and since the Appellant had received services from a person having business establishment outside India, the Appellant, being recipient of service, was liable to pay service tax in terms of Section 66A of the Act.

6.1 The Appellant contended that they had discharged Customs duty on the entire purchase price of the machineries and hence, the proceedings for recovery of another tax on the same amount paid for the same transactions was not justified; that the Adjudicating Authority erred in considering 40% of the purchase price of the machines as value of installation and commissioning service by wrongly holding that the entire transaction of import was works contract; that composite contract could not have been vivisected by the Adjudicating Authority for levying service tax on a part of composite contract and relied upon CESTAT Order No. A/11894/2019 dated 17.9.2019 passed in the case of Rahil Air Bubble Pvt Ltd Vs CCE, Rajkot and case law of Bhavik Terryab - 2017-TIOL-1429-CESTAT-DEL.

7. I find that import of machineries and installation and commissioning services provided by the overseas supplier to the Appellant are not under dispute. It is also not under dispute that charges for installation and commissioning of machineries were not separately paid by the Appellant. The Adjudicating authority considered 40 % of the value of machinery as installation



and commissioning charges for the purpose of determining service tax. I find that the transaction entered by the Appellant with the overseas supplier was that of purchase of machinery and installation and erection was incidental to sale/supply of the said machine. It is also on record that the Appellant had not separately paid any charges towards erection and installation of machines. Under the circumstances, artificially bifurcation of value of machines and demanding service tax on 40% of value of machines is not sustainable. Further, the Appellant had discharged Customs duty on the entire sale value of the machines and demanding service tax again on 40% of value of machines is erroneous.

8. I rely on the Order No. A/11894/2019 dated 17.9.2019 passed by the Hon'ble CESTAT, Ahmedabad in the case of Rahil Air Bubbles Pvt Ltd, wherein in identical facts of the case, the Hon'ble Tribunal has held that,

“The brief facts of the case are that the appellants have imported bubble wrap manufacturing machine. They have paid the custom duty on the entire bill value of the machine. The case of the department is that the supplier has undretaken erection and installation of the machine. Therefore, the service of erection and installation are provided by the foreign party to the appellant. Therefore, the appellant is liable to pay service tax on the reverse charge mechanism in terms of section 66A of the Finance Act, 1994. For this purpose, the sale value of the machine is artificially bifurcated by applying the notification No. 19/2003-ST dated 21.3.2003 whereby the 33% was taken as service and service tax was demanded on such portion.

...
...

4. We have carefully considered the submission made by both sides and perused the records. We find that the entire transaction is of purchase of imported bubble wrap machines. The appellants have discharged custom duty considering the total value of machine shown in the invoice. There is no separate charge for service such are erection and installation of such machinery. On the total value of the invoice, Custom duty was paid. The erection and installation is incidental to the sale/supply of the machine. Therefore, the entire transaction is of sale and purchase of the machine and, hence, no service is involved. Therefore, no Service Tax can be demanded. This issue is squarely covered by the Tribunal judgment in the case of Bhavik Terryab (supra) wherein the Tribunal has passed the following order.

“5. We have heard both sides and perused the appeal records. We note that there is a certificate issued by the jurisdictional Superintendent of Central Excise on 07.07.2006 in connection with the appellant's obligation under the ECCG Scheme indicating the installation of 2 of the machines prior to 18.04.2006. Similarly, there are certain indications, based on the correspondence entered into by the appellant with the supplier of machines, that the supplier appears to have had an establishment in India during the material time. Further, the contract for importation of this machinery is, admittedly, a composite one for lump-sum payment which included

installation and erection of the machine at the appellant's premises. The customs duty on the whole value is claimed to have been discharged by the appellant. In such situation we ST/186/2012-ST [DB] find that the question of subjecting a portion of the invoice value for service tax purpose is not sustainable. In this connection, we refer to the decision of the Tribunal in 3 ST/71/2011-DB Allengers Medical Systems Ltd. vs. C.C.E., Chandigarh – 2009 (14) STR 235 (Tri.-Del.) and Alidhara Texspin Engineers vs. Commissioner of Central Excise & Customs, Vapi - 2010 (20) STR 315 (Tri.-Ahmd.)

6. The Tribunal, though dealing with manufactured item held that if the contract is all inclusive lump-sum without any separate split up for erection and commissioning and excise duty was discharged on the whole value, there is no liability to service tax on the part of the value.

7. We find, prima-facie, the split up of value for service tax purpose, when the whole value has been subjected to customs duty towards import of goods, is not sustainable. However, the basic facts like contract and the invoices alongwith the other issues raised by the appellant is to be examined afresh by the original authority. We also note that composite non-vivisectionable contracts are not liable to service tax under the category of „works contract service“ prior to 01.06.2007 as held by the Hon^{ble} Supreme Court in Larsen & Tubro Ltd. 2015 (39) STR 913 (SC).

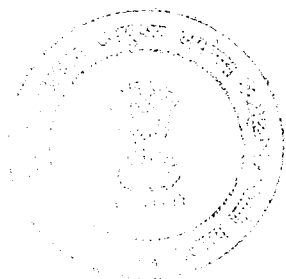
8. Considering the need for verifying all the factual details and non consideration of facts placed by the appellant at the 5 ST/186/2012-ST [DB] time of original decision, we find it fit and proper to remand the case to the original authority for a fresh decision. Since the matter is remanded, all other issues are kept open including the question of time bar raised by the appellant. Accordingly, the appeal is allowed by way of remand.”

From the above judgement, which is relied upon various decisions of this Tribunal where it was held that in case of import of machine including the erection and installation, it is not permissible to artificially bifurcate the service value from the total value. Accordingly, no Service Tax can be demanded for such import. Being an identical issue and the facts involving in the present case, it is squarely covered by the judgment of Bhavik Terryab (supra). Following the ratio of the said decision, we set aside the impugned order and allow the appeal.”

(Emphasis supplied)

9. I also rely upon the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Alidhara Texspin Engineers reported as 2010(20) STR 315, wherein it has been held that,

“14. Ratio of all the above decisions is to the effect that where an activity so integrally related and connected with the manufacturing activity and the purchase orders are for the complete plant and machineries, duly commissioned, without showing any segregated amount recovered for erection and commissioning and where the entire contract value is taken as an assessable value for the purpose of payment of excise duty, no service tax is liable to be paid by the assessee.”

10. In view of above, I hold that confirmation of service tax demand is not sustainable and required to be set aside and I do so. Since demand is set aside, recovery of interest and imposition of penalty under Sections 77(1), 77(2) and 78 of the Act are also set aside.

11. I set aside the impugned order and allow the appeal.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeal filed by the Appellant stand disposed off in above terms.

(Handwritten Signature)
(GOPI NATH)
Commissioner(Appeals)
30/6/2020

Attested

(Handwritten Signature)

(V.T.SHAH)

Superintendent(Appeals)

By RPAD

To, M/s. Balaji Multiflex Pvt Ltd, Plot No. G-1612, GIDC Metoda, Kalavad Road, Rajkot.	सेवा में, मैसर्स बालाजी मल्टीफ्लेक्स प्राइवेट लिमिटेड, प्लॉट नं. जी-1612, जीआईडीसी मेटोडा, कलावाड रोड, राजकोट।
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प्रतिलिपि :-

- 1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट-2 मण्डल, को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फाइल।