



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

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan  
रेस कोर्स रिंग रोड / Race Course Ring Road  
राजकोट / Rajkot - 360 001



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी.द्वारा

DIN-20220364SX0000333D52

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/33//BVR/2021	AC/JND/32/2020-21	22-03-2021

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

**BHV-EXCUS-000-APP-017-2021-22**

आदेश का दिनांक/ Date of Order:	10.03.2022	जारी करने की तारीख / Date of issue:	11.03.2022
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श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Akhilesh Kumar, 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 Appellant&Respondent :-  
M/s. Ashoka Energy, 502, Sharada Palace, Apartment, Zanzarda Road, Junagadh - 362001.

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.

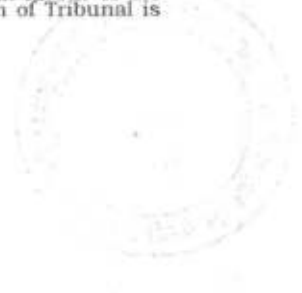
(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/  
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of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

(i) वर्गीकरण मूल्यांकन से सम्बंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन 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 सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए।/  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> 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 किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार 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 जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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/demand/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 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती एवं उसके साथ जिस 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, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार 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 जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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 is 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/-



- (ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 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 प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक 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.
- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
  - सेनबेट जमा की ली गई गलत राशि
  - सेनबेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्वयंन अर्ज़ी 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 :
- amount determined under Section 11 D;
  - amount of erroneous Cenvat Credit taken;
  - 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 को पुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद 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:
- यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी 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
  - भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी 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.
  - 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.
  - मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो क्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं- 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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.
  - 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 संप्रेषण 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.
  - 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.
  - 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 जाता है। / In case, if the order covers various umbers 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.
  - यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्वयंन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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.
  - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्भलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता 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.
  - उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को 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](http://www.cbec.gov.in).



**:: ORDER-IN-APPEAL ::**

M/s. Ashoka Energy, Junagadh (hereinafter referred to as "Appellant") has filed Appeal No. V2/33/BVR/2021 against Order-in-Original No. AC/JND/32/2020-21 dated 22.3.2021 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central GST Division, Junagadh (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in providing 'Supply of Tangible Goods Service' and was registered with Service Tax Department having Registration No. BPBPK8952ESD001. During audit of the records of the Appellant undertaken by the Departmental officers, it was observed that the Appellant had shown incorrect value of service provided by them in their ST-3 Returns when compared to income reflected in Profit and Loss Account /ledger accounts for the corresponding period and thereby short paid service tax during the Financial Years 2014-15, 2015-16 and 2016-17. It was also observed that the Appellant had short paid interest of Rs. 10,538/- for late payment of service tax during the period from F.Y. 2014-15 to June, 2017 and late filed ST-3 Returns for the period from October, 2014 to March, 2017.

2.1 Based on audit observation, Show Cause Notice No. CGST Audit/Circle-V/AC-18/2019-20 dated 5.6.2020 was issued to the Appellant for demand and recovery of service tax amounting to Rs. 4,97,233/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act'), along with interest under Section 75 of the Act, interest of Rs. 10,538/- for late payment of service tax under Section 75 and proposed imposition of penalty under Sections 70 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed demand of service tax of Rs. 4,97,233/- under Section 73(1) of the Act, along with interest under Section 75 of the Act, confirmed demand of interest of Rs. 10,538/- for late payment of service tax under Section 75 of the Act and imposed penalty of Rs. 4,97,233/- under Section 78 of the Act and penalty of Rs. 2,000/- for late filing of ST-3 Return under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994.



3. Being aggrieved, the Appellant preferred the present appeal contending, *inter-alia*, as under:

(i) The Show Cause Notice was served to them for difference between value taken as per Service Tax Return and value taken as per Profit and Loss account which comes to Rs 39,15,379/- for the three year i.e. 2014-15, 2015-16, 2016-17. They explained during personal hearing that the difference had arisen due to M/s BASF had wrongly uploaded the details in 26AS generating difference of Rs 29,90,478/-. That M/s BASF vide its email dated 15/03/2021 confirmed the bills issued to them amounting to Rs. 58,77,032/- plus Service Tax, which was emailed to adjudicating authority on 16/03/2021. Regarding difference of Rs 2,93,116/-, for F.Y.2015-16 and Rs 1,05,806/- for F.Y.2016-17, the same were posting error by accountant in books of account.

(ii) The adjudicating authority should have cross verified the confirmation given by M/s BASF, instead of relying upon form No. 26AS. That suppression of facts with an intent to evade payment of tax not established by the Department.

4. Personal Hearing in the matter was scheduled on 30.12.2021, 11.1.2022, 28.1.2022 and 3.3.2022 in virtual mode through video conferencing and intimated to Appellant by email. Shri Prashant Thaker, authorized representative, vide email dated 26.2.2022 waived the opportunity of personal hearing and stated that they have filed additional written submission vide their email dated 27.1.2022, which may be considered while deciding the case.

4.1 In additional written submission received on 27.1.2022, it has, *inter alia*, been contended that,

(i) They had provided generators on rent basis to M/s BASF and had discharged service tax on the bills issued to M/s BASF. They had submitted letter dated 15.3.2021 of M/s BASF showing summary of bills raised by them totally amounting to Rs. 58,77,032/- during 2014-15 to the adjudicating authority but the same was not considered while passing the impugned order. Further, they had received payment of Rs. 33,09,625/- from M/s BASF in the F.Y. 2014-15 in respect of bills raised by them in the F.Y. 2013-14 on which service tax was discharged in F.Y. 2013-14. Since the payment was received in 2014-15, the same was reflected in Form 26AS for the year 2014-15. This can be corroborated



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from the letter dated 31.12.2021 of M/s BASF showing bill wise details issued to them during F.Y. 2012-13 to 2014-15 and payment made by them. Thus, the difference pointed out by Audit is clarified by them with corroborative evidence in the form of letter dated 31.12.2021 of M/s BASF and form 26AS.

(ii) There are plethora of cases, wherein the Courts have taken the view that the quantification of liability basis the invocation of the provisions of best judgement assessment must be based on cogent material. It is not an ex-parte assessment as ordinarily understood under the Income Tax Act, 1961. It is an undisputed fact that the levy of service tax cannot be based solely on the amounts on which the TDS has been deducted and reflected in Form 26AS. This is for the reasons that the provisions determining the nature of the transaction (service or not), nature of service involved, the applicable rate of tax, the value of services and the person who is required to pay the tax (forward or reverse charge) are different from the provisions under Income Tax Act providing for deduction of TDS. Hence it can be said that the crude method adopted of taking the differential amount by invoking the provisions may not be in accordance with law. Even for the valuation of service are attracted only if the concerned person (a) fails to furnish the return or (b) if the return has been filed in that case, he fails to assess the tax in accordance with law. Therefore, it needs to be considered factually whether the given ingredients are satisfied or not to permit the invocation of Section 73 of the Act.

(iii) That two entries for the F.Y. 2015-16 and 2016-17, amounting to Rs 2,93,123/- and Rs 2,65,479/- respectively pertained to SEZ units where there were not any tax collection of service tax and hence no tax evasion is involved. However, while finalising the account for income tax audit, the accountant credited to facilitate the income with form no. 26AS. However, Audit considered them as evasion of service tax and the same was also added while computing taxable liability.

5. I have carefully gone through the facts of the case, the impugned order, and the grounds raised in Appeal Memorandum and additional written submission. The issue to be decided in the present appeal is whether the impugned order confirming service tax demand of Rs. 4,97,233/- under Section 73(1) of the Act, along with interest under Section 75 and imposing penalty



under Sections 70 and 78 of the Act is correct, legal and proper or not.

6. On perusal of records, I find that the Appellant had rendered 'Supply of Tangible Goods Service' to their clients. During audit of the records of the Appellant, on comparing income reported in Profit and Loss account with corresponding ST-3 Returns, it was found that the Appellant had short paid service tax during the Financial Years 2014-15 to 2016-17 and had also failed to pay interest for late payment of service tax. The impugned order, *inter alia*, confirmed service tax demand of Rs. 4,97,233/- under Section 73 of the Act and imposed penalty of Rs. 4,97,233/- under Section 78 of the Act.

6.1 The Appellant has contended that levy of service tax cannot be based solely on the amounts on which the TDS has been deducted and reflected in Form 26AS. They had received payment of Rs. 33,09,625/- from M/s BASF in the F.Y. 2014-15 in respect of bills raised by them in the F.Y. 2013-14 on which service tax was also discharged in F.Y. 2013-14. Since the payment was received in 2014-15, the same was reflected in Form 26AS for the year 2014-15 and submitted copy of letter dated 31.12.2021 of M/s BASF.

6.2 I find that the Appellant has taken this plea during the course of adjudication. The adjudicating authority has given findings at Para 14.1 and 14.2 of the impugned order, which are reproduced as under:

"14.1 Likewise, Noticee submitted that they received Rs. 58,75,887/- from M/s. BASF India Ltd., whereas, as per Form 26AS, it is Rs. 88,66,365/-. I also find that all transactions recorded in Form - 26AS in respect of M/s. BASF India Ltd. are showing dates of transaction and dates of booking which are ranging between 30.04.2014 to 31.03.2015 i.e. FY 2014-15 only, and therefore, contention of the Noticee that M/s. BASF India Ltd. has made payment of bills of February and March, 2014 (i.e. 2013-14), in the April 2014 (i.e. FY 2014-15) is also not acceptable.

14.2 Regarding documents of M/s. BASF submitted by the Noticee on 16.03.2021 as reproduced at para 10.7 above of this Notice, I find that none of details submitted by the Noticee is matching with the details as available in Form 26AS of FY 2014-15, and therefore, these details are of little avail to the Noticee. ....".

6.3 I have gone through letter dated 31.12.2021 of M/s BASF submitted by the Appellant along with additional written submission. I find that the Appellant has not produced copies of corresponding bills issued by them in the appeal memorandum. Hence, it is not possible to corroborate details mentioned in said letter dated 31.12.2021 of M/s BASF. Further, the said details were obtained by



the Appellant from M/s BASF subsequent to issuance of impugned order and hence, it was not before the adjudicating authority, when the impugned order was passed. Further, the adjudicating authority has observed in the impugned order reproduced *supra* that details submitted by the Appellant were not matching with Form 26AS. Considering the facts of the case, I find it is pertinent to remand the matter to the adjudicating authority for limited purpose of examining whether there was short payment of service tax in F.Y. 2014-15 in respect of services rendered to M/s BASF or not. The Appellant is directed to produce letter dated 31.12.2021 of M/s BASF, corresponding bills raised to M/s BASF, ledger account of M/s BASF for the relevant period and any other information/ documents called upon by the adjudicating authority. Needless to mention that principles of natural justice be adhered to while passing *de novo* order.

7. Regarding liability to pay service tax on two entries amounting to Rs 2,93,123/- and Rs 2,65,479/- recorded in F.Y. 2015-16 and F.Y. 2016-17 respectively, the Appellant pleaded that both the said entries pertained to SEZ unit and there was no service tax liability, but the accountant credited the income ledger to tally with Form 26AS.

7.1 I find that the adjudicating authority has given findings in the impugned order that the Appellant failed to produce declaration in Form A-1 verified by the Specified Officer of SEZ and hence, not eligible for exemption under Notification No. 12/2013-ST dated 1.7.2013. The Appellant has not contested said findings of the adjudicating authority nor furnished said declaration before me. Further, the explanation that their accountant credited said entries in income ledger to tally them with Form 26AS is quite absurd and without any reasoning. I, therefore, hold that the Appellant is not eligible for exemption from service tax, even if the said entries pertained to service provided to SEZ unit, as claimed by them.

8. As regards confirmation of service tax demand in respect of service rendered to clients, other than M/s BASF, the Appellant has not demonstrated as to how findings given by the adjudicating authority in the impugned order is incorrect. I, therefore, uphold confirmation of service tax demand to that extent.



9. The Appellant has not challenged confirmation of demand of interest of Rs. 10,538/- under Section 75 of the Act for late payment of service tax and imposition of late fee of Rs. 2,000/- under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 for late filing of ST-3 Returns. I, therefore, uphold the impugned order to that extent as not challenged.

10. As regards penalty imposed under Section 78 of the Act, the adjudicating authority has given findings at para 18 of the impugned order, which are reproduced as under:

“18. Regarding proposal for imposition of penalty under Section 78 of the Finance Act, 1994, I find that the noticee have clearly failed to explain the difference of the taxable income noticed during the course of Audit. Even during the course of adjudication proceedings, they have put forth contentions which are factually incorrect or outright outlandish or not supported by documentary evidences or legally not sustainable. Contention attributing differences in the taxable income to the accountant who made entry to adjust their accounts is absurd and cannot be accepted. Noticee has also failed to substantiate that they provided any exempted services to units in SEZ. Accordingly, looking to the above discussion *mens rea* of the Noticee are amply proved and they are required to be penalized under section 78 of the Finance Act, 1994, as they have not only suppressed the facts from the department, but even thereafter, tried to mislead the department by making submissions which are untenable, and I therefore find that imposition penalty under Section 78 is quite proper and justifiable.”

10.1 I concurred with the above findings and uphold the penalty under Section 78 of the Act. The quantum of penalty under Section 78 shall be subject to outcome of remand proceedings as per findings given in para 6.3 above.

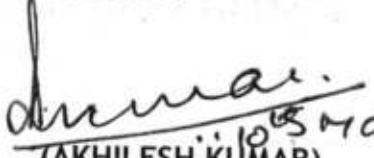
11. In view of above, I set aside the impugned order in respect of service rendered to M/s BASF and remand the matter to the adjudicating authority as per findings given in para 6.3 above. The remaining portion of impugned order is upheld.

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

12. The appeal filed by the Appellant is disposed off as above.



सत्याप्त,  
  
 विपुल शाह  
 अधीक्षक (अपीलेंस)

  
 (AKHILESH KUMAR)  
 Commissioner (Appeals)



By RPAD

To, M/s Ashoka Energy, 502, Sharda Palace Apartment, Zanzarda Road, Junagadh.	सेवा में, मेसर्स अशोक एनर्जी, 502, शारदा पैलेस अपार्टमेंट, ज़ांज़रदा रोड, जूनागढ़।
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प्रतिलिपि :-

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

