::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी. द्वारा :- **DIN-20220364SX0000212555**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/118/RAJ/2021	**17/DC/KG/2020-21**	**18-03-2021**

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

RAJ-EXCUS-000-APP-133-2021-22

आदेश का दिनांक / Date of Order:	**25.03.2022**	जारी करने की तारीख / Date of issue:	**28.03.2022**

श्रीअखिलेश 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 एवंसेवाकर, 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 Shreeji Enterprise, "Shreeji Krupa", Gundala Road Gondal, Distt: Rajkot-360311 .

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 निम्नलिखि+त 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 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 अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 माँग ,ब्याज की माँग 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 क्रमश: 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 dutydemand/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी 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 माँग,ब्याज की माँग 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 क्रमश: 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 fees 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/-.

(i) वित्त अधिनियम,1994की 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 Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) 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 जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना 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" मे 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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/

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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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:

(i) 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

(ii) 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 छुट (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.

(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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी केडीट 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 समायावधि पर या बाद में पारित किए गए है।/
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 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.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers 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 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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित 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.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट 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

:: ORDER-IN-APPEAL ::

M/s. Shreeji Enterprise, Gondal, District: Rajkot (hereinafter referred to as "Appellant") has filed Appeal No. V2/118/RAJ/2021 against Order-in-Original No. 17/DC/KG/2020-21 dated 18.3.2021 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Central GST Division-II, Rajkot (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in providing 'Works Contract Service'. During inquiry initiated by the officers of Directorate General of GST Intelligence, Rajkot, it was revealed that the Appellant was providing 'Works Contract Service' to Project Implementation Unit, Commissioner of Health, Gandhinagar, but had not obtained service tax registration and was not paying service tax. It was further revealed that the Appellant had evaded service tax amount of Rs. 14,52,657/- during the Financial Years 2015-16 and 2016-17. After initiation of inquiry, the appellant obtained service tax registration and paid service tax amount of Rs. 7,81,828/- in cash on 7.4.2017 and Rs. 5,01,188/-through Cenvat credit, totally amounting to Rs. 12,83,016/- for the said years. The Appellant also paid interest amount of Rs. 50,052/- on 7.4.2017, 19.5.2017 and 11.7.2018 and penalty of Rs. 1,92,450/- on 23.4.2018.

2.1 On culmination of investigation, Show Cause Notice No. DGGI/RRU/36-01/2019-20 dated 31.7.2019 was issued to the appellant, calling them to show cause as to why service tax amounting to Rs. 14,52,657/- should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act'), along with interest under Section 75 of the Act and service tax amount of Rs. 10,02,763/- should not be appropriated against confirmed demand; Cenvat credit of Rs. 2,80,253/- availed and utilized wrongly should not be denied under Rule 14 of the Cenvat Credit Rules, 2004. The notice also proposed imposition of penalty under Sections 77(1)(b) and 78 of the Act.

2.3 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed demand of service tax totally amounting to Rs. 14,52,657/- under Section 73(1) of the Act, along with interest under Section 75 of the Act and appropriated service tax of Rs. 10,02,763/- paid by them against confirmed demand; disallowed Cenvat credit of Rs. 2,80,253/- availed and utilized wrongly by them under Rule 14 of CCR, 2004 and imposed penalty of Rs. 10,000/-

under Section 77(1)(b) of the Act and penalty of Rs. 14,52,657/- under Section 78 of the Act.

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

(i) They had paid entire amount of Service Tax along with interest well before issuance of SCN and even before recording of statement during the course of investigation. Hence, SCN was not required to be issued in view of provisions of Section 73(3) of the Act. Even if service tax is paid after inquiry by the department then also provision of section 73(3) is quite applicable, since the said section states that service tax may be paid on the basis of tax ascertained by a Central Excise Officer also. Hence, it is not necessary that in each and every case where payment is made during inquiry or after inquiry, SCN is to be issued. If this is the case, the provision of section 73(3) of the Finance Act, 1994 becomes redundant. It is not a case of non-payment of service tax but it is just a case of late payment of service tax. Further, the same is not due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any of provision with intent to evade payment of service tax and relied upon case law of Adecco Flexione Workforce Solutions Ltd.- 2012 (26) STR 3 (KAR.).

(ii) That the adjudicating authority confirmed demand without correctly giving effect of threshold exemption as per Notification No.33/2012-ST dated 20-06-2012, by misinterpreting the said notification. Notification No.33/2012 exempts taxable services of aggregate value not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the Finance Act, 1994. As per para 3(B) of the said notification "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66B of the said Finance Act under any other notification. Hence, sum total must be made of value of taxable services and not the invoice amount or value of services. During the F.Y.2015-16, they have gross receipts of Rs. 18,07,845/- in respect of original Works Contract Service. Accordingly, they have taken value of Services as Rs.7,23,138/- [18,07,845*40%], after abatement. The value of services is less than Rs.10 Lakhs and hence they

were eligible for threshold exemption under Notification 33/2012-ST and no service tax was payable for the F.Y.2015-16. Further, since value of taxable services in the F.Y.2015-16 was less than Rs. 10 Lac, they were eligible to claim benefit of threshold exemption of Rs.10 Lakhs of value of taxable services in the F.Y.2016-17 also. Thus, impugned order has wrongly confirmed service tax demand of Rs. 44,179/- and Rs. 1,25,488/- for the F.Y. 2015-16 and 2016-17, respectively.

(iii) That Cenvat credit was disallowed by erroneously observing that Cenvat can be said to be availed on the date of filing of ST-3 Return, which is a statutory record for availing Cenvat Credit and since appellant has filed ST-3 Return on 07-03-2018, Cenvat credit pertaining to period prior to one year and three Months, as per Rule 4(7) of the Cenvat Credit Rules, 2004. However, date of filing of ST-3 Return has nothing to do with the availment of Cenvat Credit. Further, Cenvat credit is to be availed on the strength of documents mentioned in Rule 9 of the CENVAT Credit Rules, 2004. It is undisputed that they have availed Cenvat credit based on invoices issued by provider of service, which is a valid document.

(iv) The demand of service tax is time barred as the show cause notice is served beyond a normal period of thirty months from relevant date despite there being no suppression etc. with an intent to evade payment of service tax on their part. It is not a case of non-payment of service tax but it is late payment of service tax only. The same is due to the fact that their Firm was newly incorporated at the material time and exemption regarding services provided to government was withdrawn in that year only and thus, it was something new levy. However, they have paid entire amount of service tax as soon as pointed out.

(v) The adjudicating authority erred in imposing penalties under Sections 77(1)(b) and 78 of the Act.

4. Personal Hearing in the matter was scheduled on 10.3.2023 in virtual mode through video conferencing. Shri Keyur Radia, Chartered Accountant, appeared on behalf of the Appellant. He reiterated the submission made in appeal memorandum. He further submitted that DGGI officers are not 'proper officer' as per the Hon'ble Supreme Court's judgement in the case of Canon India (P) Ltd.

4.1 The Appellant has submitted additional written submission vide email dated

14.3.2022, wherein grounds raised in appeal memorandum are reiterated.

5. I have carefully gone through the facts of the case, the impugned order, and grounds raised in Appeal Memorandum and in additional written submission. The issue to be decided in the present appeal is whether the impugned order confirming service tax demand of Rs. 14,52,657/- under Section 73(1) of the Act, along with interest under Section 75, imposing penalty under Sections 77 and 78 of the Act and denying Cenvat credit of Rs. 2,80,253/-, is correct, legal and proper or not.

6. On perusal of the records, I find that an offence case was booked against the Appellant for non-payment of service tax. Investigation carried out by the officers of DGGI revealed that the Appellant had rendered 'Works Contract Service' to Gujarat Government Department during the Financial Years 2015-16 and 2016-17 without obtaining service tax registration and without payment of service tax. The Appellant has not disputed about provision of 'Works Contract Service' or their liability to pay service tax on said service. They have pleaded that adjudicating authority has wrongly interpreted Notification No. 33/2012-ST dated 20.6.2012 and if abated value of invoices is considered then they become eligible for SSI threshold exemption of Rs. 10 lac in the Financial Years 2015-16 and 2016-17 and consequently, service tax amount of Rs. 44,179/- and Rs. 1,25,488/- respectively for the said years are not payable by them.

6.1 I find it pertinent to examine the provisions contained in Notification No. 33/2012-ST dated 20.6.2012, which are reproduced as under:

> "In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Finance Act), and in supersession of the Government of India in the Ministry of Finance (Department of Revenue) Notification No. 6/2005-Service Tax, dated the 1st March, 2005, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* G.S.R. number 140(E), dated the 1st March, 2005, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts taxable services of aggregate value not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the said Finance Act :
>
> ...
>
> ...

Explanation – For the purpose of this notification, -

(A) ... ...

(B) "aggregate value" means the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66B of the said Finance Act under any other notification."

(Emphasis supplied)

6.2 It is observed that the Appellant had provided 'Works Contract Service' during the Financial Years 2015-16 and 2016-17. As per clause (h) of Section 66E of the Act, service portion in the execution of a works contract is a declared service. Further, the value of service portion in the execution of a works contract is to be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. The relevant portion is reproduced as under:

"RULE 2A. Determination of value of service portion in the execution of a works contract. —

Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.

...

...

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely :-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

Provided that ...

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent. of the total amount charged for the works contract.

6.3 The Appellant had opted to pay service tax as per Rule 2(ii)(A) *ibid* reproduced *supra*. Accordingly, the Appellant was liable to pay service tax on forty percent of the total amount charged for works contract, which is deemed to be service portion involved in the work contract. The total amount of works contract executed by the Appellant in the Financial Year 2015-16 was Rs. 18,07,845/-, as per Para 7.3 of the impugned order, and accordingly, Rs. 7,23,138/-, being 40% of Rs. 18,07,845/-, was service portion on which the Appellant was liable to discharge service tax. Hence, total aggregate value of taxable service in the Financial Year 2015-16 was Rs. 7,23,138/-, which was within the SSI threshold limit as per Notification No. 33/2012-ST dated 20.6.2012 and therefore, no service tax was payable for the Financial Year 2015-16, as has been claimed by the Appellant. Since, total aggregate value of taxable service was within SSI threshold limit in the Financial Year 2015-16, the Appellant is eligible for exemption for first aggregate value of taxable service equal to Rs. 10 lac in the Financial Year 2016-17 as well, in terms of Para 2(viii) of Notification No. 33/2012-ST dated 20.6.2012.

6.4 I rely on the Order passed by the Hon'ble CESTAT, Allahabad in the case of Ashok Kumar Mishra reported as 2018 (12) G.S.T.L. 107 (Tri. - All.), wherein it has been held that,

"4. Having considered the rival contention and on perusal of Explanation "B" to the said Notification No. 6/2005-S.T., dated 1-3-2005, we find that the said explanation authorizes exclusion of consideration received towards providing service which are exempt from whole of Service Tax leviable thereon. On perusal of the said Notifications No. 9/2004 and No. 1/2006-ST, we find that 60% of the consideration received is exempted from the whole of the Service Tax leviable thereon. Therefore, we find that for the purpose of calculation of aggregate value as per said explanation "B", 60% of the consideration received by the appellant for which exemption was admissible does not need to be taken into consideration. We also find from the record that after excluding 60% consideration the aggregate value of clearance for the years 2007-08, 2008-09 and 2009-10 in the present case is within the permissible limit for the exemption under the said Notification No. 6/2005-ST, dated 1-3-2005 which exempts taxable service from whole of Service

Tax leviable under Section 66 of the Finance Act, 1994. We, therefore, hold that the impugned Order-in-Appeal is not sustainable."

6.5 In view of above discussion, I hold that the Appellant is eligible for benefit of threshold exemption limit of Rs. 10 lakh in the Financial Years 2015-16 and 2016-17, in terms of Notification No. 33/2012-ST dated 20.6.2012. Accordingly, I set aside the confirmation of service tax demand on aggregate value of taxable service up to Rs. 10 lac in the Financial Years 2015-16 and 2016-17. The service tax demand is required to be re-quantified by giving effect of benefit of SSI exemption notification supra. I, therefore, remand the matter to the adjudicating authority for limited purpose of quantifying service tax demand, as per findings supra.

7. The Appellant has also contended that they had paid entire amount of Service Tax along with interest well before issuance of SCN. Hence, SCN was not required to be issued in view of provisions of Section 73(3) of the Act and relied upon case law of Adecco Flexione Workforce Solutions Ltd.- 2012 (26) STR 3 (KAR.).

7.1 I find it is pertinent to examine the relevant provisions contained in sub-Section (3) and sub-Section (4) of Section 73 of the Act, which are reproduced as under:

"(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the [Central Excise Officer] may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.
Explanation 1 — ... ...
Explanation 2 — ... ...

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax."

7.2 I find that provisions of Section 73(3) of the Act is subject to provisions contained in Section 73(4) of the Act. It is observed that Show Cause Notice was issued to the Appellant by invoking extended period of limitation under proviso to Section 73(1) of the Act on the ground of suppression of facts. It is on record that the Appellant had obtained service tax registration and had discharged service tax on 'Works Contract Service' rendered by them only after initiation of inquiry against them by the DGGI officers. Since, there was suppression of facts involved, provisions of Section 73(4) of the Act are attracted and their case cannot be covered under Section 73(3) of the Act. I, therefore, hold that provisions contained in Section 73(3) of the Act are not applicable to the facts of the present case.

7.3 I have examined relied upon case law of Adecco Flexione Workforce Solutions Ltd. reported as 2012 (26) STR 3 (KAR.). In the said case, the assessee paid service tax along with interest for delayed payment of service tax before issuance of Show Cause Notice. However, penalty under Section 76 was imposed upon the assessee. On an appeal, both Commissioner (Appeals) and CESTAT held that their case was covered under Section 73(3) of the Act and hence, penalty was not imposable. The Department filed appeal before the Hon'ble Karnataka High Court who decided the case in favour of assessee. However, facts involved in the present case are quite different. The present case is about non-payment of service tax and not delayed payment of service tax. The Appellant, admittedly, obtained service tax registration and discharged service tax after initiation of inquiry by the officers of DGGI. Hence, their case is not covered under the provisions of Section 73(3) of the Act as per findings given supra. I, therefore, hold that reliance placed on said case law is not sustainable.

8. The Appellant has contended that the impugned order wrongly disallowed Cenvat credit of Rs. 2,80,253/- by erroneously observing that Cenvat credit can be said to be availed on the date of filing of ST-3 Return, which is a statutory record for availing Cenvat Credit and since they had filed ST-3 Return on 07.03.2018, Cenvat credit pertaining to period prior to one year and three months, is not eligible as credit, as per Rule 4(7) of CCR, 2004. The Appellant further contended that date of filing of ST-3 Return has nothing to do with the availment of Cenvat Credit and Cenvat credit is to be availed on the strength of documents mentioned in Rule 9 of CCR, 2004.

8.1 I find that the adjudicating authority has denied Cenvat credit of Rs. 2,80,253/- by giving finding at Para 10.4 of the impugned order, which is reproduced as under:

> "10.4 From scrutiny of the Cenvat Credit register and invoices submitted by the Noticee and comparing the same with ST-3 returns, it is found that the Noticee was not eligible for the Cenvat Credit of Rs.2,09,935/- and Rs.70,345/- shown as utilized towards payment of Service Tax and KKC on 30.09.2016 and 31.12.2016 respectively. I find that the Noticee being a partnership firm were required to make payment of Service tax on quarterly basis and as they have registered themselves with the Service Tax department only on 06.03.2017 and filed the only ST-3 return (which is a statuary record for availing and utilizing Cenvat Credit) for the period October to March 2016-17 on 07.03.2018 they were not eligible for Credit on invoices raised to them prior to 08.12.2016 (One year for taking the Cenvat Credit and another 3 months for utilizing the same being a partnership firm). I find that according to Rule 4(7) of the Cenvat Credit Rules, 2004 a provider of output service should avail the Cenvat credit on the bills of input services within one year of issuance of such bills/invoices. In the present case, I find that the Noticee has not filed any ST-3 returns except one return for the period of October to March 2016-17 they can not avail and utilize Cenvat Credit merely on the basis of debiting the amount of credit in their a books of accounts. Therefore, I hold that, the Noticee were eligible for Cenvat Credit of a Rs. 2,20,935/- only as against the total amount of Rs. 5,01,188/- availed and utilized by the Noticee. Hence, the remaining Cenvat Credit amounting to Rs. 2,80,253/- appears to be wrongly availed and utilized by the Noticee which was not admissible to them and required to be recovered from the Noticee."

8.2 I find that Rule 9(1) of CCR, 2004 prescribed documents on the basis of which Cenvat credit can be availed. Further, Rule 9(6) of CCR, 2004 mandated that every manufacturer and output service provider to maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded. Rule 4(1) of CCR, 2004 prescribed time limit of one year for taking Cenvat credit from the date of issue of documents. If the Appellant had availed Cenvat credit of input services in their books of accounts within limitation prescribed under Rule 4(1) of CCR, 2004 and complied with the provisions contained in Rule 9 of CCR, 2004, then they are eligible to claim/utilize the same against discharge of their service tax liability on output service. The Appellant had utilized disputed Cenvat credit on the strength of invoices issued during the months of August, 2016 and October, 2016 as per Para 8.1 of Show Cause Notice. The Appellant has not brought to my notice that they had maintained records of receipt and consumption of input services in their books of accounts, as envisaged in Rule 9(6) of CCR, 2004. Under the circumstances, the adjudicating authority was justified in considering the date of filing of ST-3 Return

on 7.3.2018 for applying the limitation of 1 year prescribed under Rule 4(1) of CCR, 2004 for availing Cenvat credit. I, therefore, do not find any infirmity in the impugned order so far as it relates to denying Cenvat credit of Rs. 2,80,253/-. I discard the contention of the Appellant on this count being devoid of merit.

9. The Appellant has contended that the demand is barred by limitation as the Show Cause Notice was served beyond normal period of thirty months from relevant date despite there being no suppression etc. with an intent to evade payment of service tax on their part. I find that the Appellant was providing 'Works Contract Service' without obtaining service tax registration and without discharging service tax. Non payment of service tax by the Appellant was unearthed during inquiry carried out by the by the officers of DGGI. So, there was suppression of facts involved with intent to evade payment of service tax and extended period of limitation under proviso to Section 73(1) of the Act was rightly invoked.

10. Now, coming to imposition of penalty under Section 78 of the Act. I have upheld invocation of extended period of limitation on the grounds of suppression of facts as per findings *supra*. Under the circumstances, imposition of penalty under Section 78 of the Act is mandatory, as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.). In the said case, it has been held by the Apex Court that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty imposed under Section 78 of the Act. However, quantum of penalty imposed under Section 78 of the Act shall be equal to service tax re-quantified in remand proceedings, as per directions given in para 6.5 above.

11. Regarding penalty of Rs. 10,000/- imposed under Section 77 of the Act, I find that the adjudicating authority has imposed penalty on the grounds that the Appellant had failed to obtain service tax registration and failed to file all ST-3 returns. I concur with the findings of the adjudicating authority and uphold imposition of penalty of Rs. 10,000/- under Section 77 of the Act.

12. I have also examined the case law of Canon India Pvt. Ltd - 2021 (376) ELT 3 (SC) relied upon by the Appellant. In the said case, Directorate of Revenue Intelligence had issued Show Cause Notice for recovery of Customs duty under Section 28 of the Customs Act, 1962. The Hon'ble Supreme Court held that Deputy

Commissioner or Assistant Commissioner of Customs was the proper officer to issue Show Cause Notice under Section 28 ibid and Show Cause Notice issued by Additional Director General of the DRI was invalid and without any authority of law. In the present case, the Show Cause Notice was issued by the Deputy Director, Directorate General of Goods and Service Tax Intelligence, Rajkot and not by Directorate of Revenue Intelligence. Hence, facts of the present case are different. I, therefore, discard the reliance placed on the case law of Canon India Pvt. Ltd.

13. In view of above, I partially allow the appeal and remand the matter for re-quantification of service tax demand, as per directions given in Para 6.5 above. Remaining portion of impugned order is upheld.

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

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

14th March, 2022.

(AKHILESH KUMAR)
Commissioner (Appeals)

By RPAD

To, M/s Shreeji Enterprise, 'Shreeji Krupa', Shreejinagar, Gundala Road, Gondal, District : Rajkot.	सेवा में, मेसर्स श्रीजी एंटरप्राइज, 'श्रीजी कृपा', श्रीजीनगर, गुंडाला रोड, गोंडल, जिला : राजकोट।

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, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) ऊप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट -II मण्डल, राजकोट को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।